**U.S. Department of Labor**

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

**IN THE MATTER OF:**

**ROBERT FRANTZ**
**LAURIE FRANTZ,**

**ARB CASE NOS. 2021-0050**
**2021-0051**
**2021-0052**

**COMPLAINANTS,**

**ALJ CASE NO. 2018-MAP-00003**
**ALJ SEAN M. RAMALEY**

**v.**

**DATE: November 17, 2023**

**HOSELTON AUTOMOTIVE GROUP,**

**RESPONDENT.**

**Appearances:**

***For the Complainant*:**
**Anthony J. LaDuca, Esq.; *LaDuca Law Firm*; Rochester, New York**

***For the Respondents*:**
**Kevin J. Mulvehill, Esq.; *Phillips Lytle LLP*; Rochester, New York**

**Before HARTHILL, Chief Administrative Appeals Judge, and PUST and WARREN, Administrative Appeals Judges**

## DECISION AND ORDER AFFIRMING, IN PART, AND VACATING, IN PART

PUST, Administrative Appeals Judge:

This case arises under the Moving Ahead for Progress in the 21st Century Act (MAP-21 or Act).[1] Laurie Frantz (Complainant or Frantz) and her son, Robert Frantz, filed complaints alleging that their former employer, Hoselton Automotive Group (Respondent or Hoselton Automotive) retaliated against them in violation of MAP-21's whistleblower protection provisions. After a formal hearing, a United States Department of Labor (DOL) Administrative Law Judge (ALJ) issued a

[1] 49 U.S.C. § 30171, as implemented by 29 C.F.R. Part 1988 (2023).

Decision and Order (D. & O.) denying Complainant's complaint. Complainant appealed the matter to the Administrative Review Board (ARB or Board).[2] After thoroughly examining the parties' arguments and the record, the Board affirms, in part, and vacates, in part, the ALJ's D. & O.

## BACKGROUND

Respondent is an automotive dealership that has several automotive divisions, including Chevrolet, General Motors, Nissan, and Toyota.[3] Respondent hired Complainant as a warranty processor in 1993 and she worked there until Respondent terminated her employment on January 8, 2018.[4] As a warranty processer, Complainant was responsible for processing customers' claims for vehicle repairs or replacements covered by the applicable manufacturer's warranty and for processing those claims "correctly and accurately."[5] Specifically, Complainant ensured that the specific complaint, diagnosed cause, remedy, codes, and parts used were correctly listed on the claim documentation before Complainant submitted them to the vehicle manufacturer for reimbursement.[6] Complainant's job duties had not historically included any expectation that she verify the certification status of Respondent's vehicle repair technicians, nor had she ever done so.[7]

Guy Kalpin (Kalpin) was Respondent's Service Director during the relevant timeframe. By August 2017, Kalpin was dissatisfied with the dealership's warranty administration, led by Complainant.[8] On August 7, 2017, Kalpin contacted Randy Shepard & Associates (RS&A), a large warranty claim processing company for new car dealerships, to express interest in obtaining a mini-audit of certain warranty claims due to his concern that the dealership's technicians were not being reimbursed for sufficient diagnostic time, specifically from Toyota.[9] In a mini-audit, a dealership typically selects a limited number of claims for a warranty processing

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[2] On July 3, 2019, the ALJ issued an Order Granting, In Part, and Denying, In Part, Respondent's Motion for Summary Decision and dismissed Robert Frantz's complaint. Robert Frantz did not appeal the ALJ's dismissal.

[3] D. & O. at 3.

[4] *Id.*

[5] *Id.* at 4; Hearing Transcript (Tr.) at 695.

[6] D. & O. at 4; Tr. at 640, 737, 753-54. Complainant did not diagnose or directly repair vehicles; that work was done by the Service Department. Tr. at 638-40.

[7] D. & O. at 20; Tr. at 773.

[8] D. & O. at 8, 10; Tr. at 929-30, 1112, 1125.

[9] D. & O. at 17; Tr. at 887-89.

review as if the claims were being reviewed by the manufacturer.[10] Respondent elected not to use RS&A to perform a mini-audit at this time.[11]

Sometime in November 2017, Complainant became aware that Toyota had recently instituted a Limited Service Campaign to inspect and correct potential issues involving frame corrosion on certain models of Toyota vehicles.[12] The Limited Service Campaign resulted from a class action settlement in *Warner v. Toyota Motor Sales*,[13] through which Toyota announced a "Frame Inspection and Replacement Program" for specific vehicles in identified cold climate states. Through the Limited Service Campaign, Toyota provided inspection of the subject vehicles' frames and either replacement, if a specified standard of perforation was met, or the application of a corrosion resistant compound (CRC) to protect the vehicle from further corrosion caused by rust linked to an interaction with road salt.[14] Toyota mandated that dealerships only allow certified technicians to perform the Frame Inspection and Replacement Program work as part of the CRC Limited Service Campaign in order to have the cost reimbursed by Toyota.[15]

Around the same time, Kalpin sent an email to Michael Brienzi (Brienzi), Respondent's service manager, and Paul Palmer (Palmer), Respondent's assistant service manager, informing them that only certified technicians should be performing airbag replacement work for Toyota as part of an unrelated Takata Airbag Recall.[16] Respondent did not notify Complainant of Toyota's directive regarding technician certification related to airbag replacement.[17]

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10 D. & O. at 17, 19 n.2.

11 Tr. at 888.

12 D. & O. at 5, 25 n.4; Tr. at 632; Joint Exhibit (JX) 1, HOS039-40, 754-65.

13 D. & O. at 25 n.4 (citing *Warner v. Toyota Motor Sales, U.S.A., Inc.*, No. CV 15-2171, 2016 WL 8578913, at *1 (C.D. Cal. Dec. 2, 2016)). The Board notes that this case decision was not introduced at the hearing nor admitted into evidence. Complainant testified that she was aware of caselaw involving CRC concerns. Tr. at 633. Nevertheless, the parties cited to *Warner* throughout their filings before the ALJ and Board. A true and correct copy of *Warner* was attached to the Memorandum of Law in Support of Respondent's Motion for Summary Judgment Relating to Complainants' Complaint (Resp. Motion for Summary Decision), Exhibit (Ex.) XX.

14 D. & O. at 25 n.4; JX 1, HOS039-40, 754-65.

15 D. & O. at 5, 9; Tr. at 643, 1197-98.

16 D. & O. at 19.

17 *Id*.

After learning that uncertified technicians were performing airbag recall work, Kalpin initiated an investigation.[18] As part of this investigation, Christine Russo Brown (Russo Brown), Respondent's customer relations employee, Steve Carroll (Carroll), Respondent's chief operating officer, and Shelly Wilson (Wilson), a member of Respondent's human resources department, interviewed Brienzi and Palmer to discover what they knew about the Airbag Recall certification issues.[19] Carroll asked Brienzi and Palmer if Complainant checked to ensure that the work was performed by certified technicians before she processed claims.[20] Brienzi stated, "I do not think she would know. Not really her part."[21] Palmer replied that he was unsure if Complainant was aware, but that "team leaders do know who can do which work."[22] Respondent did not conduct any formal investigation, interviews, or reviews regarding the certification of technicians performing work on the CRC Limited Service Campaign.[23]

On November 16 and 17, 2017, MSX International performed a "courtesy audit" on Respondent's General Motors repair orders.[24] The audit was based on a random sampling of twenty-two repair orders from August 2017 to November 2017.[25] The courtesy audit revealed that nineteen of the twenty-two repair orders contained errors.[26] The repair orders were processed by Robert Frantz, Complainant's son, who was also employed by Respondent to do warranty related work.[27] If such errors were discovered by the manufacturer, Respondent would be "charged back" for its claim submissions, resulting in it not being reimbursed for relevant warranty claim work.[28]

On November 21, 2017, Carroll emailed Kalpin about the possibility of outsourcing Respondent's warranty work.[29] During this timeframe, Respondent continued to service vehicles subject to the Airbag Recall with uncertified

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18 *Id.*; Tr. at 1132.

19 D. & O. at 20; Tr. at 1079.

20 D. & O. at 20.

21 *Id.*; Tr. at 1006.

22 D. & O. at 20; Tr. at 1007; Complainant was not a "team leader" for Respondent.

23 D. & O. at 16; Tr. at 1097-98.

24 D. & O. at 8; Tr. at 943-44; Respondent's Exhibit (RX) 3; JX 1, HOS007-13.

25 Tr. at 943-44; RX 3; JX 1, HOS007-13.

26 D. & O. at 8, 17; Tr. at 944; RX 3; JX 1, HOS007-13.

27 Robert Frantz worked as a warranty administrator for Respondent. D. & O. at 16; Tr. at 1208.

28 Tr. at 940-41, 1134.

29 D. & O. at 10; Tr. at 951-52; JX 1, HOS041-42.

technicians, and also continued to allow uncertified technicians to perform frame inspections and CRC applications on vehicles covered by the Limited Service Campaign. On November 27, 2017, Respondent's chief financial officer, Dennis Segrue (Segrue), informed Carroll that use of uncertified technicians should be stopped, that vehicles serviced by uncertified technicians should be brought back in and reserviced properly, and that Carroll should "talk to [Complainant] or some other reliable source" regarding how to properly document the necessary remediation.[30]

On November 28, 2017, Kalpin called RS&A to initiate discussion about RS&A taking on the dealership's warranty work.[31] Following the phone call, RS&A sent Respondent a brochure and requested the dealership's labor volumes via e-mail.[32] On November 29, 2017, Kalpin provided RS&A with Respondent's labor volumes, and RS&A replied with its labor rates.[33]

In early December, Kalpin learned that uncertified technicians were applying CRC to vehicles covered under the Limited Service Campaign.[34] On December 4, 2017, Kalpin informed Complainant that Respondent had terminated Brienzi's employment and that there were uncertified technicians in the service department.[35] On that same day, Kalpin e-mailed RS&A to continue to inquire about contract specifics.[36]

On December 6, 2017, Complainant met with Kalpin and Palmer to discuss subletting the CRC work to an outside source.[37] At this meeting, Palmer informed Complainant that Jagar Bingham (Bingham), a detailer for Respondent's Toyota division, had been performing CRC work since October 2017, and that Bingham was not certified to work on the CRC Limited Service Campaign.[38] According to Complainant, upon receiving this information she told Carroll and Kalpin she would no longer process CRC repair orders and wanted the vehicles that had been previously serviced by uncertified technicians to be brought back to the dealership

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30 D. & O. at 20; Tr. at 359, 387.

31 Tr. at 890.

32 D. & O. at 20; Tr. at 890.

33 D. & O. at 20.

34 D. & O. at 8; Tr. 1178.

35 D. & O. at 20. On November 30, 2017, Respondent terminated Brienzi's employment for his "lack of institutional control" including his continuing to allow noncertified technicians to perform Toyota Airbag Recall work after being told not to do so. *Id.*

36 *Id.*; Tr. at 896.

37 D. & O. at 20.

38 *Id.* at 20; Tr. at 650, 851.

for proper inspection and repair.[39] Yet, following this objection and request, Complainant processed two CRC repair orders for work performed by uncertified technicians on December 14, 2017.[40] Complainant testified that she initially refused to process the claims, but ultimately processed them after Marc Specht (Specht), a service assistant and detail coordinator, called Complainant and assured her that Ryan Brown (a certified technician) had re-inspected the vehicles.[41] Complainant did not independently verify which technicians performed the work on these claims because she did not have the technicians' codes, nor was it part of her regular duties to do such verification.[42]

During the same time frame in mid-December, Carroll and Kalpin conducted an internal test to determine whether Complainant was checking repair orders before processing them.[43] According to Carroll, Complainant submitted fifteen repair orders and only one passed Respondent's internal compliance test; the others had internal errors and should not have been submitted.[44]

On December 19, 2017, Complainant texted Carroll and requested a meeting due to her "very serious and valid concerns."[45] Complainant met with Carroll and Kalpin on December 20, 2017, and showed them five repair orders in which the CRC application had been performed by an uncertified technician.[46] After the meeting, Complainant recommended to Drew Hoselton, Respondent's president, that Respondent terminate Kalpin; he declined to do so.[47]

Approximately ten days later, Complainant began putting CRC campaign orders in error status or deleting them from Axcessa, Respondent's electronic reporting system.[48] Complainant put a CRC repair order in error status on December 30, 2017, deleted a CRC repair order from the system and noted that it

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39 D. & O. at 20; Tr. at 651, 653.

40 D. & O. at 20.

41 *Id*. at 20; Tr. at 653.

42 D. & O. at 20; Tr. at 805.

43 D. & O. at 10; Tr. at 971.

44 D. & O. at 10; Tr. at 971-72.

45 D. & O. at 21; Tr. at 677-78, 975.

46 D. & O. at 21; Carroll testified that he took a picture of four repair orders discussed at the meeting. Tr. at 978.

47 D. & O. at 21.

48 *Id*.

did not meet Toyota guidelines on January 2, 2018, and deleted a CRC repair order on January 6, 2018.[49]

On January 4, 2018, Kalpin informed RS&A that Respondent intended to contract with it for warranty processing at Respondent's Toyota and Nissan divisions.[50] On January 8, 2018, Kalpin and Wilson met with Complainant and Robert Frantz.[51] At the meeting, Kalpin initially informed Complainant and Robert Frantz that Respondent was terminating their employment but Wilson interjected that Kalpin was supposed to say that Respondent had "eliminated their positions."[52] Kalpin informed Complainant and Robert Frantz that Respondent intended to outsource its warranty administration process to RS&A.[53] RS&A began performing Respondent's Toyota and Nissan warranty processing services on January 9, 2018.[54]

On March 6, 2018, Complainant and Robert Frantz filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that "Respondent terminated [their] employment in retaliation for raising concerns regarding uncertified technicians performing warranty and recall repairs and not following recall procedures."[55] After sixty (60) days had elapsed without the issuance of a determination by OSHA, pursuant to 29 C.F.R. § 1983.105(a), Complainant and Robert Frantz requested that OSHA terminate its investigation so they could proceed to an administrative hearing.[56] On May 30, 2018, OSHA dismissed the complaint, noting that its investigation to that date had left it unable to conclude that there was reasonable cause to believe that a violation of MAP-21

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49 *Id*. at 21-22.

50 *Id*. at 22; Tr. at 896.

51 D. & O. at 22. The record reflects that there were issues between Robert Frantz and Respondent. On December 18, 2017, Kalpin and Palmer met with Robert Frantz and gave him a new job description. *Id*. at 21. Carroll testified that Robert Frantz was given an action plan because he refused to provide information about other employees. *Id*. at 10. According to Carroll, Robert Frantz "claimed that the service manager made, signed, falsified an RO and signed an RO, but yet the RO was submitted." *Id*.; Tr. at 983-84. The ALJ found that "[t]he evidence establishes that the purpose of giving Robert Frantz the job description was to either force him to quit, or terminate him after he accepted the newly crafted position description." D. & O. at 21.

52 *Id*. at 22.

53 *Id*.

54 *Id*.; Tr. at 895-96.

55 Resp. Motion for Summary Decision, Ex. G.

56 D. & O. at 1.

had occurred.[57] On June 21, 2018, Complainant and Robert Frantz timely requested a hearing before an ALJ.[58]

Prior to the hearing, Respondent filed a Motion for Summary Judgment.[59] On July 3, 2019, the ALJ issued an Order Granting, In Part, and Denying, In Part, Respondent's Motion for Summary Decision.[60] The ALJ dismissed Robert Frantz's complaint but denied Respondent's request to dismiss Complainant's complaint.[61]

The ALJ conducted the hearing on September 5 and 6, and October 29 and 30, 2019. On June 23, 2021, the ALJ issued a D. & O. denying Complainant's complaint. The ALJ concluded the following: (1) while Complainant's objection and refusal to process CRC claims involving the work of uncertified technicians were both subjectively and objectively reasonable, her later processing of those same claims constituted a deliberate violation of the Act which abrogated any claim to its protections; (2) assuming, *arguendo*, that Complainant engaged in protected activity and the deliberate violation provision of the Act did not bar her claim, her employment termination was an adverse action to which Complainant's protected activities were contributory factors; and (3) Respondent proved that it would have terminated Complainant's employment in the absence of any alleged protected activity, thus avoiding liability.[62] On July 9, 2021, the ALJ issued an Attorney Fee Order denying Complainant's attorney's fee petition for services rendered.[63]

On July 7, 2021, Complainant and Respondent each filed a petition for review of the ALJ's D. & O. Complainant challenged the ALJ's finding that she deliberately violated MAP-21 and thus forfeited its protections, and the ALJ's alternative conclusion that Respondent sufficiently established it would have terminated her employment even if she had not engaged in any protected conduct.[64] Respondent challenged the ALJ's factual basis for finding that Complainant engaged in protected activity when she refused to process claims involving CRC work done by uncertified technicians, and further appealed the ALJ's finding on the contributing

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57 *Id.*

58 *Id*.

59 *Id*. at 2.

60 *Id*.

61 *Id*. Robert Frantz did not appeal the dismissal.

62 *Id*. at 27, 33-34.

63 Attorney Fee Order at 1.

64 Complainant's Petition for Review at 1-2; D. & O. at 27-28, 32-34. Complainant also appealed the related order of the ALJ denying her request for an award of attorney's fees.

factor causation element of the claim.[65] The Board accepted and consolidated the parties' appeals for the purposes of rendering a decision. On July 13, 2021, Complainant filed a petition for review of the ALJ's Attorney Fee Order.[66]

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of the Department of Labor has delegated to the Board the authority to review ALJ decisions under MAP-21.[67] In MAP-21 cases, the Board reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings if they are supported by substantial evidence.[68] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[69]

## DISCUSSION

### 1. Governing Law

To prevail on a MAP-21 claim, a complainant must prove by a preponderance of the evidence that: (1) she engaged in activity that MAP-21 protects; (2) her employer took adverse action against her; and (3) her protected activity was a contributing factor in the adverse action.[70] If the complainant meets this burden of proof, the respondent may avoid liability if it proves by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.[71]

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65 Respondent's Petition for Review to Administrative Review Board at 2-6; D. & O. at 24-27, 29-32.

66 Complainant's [July 13, 2021] Petition for Review at 1; Attorney Fee Order at 1.

67 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

68 29 C.F.R. § 1988.110(b); Procedures for Handling Retaliation Complaints Under Section 31307 of the Moving Ahead for Progress in the 21st Century Act, 81 Fed. Reg. 13976 (Mar. 16, 2016) (MAP-21 Interim Rule). OSHA adopted, without change, the provisions of the MAP-21 Interim Rule, which established procedures for the handling of whistleblower complaints under MAP-21. Procedures for Handling Retaliation Complainants Under Section 31307 of the Moving Ahead for Progress in the 21st Century Act, 81 Fed. Reg. 90196, 90197 (Dec. 14, 2016) (MAP-21 Final Rule).

69 *Kossen v. Empire Airlines*, ARB No. 2022-0004, ALJ No. 2019-AIR-00022, slip op. at 5 (ARB June 13, 2023).

70 29 C.F.R. § 1988.109(a).

71 *Id*. § 1988.109(b).

In the present matter, there is no dispute between the parties regarding whether Respondent terminated Complainant's employment; thus, Complainant suffered an adverse action. The remaining elements of the claim are disputed—whether Complainant engaged in activity protected under MAP-21, whether Complainant's protected activity was a contributing factor in the adverse action, and whether Respondent established by clear and convincing evidence that it would have terminated her employment even if there had been no protected activity.

**2. Protected Activity**

*A. ALJ's Protected Activity Analysis*

The applicable whistleblower provision of MAP-21 in this case is 49 U.S.C. Section 30171(a)(5).[72] This provision prohibits discrimination against an employee

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[72] At hearing and in her post-hearing brief filed with the ALJ, Complainant identified her claim as based solely on her refusal to process CRC repair orders performed by technicians that did not possess the certifications required by Toyota. As such, the ALJ's analysis centered on Section 30171(a)(5), which prohibits discrimination against an employee if they "objected to, or refused to participate in, any activity that the employee reasonably believe[s] to be in violation of any provision of chapter 301 of this title, or any order, rule, regulation, standard, or ban under such provision." 49 U.S.C. § 30171(a)(5). Complainant never claimed that her protected conduct related to her "[providing] information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of [the Act]." Section 30171(a)(1). Other than in referencing Subsection (a)(1) in a recitation of the full Section 30171, the ALJ's analysis did not mention or rely on any finding of a motor vehicle defect but instead was cast specifically, and correctly, as governed by Subsection (a)(5) of Section 30171.

In her filings with the Board, Complainant repeated the above-cited description of her protected conduct, but also argued that:

> [t]he Motor Vehicle 'defect' at issue in the present case relates to a class action lawsuit alleging 'subject vehicles lacked adequate rust protection, resulting in premature rust corrosion that compromises the structural integrity, safety, stability and crash-worthiness of the vehicles.' *See Warner v. Toyota*, Final Class Action Settlement Order page 2. The process for performing the recall is part of the Court Ordered Settlement.

Comp. Reply Brief at 9. Complainant connects this "defect" proposition only to the corrosion at issue in the class action settlement order and the process to correct it; she does not appear to be arguing that she provided information to Hoselton relating to this alleged defect under Section 30171(a)(1). To the extent she is attempting to now argue that she engaged in protected activity under Section (a)(1), such an argument has been waived, as Complainant failed to raise this argument before the ALJ. *See Schlagel v. Dow Corning Corp.*, ARB No. 2002-0092, ALJ No. 2001-CER-00001, slip op. at 9 (ARB Apr. 30, 2004) (stating that matters not raised to an ALJ are waived on appeal to the ARB); *see also In re*

who "objected to, or refused to participate in, any activity that the employee reasonably believed to be in violation of any provision of chapter 301 of this title,[73] or any order, rule, regulation, standard, or ban under such provision."[74]

Complainant claimed before the ALJ that she engaged in the following protected acts, all of which related to the use of uncertified technicians on the CRC Limited Service Campaign:[75]

> (1) informing Palmer, Carroll, and Kalpin on December 6 and December 20, 2017, that she was refusing to process CRC claims performed by uncertified technicians;[76]
> (2) requesting information on Respondent's plan to bring vehicles affected by the CRC campaign back to the dealership during a December 20, 2017 meeting;[77]
> (3) putting CRC repair jobs into error status in Axcessa and noting that the "repair [was] not done per Toyota requirements;"[78] and
> (4) deleting "open" CRC repair jobs in Axcessa.[79]

Reviewing the factual averments in light of the evidence in the record, the ALJ determined that only the first of these acts, objecting to and refusing to process claims involving CRC-related work completed by uncertified technicians on

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*Palisades Urb. Renewal Enters., LLP*, ARB No. 2007-0124, ALJ No. 2006-DBA-00001, slip op. at 8 n.44 (ARB July 30, 2009) (citations omitted) (ARB does not consider arguments made for the first time in reply briefs).

73 "[T]his title" refers to Title 49 of the United States Code.

74 *Id.* § 30171(a)(5); 29 C.F.R. § 1988.102(b)(5). Chapter 301 of MAP-21 is the codification of the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA). MAP-21 Interim Rule, 81 Fed. Reg. at 13976-77. Chapter 301, at Subchapter II, provides for, but is not limited to, the creation of federal [motor vehicle] safety standards, prohibitions on manufacturing, selling, and importing noncomplying motor vehicles and equipment, notification requirements and remedy procedures for defects and noncompliance. 49 U.S.C. §§ 30111-29. The purpose of Chapter 301 "is to reduce traffic accidents and deaths and injuries resulting from traffic accidents." *Id.* § 30101.

75 None of Complainant's allegations of protected conduct related specifically to the Takata Airbag Recall effort. Complainant's Post Hearing Brief (Comp. Post Hearing Br.) at 7-8 (only alleging CRC application concerns).

76 D. & O. at 25-26.

77 *Id.* at 26.

78 *Id.*

79 *Id.*

December 6 and December 20, 2017, were potentially protected under the Act.[80] The ALJ grounded this factual determination in his legal conclusion that "Respondent violated Toyota's safety standards that required the use of certified technicians, which falls under MAP-21's purview."[81] The ALJ provided no analytical explanation for this legal conclusion, but merely cited to 49 U.S.C. § 30171(a)(5) and footnoted a California federal court case in which Toyota had agreed to a settlement including the CRC Limited Service Campaign.[82]

The ALJ then analyzed whether Complainant's belief that Respondent's use of uncertified technicians to perform CRC work violated the Act, was reasonable as required by MAP-21.[83] The ALJ held that Complainant's belief "was subjectively reasonable because she actually believed that Respondent's use of uncertified technicians to perform work related to the CRC safety campaign violated safety standards" and "was objectively reasonable because a similarly situated person could have come to the same determination."[84] Although the ALJ found that Complainant's belief was both subjectively and objectively reasonable and thus that she had engaged in protected conduct, the ALJ subsequently determined that

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80 *Id*. Neither party appeals the ALJ's limitation of the protected activity finding to the December 6 and 20, 2017 communications, and so the Board does not address Complainant's earlier assertion that her entries into Axcessa evidenced further protected activity.

81 *Id*. at 25.

82 The footnote provided:

> Complainant asserted that she was aware of a case involving recalls. *Warner v. Toyota Motor Sales, U.S.A., Inc.*, No. CV152171FMOFFMX, 2016 WL 8578913, at *1 (C.D. Cal. Dec. 2, 2016) ("[t]he Frame Inspection and Replacement Program will provide prospective coverage for replacement of frames on Subject Vehicles in accordance with Rust Perforation Standard and the Inspection Protocol. The duration of prospective coverage will begin following the date of Final Order and Final Judgement and will be calculated by the longer of 12 years from the date of First Use of the Subject Vehicle or, if the Class Member has owned or leased the vehicle beyond 12 years from date of First Use, 1 year from the date of entry of the Final Order and Final Judgment.).

*Id*. at 25 n.4.

83 *Id*. at 27.

84 *Id*.

Complainant deliberately violated MAP-21, which negated her protection under the Act.[85]

Both parties appeal different components of the ALJ's protected activity analysis. Respondent asserts that: (1) Complainant did not have a subjective good faith or objectively reasonable belief that processing warranty claims for the work of uncertified technicians violated MAP-21;[86] and (2) processing CRC claims performed by uncertified technicians does not constitute a violation of MAP-21, as a matter of law.[87] In response, Complainant argues that: (1) the ALJ properly found she held a subjective, good faith belief that the use of uncertified technicians on the CRC Limited Service Campaign was a violation of law, and that her belief was also objectively reasonable;[88] (2) refusing to process CRC claims performed by uncertified technicians is protected under MAP-21 because there was a "motor vehicle defect" and a court order requiring the use of certified technicians;[89] and (3) the ALJ erred in concluding that she deliberately violated the Act.[90]

As identified above, there are distinct components of the ALJ's protected activity analysis that have been challenged on appeal. Specifically, the Board's review must determine whether: (1) Complainant's conduct was protected by the Act; (2) she held a subjective, good faith belief that her actions related to a violation of the Act; (3) her belief was objectively reasonable; and (4) she deliberately violated the Act. The Board examines each legal issue in turn.

*B. The ALJ Erred in Finding Respondent Violated Map-21*

The ALJ found that "Respondent violated Toyota's safety standards that required the use of certified technicians, which falls under MAP-21's purview."[91] In reviewing this determination on appeal, the Board must interpret statutory language consistent with congressional intent.[92] Congress' intent is most clearly

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85 *Id*. at 27-28. The Board addresses the ALJ's deliberate violation determination, *infra* Part 2E.

86 Respondent's Brief (Resp. Br.) at 44-55.

87 *Id*. at 23-44.

88 Complainant's Reply Brief (Comp. Reply) at 2-8, 11.

89 *Id*. at 11-13.

90 Complainant's Brief (Comp. Br.) at 16-21.

91 D. & O. at 25.

92 *Byron v. I.E.H. Labs.*, ARB No. 2014-0087, ALJ No. 2014-FDA-00001, slip op. at 5-6 (ARB Sept. 28, 2016); *see also Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979).

expressed in the text of the statute; thus, the Board begins its analysis with an examination of the plain language of the relevant provision.[93]

The applicable provision of MAP-21, Section 30171(a)(5), prohibits discrimination against an employee who "objected to, or refused to participate in, any activity that the employee reasonably believed to be in violation of any provision of chapter 301 of this title, or any **order,** rule, regulation, ***standard***, or ban ***under such provision***."[94] The phrase "under such provision" refers specifically to "any provision of chapter 301."

*i. Violation of a court order is not within the purview of the Act*

By its terms, Section 30171(a)(5) applies only to "orders" under any provision of Chapter 301, it does not encompass any and all orders involving motor vehicles issued by any entity not directly authorized by the Act. While the term "order" is not defined under § 30102,[95] review of the statute as a whole makes clear that "order" refers to administrative orders issued by the Secretary of Transportation. Under § 30118(b), Congress authorized the Secretary of Transportation to make final decisions regarding a motor vehicle or replacement equipment that contains a defect related to motor vehicle safety or does not comply with an applicable motor vehicle standard prescribed under Chapter 301.[96] Upon making such determination, the Secretary of Transportation "shall order the manufacturer to" give notification to owners, purchasers, and dealers of the defect or noncompliance or remedy the defect or noncompliance.[97] Other sections within Chapter 301 further reference orders issued under § 30118(b) including: §§ 30120(g)-(i), discussing nonapplication and limitations to orders for remedies and notifications; § 30161, discussing judicial review of orders issued by the Secretary of Transportation; and §§ 30162(a)-(b), discussing interested persons and procedural requirements for issuing an order under § 30118(b).[98] Thus, the term "order" in § 30171(a)(5) refers simply to orders issued by the Secretary of Transportation under the authority of MAP-21. Accordingly, the Class Action Settlement is not an "order" under MAP-21.

Complainant objected and refused to process warranty claims involving CRC

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93 *Bala v. Port Auth. Trans-Hudson Corp.*, ARB No. 2012-0048, ALJ No. 2010-FRS-00026, slip op. at 5 (ARB Sept. 27, 2013) (citing *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 295 (3d Cir. 2012)).

94 49 U.S.C. § 30171(a)(5) (emphasis added).

95 *See id.* § 30102.

96 *Id.* § 30118(b).

97 *Id.* § 30118(b)(2).

98 *See id.* §§ 30120(g)-(i), 30161, 30162(a)-(b).

related work completed by uncertified technicians on December 6 and 20, 2017.[99] Complainant, however, has not identified any Chapter 301 requirement that requires such work to be done by a certified technician; nor could she, because, as explained above, the Toyota class action settlement is not an "order" under Chapter 301.

*ii. Toyota's safety standards do not fall under MAP-21's purview*

Although Respondent did not argue before the ALJ or the ARB that Complainant violated any "standard" under Chapter 301, the ALJ concluded that "Respondent violated Toyota's safety standards that required the use of certified technicians, which falls under MAP-21's purview."[100] The Board has thoroughly examined the ALJ's finding and independently researched caselaw, regulations, and provisions of Chapter 301, but cannot identify any link between Toyota's self-imposed safety standards and "standards" under the Act.

Although the term "standard" is not defined under § 30102,[101] review of the statute as a whole makes clear that "standard" has a precise meaning under MAP-21. This is evident based on § 30111, entitled "Standards." Under § 30111(a), Congress authorized the Secretary of the Department of Transportation (DOT) to prescribe "motor vehicle safety standards."[102] A "motor vehicle safety standard" is defined as "a minimum standard for motor vehicle or motor vehicle equipment performance."[103]

In order to implement a standard, the Secretary of Transportation must follow specific procedures, which include considering relevant motor vehicle safety information, consulting with designated agencies and appropriate authorities, considering whether a proposed standard is reasonable, practicable, and appropriate, and considering whether the standard will carry out the Act's purpose and policy.[104] Once a standard is prescribed, the Secretary of Transportation shall specify the effective date of the standard under this chapter, which many not become effective before the 180th day after the standard is prescribed or later than

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99 29 C.F.R. § 1988.100(a) (stating "[t]his part sets forth procedures for, and interpretation of, section 31307 of the Moving Ahead for Progress in the 21st Century Act.").

100 D. & O. at 25. We review the ALJ's legal conclusions de novo. *Supra* note 68.

101 49 U.S.C. § 30102.

102 *Id*. § 30111(a).

103 *Id*. § 30102(a)(10).

104 *Id*. § 30111(b).

one year after it is prescribed.[105] Additionally, the Secretary of Transportation is obligated to "establish and periodically review and update on a continuing basis a 5-year plan for testing motor vehicle safety standards prescribed under this chapter that the Secretary [of Transportation] considers capable of being tested."[106]

Thus, the term "standard" in § 30171(a)(5) refers to motor vehicle standards prescribed by the Secretary of Transportation as discussed in § 30111. This interpretation is further evidenced by DOL and DOT guidance. For example, the MAP-21 Final Rule discusses Chapter 301 and the Secretary of Transportation's delegation of authority to the NHTSA to issue vehicle safety standards and to require manufacturers to recall vehicles that have a safety-related defect or do not meet federal safety standards.[107]

The DOT motor vehicle standards promulgated by the Secretary of Transportation, through NHTSA, are found in the regulations published at 49 C.F.R. § 571. Because "each standard . . . applies *according to its terms* to all motor vehicles or items of motor vehicle equipment,"[108] unless a specific safety standard directly addresses the issue identified as an alleged defect or matter of noncompliance, these standards cannot form the basis of a litigant's extrapolated claim of liability tied to Chapter 301.[109] None of these published Federal Motor Vehicle Safety Standards specifically address the corrosion resistance specifications of motor vehicle frames, nor do any of the standards involve the qualifications of individuals assigned to apply CRC to motor vehicle component parts.

Contrary to the ALJ's findings, the "Toyota safety standards" at issue in the present case do not fall within MAP-21's purview. The referenced "Toyota safety standards" are not prescribed by the Secretary of Transportation and did not involve regulatory or rulemaking processes. Instead, these safety standards relate to quality assurance measures voluntarily implemented by Toyota. Thus, the ALJ erred in finding that the "Toyota's safety standards" relied upon by Complainant fall under MAP-21's purview.

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105 *Id*. § 30111(d).

106 *Id*. § 30111(e). "In developing the plan and establishing testing priorities, the Secretary [of Transportation] shall consider factors the Secretary considers appropriate, consistent with section 30101 of this title and the Secretary's other duties and powers under this chapter." *Id*.

107 MAP-21 Final Rule, 81 Fed. Reg. at 90197.

108 49 C.F.R. § 571.7(a) (2023) (emphasis added).

109 *See Clarke v. TRW, Inc.*, 921 F. Supp. 927, 935 (N.D.N.Y. 1996) (noting that NTMVSA statutory provisions prohibiting noncompliance with federal safety regulations do not apply to establish a violation of law, relevant to claimant's state law whistleblower claim, when the specific terms of the Federal Motor Vehicle Safety Standards are not met).

Thus, Complainant has not identified any Chapter 301 "order" or "standard" violation. Nevertheless, Complainant may prevail on her claim under Section 3017(a)(5) if she can establish that she objected to, or refused to participate in, an activity that she *reasonably believed* to be in violation of any order or standard under Chapter 301.[110] An employee who objects to or refuses to participate in any activity is protected so long as the employee's belief of a violation is both *subjectively* and *objectively* reasonable.[111] The Board addresses each in turn.

### C. *The ALJ Correctly Found Complainant Established a Subjective Good Faith Belief*

An employee's *subjective, good faith belief* is established so long as the complainant actually believed that the conduct objected to violated the relevant law or regulation.[112] Here, the ALJ concluded that Complainant's belief that a violation of MAP-21 had occurred "was subjectively reasonable because she actually believed that Respondent's use of uncertified technicians to perform work related to the CRC safety campaign violated safety standards[.]"[113] Respondent argues that the ALJ erred in this conclusion because Complainant never had a subjective belief that there was a violation. Respondent seeks to support this assertion by pointing to Palmer's testimony that, when the Airbag Recall certification issue was discovered, Complainant told him that Toyota had no system for knowing who was and was not certified so it wasn't a "huge problem" and the dealership did not have to "get all worked up about it."[114] Presumably, Respondent insinuates that if Complainant was not concerned with uncertified technicians performing Airbag Recall work, then Complainant should have been equally not concerned with uncertified technicians performing CRC work. Respondent also argues that Complainant had no personal knowledge or evidence indicating that the CRC work performed by uncertified technicians was done improperly; therefore, there was no link between motor vehicle safety and her refusal to process the claims.[115]

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110 49 U.S.C. § 30171(a)(5); 29 C.F.R. § 1988.102(b)(5) (emphasis added). Neither party argued, and none of the evidence in the record established, that Complainant's actions related to her belief that a "rule" or "regulation" under Chapter 301 had been violated.

111 *See* MAP-21 Interim Rule, 81 Fed. Reg. at 13978.

112 *Id*. (citing *Sylvester v. Parexel Int'l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 14-16 (ARB May 25, 2011) (discussing reasonable belief standard under analogous language in the Sarbanes-Oxley Act of 2002 (SOX)).

113 D. & O. at 27.

114 Resp. Br. at 46; Tr. at 269, 271.

115 Resp. Br. at 46.

The Board finds these assertions to be unpersuasive. The ALJ heard both Palmer's and Complainant's testimony on this issue[116] and concluded Complainant had credibly established that she did in fact believe that the use of uncertified technicians on CRC work violated the Act.[117] The Board generally defers to an ALJ's factual findings when they result from credibility judgments and determinations of the weight to be given to conflicting witness testimony.[118] While Complainant's belief may have been incorrect with regard to whether the use of uncertified technicians actually constituted a violation of the Act, a mistaken belief is sufficient if it is held in good faith.[119]

Respondent's other claims—that absent Complainant's own self-serving testimony, there is no evidence that Complainant engaged in protected activity; that Complainant cannot object to or refuse to do something that no one requested or wanted her to do; and that Respondent was already aware of and trying to fix the subject process—are just as unpersuasive. Substantial evidence supports the finding that Complainant provided information about Respondent's use of uncertified technicians to perform work related to the CRC safety campaign, and that Respondent was aware of her activity (Carroll confirmed that Complainant brought repair orders to his attention during a December 20 meeting).[120] In addition, while Respondent is correct that (1) it was Complainant's responsibility to make sure that repair orders complied with manufacturer's requirements and that (2) Complainant was instructed not to process claims that contained errors or were otherwise noncompliant, Respondent was also aware that it never provided Complainant with the necessary certification codes or made it a specific part of her job duties to identify which technicians were certified to perform which work, and so claims were routinely processed involving work done by uncertified technicians.[121]

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[116] Complainant and her attorney engaged in the following dialogue on direct examination: "Did you read about the CRC campaign? Yes." "And did you read the case law before you started the CRC campaign? Yes." "And when you read campaigns like the CRC campaign, is it optional to be certified? No. Is it mandatory? Yes." Tr. 633, 643-44.

[117] D. & O. at 27.

[118] *Jamek Eng'g Servs., Inc.*, ARB No. 2022-0039, ALJ No. 2017-DBA-00021, slip op. at 10 (ARB Sept. 22, 2022) (quoting *Griffin v. Sec'y of Lab.*, ARB Nos. 2000-0032, -0033, ALJ No. 1991-DBA-00094, slip op. at 9 (ARB May 30, 2003)).

[119] *Schaefer v. N.Y. Comm. Bancorp, Inc.*, ARB No. 2022-0050, ALJ Nos. 2018-SOX-00048, -00051, slip op. at 14 n.92 (ARB June 22, 2023) (quoting *Sylvester*, ARB No. 2007-0123, slip op. at 16 (other citation omitted)).

[120] D. & O. at 6; Tr. at 679.

[121] Brienzi credibly testified that Complainant did not have these codes and that she had to trust that the service writer and team leader was giving the jobs to qualified technicians. Tr. at 129-30. Similarly, Kelly Watkins, a service manager from RS&A,

After Toyota specifically directed that only certified technicians could do work associated with the Takata Airbag Recall and later the CRC Limited Service Campaign, it is illogical for Respondent to both claim that Complainant could not object or refuse to process claims involving uncertified technicians but at the same time must only process claims that met Toyota's requirements—all without being provided the necessary certification codes.

We find that substantial evidence supports the ALJ's finding that Complainant's belief that Respondent's use of uncertified technicians to perform work related to the CRC Limited Safety Campaign violated MAP-21 "was subjectively reasonable because she actually believed [it]."[122]

*D. Although the ALJ Erred by Not Supporting his Determination that Complainant's Belief was Objectively Reasonable, Remand is Unnecessary*

As previously explained in Part C above, an employee engages in protected activity under Section 30171(a)(5) if she provides information or complains to her employer about, or refuses to participate in, an activity that she **reasonably believes** violates any provision of Chapter 301 or any order, rule, regulation, standard, or ban under Chapter 301.[123]

The employee's belief is *objectively* reasonable if a reasonable person in the same factual circumstances and with the same training and experience would have

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testified that the dealership's service department, and specifically the service advisor or manager, is responsible for checking the technicians' certifications. *Id*. at 909.

[122] D. & O. at 27; Tr. at 633, 643-44, 650, 667-69. We note that, while analyzing Complainant's subjective belief, the ALJ stated, "Complainant satisfied this standard by presenting facts about the protected activity that *related to* the general subject matter and not outside the realm of MAP-21." D. & O. at 27 (emphasis added). This is not an accurate statement of the applicable standard or Complainant's burden. First, as noted, *supra* note 72, the ALJ incorrectly conflated Sections 30171(a)(1) and (a)(5). In a Section 30171(a)(5) case, a complainant satisfies her burden by presenting evidence that she actually believed that the conduct objected to violated a provision under Chapter 301. Second, the ALJ appears to have relied on a reviewing standard that applies at a different procedural stage of the adjudicative process. *See* D. & O. at 27 (citing *Evans v. EPA*, ARB No. 2008-0059, ALJ No. 2008-CAA-00003 (ARB July 31, 2012)). The Board in *Evans* examined an ALJ's dismissal of a complaint for failure to state a claim and held that to survive a motion to dismiss, the complaint must be reviewed to determine whether it provides fair notice, which encompasses "some facts about the protected activity and alleging that the facts relate to the laws and regulations of one of the statutes in our jurisdiction." *Evans*, ARB No. 2008-0059, slip op. at 11. Comparatively, in the present case, Complainant was required to (and did) present evidence that she actually believed that the conduct objected to violated MAP-21 because there was a full hearing on the merits.

[123] 49 U.S.C. § 30171(a)(5); 29 C.F.R. § 1988.102(b) (5) (emphasis added).

believed that the conduct about which she complained constituted a violation of the pertinent law.[124] A reasonable but mistaken belief that the respondent's conduct constitutes a violation of the applicable law can constitute protected activity.[125]

Here, the ALJ determined that Complainant's belief that a violation of MAP-21 had occurred "was objectively reasonable because a similarly situated person could have come to the same determination."[126] The ALJ provided no analysis or explanation of what a "similarly situated person" would believe when he made this determination.[127] In the absence of any such explanation by the ALJ, or examination of the factual circumstances that led to his conclusion, the Board is left with two choices—either conduct our own analysis based on a review of the record, or remand to the ALJ to conduct that analysis.

Given the lack of analysis or citation to record evidence on this point, remand to the ALJ would be the appropriate course of action, with instructions to conduct the analysis and provide a thorough explanation of his finding. In this case, however, remand is unnecessary[128] because we agree with the ALJ's finding on the affirmative defense that Respondent proved by clear and convincing evidence that it would have made the same decision to terminate Complainant's employment in the absence of any protected activity.[129]

*E. Deliberate Violation*

MAP-21 does not apply to an employee of a dealership "who, acting without direction from such . . . dealership (or such person's agent), deliberately causes a

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[124] MAP-21 Interim Rule, 81 Fed. Reg. at 13978 (citing *Sylvester*, ARB No. 2007-0123, slip op. at 15).

[125] *Id.* (citing *Sylvester*, ARB No. 2007-0123, slip op. at 16).

[126] D. & O. at 27.

[127] *Id.*

[128] *Yowell v. Fort Worth & W. R.R.*, ARB No. 2019-0039, ALJ No. 2018-FRS-00009, slip op. at 9-10 (ARB Feb. 5, 2020) (finding remand for additional fact finding not necessary if affirmative defense is sufficiently established) (citing *Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 (2d Cir. 2006) ("[A]n error does not require a remand if the remand would be pointless because it is clear that the agency would adhere to its prior decision in the absence of error.")); *Samson v. U.S. Dep't of Lab.*, 732 F. App'x 444, 446-47 (7th Cir. 2018) (ALJ's error on the element of protected activity did not require remand when remand would be "pointless" given that the issue of causation permitted only one result; this is so because of the deference given to the ALJ's credibility findings*); Zhao v. Gonzales*, 404 F.3d 295, 310-11 (5th Cir. 2005) (reversing Board of Immigration Appeals without remand for fact-finding, finding it unnecessary under a narrow set of circumstances).

[129] *See* Part 4, *infra.*

violation of any requirement relating to motor vehicle safety under this chapter."[130] The ALJ found that Complainant deliberately violated MAP-21 when she approved and processed two repair orders without direct instruction from a supervisor after becoming aware of and initially objecting to processing CRC claims using uncertified technicians.[131]

*i. Analysis of Deliberate Violation Defense*

As noted, MAP-21 does not apply to an employee who, acting without direction from its employer, deliberately causes a violation of any requirement relating to motor vehicle safety under Chapter 301. MAP-21's implementing regulations are silent regarding this provision and there is scarce MAP-21 caselaw addressing it.[132] As such, the Board must look to other federal whistleblower statutes and regulations for guidance. MAP-21's implementing regulations specifically indicate that consideration was given to the regulations implementing the whistleblower provisions of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR-21), the SOX, and the Surface Transportation Act of 1982 (STAA).[133] Moreover, the burden-shifting framework of the Energy Reorganization Act of 1974 (ERA), which serves as a "gatekeeping function" that stems frivolous complaints, is identical to the burden-shifting framework present in MAP-21.[134] Therefore, we look to these statutes to inform our analysis.

*a. ERA's Deliberate Violation Provision*

Like MAP-21, the ERA also precludes protection to an employee who, acting without direction from its employer, deliberately causes a violation of any requirement of any statute listed in 29 C.F.R. § 24.100(a) or the Atomic Energy Act of 1954 (AEA).[135] The rule promulgated under the authority of the ERA (ERA Final

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130 49 U.S.C. § 30171(d).

131 D. & O. at 28.

132 To date, the ARB has only issued one decision involving MAP-21. *See Vasquez v. Caterpillar Logistics*, ARB No. 2017-0066, ALJ No. 2016-MAP-00001 (ARB Apr. 16, 2020) (affirming ALJ's Order Granting Motion for Summary Decision because the respondents were not motor vehicle manufacturers, part suppliers, or dealerships). Likewise, federal courts have limited precedent involving MAP-21. *See Barcomb v. General Motors, LLC*, 978 F.3d 545, 550 (8th Cir. 2020) (holding that an employee's complaints about quality control processes in a manufacturing plant are not information related to a motor vehicle defect, and thus not protected under Section 30171(a)(1) of MAP-21).

133 *See* MAP-21 Interim Rule, 81 Fed. Reg. at 13978-79.

134 *Id*. at 13979.

135 42 U.S.C. § 5851(g); 29 C.F.R. § 24.102(e).

Rule) briefly discusses, in part, ERA's deliberate violation provision,[136] noting that "the ARB interprets the phrase 'deliberate violations' for the purpose of denying protection to an employee as including an element of willfulness."[137]

*b. AIR-21's Deliberate Violation Provision*

As more specifically defined in the statute, AIR-21 prohibits employers from discharging or otherwise discriminating against employees because they provided information to the employer or federal government relating to aviation safety violations.[138] Similar to MAP-21, AIR-21 provides that the protection provisions of the statute shall not apply if the employee, "acting without direction from [the employer] deliberately causes a violation of any requirement relating to aviation safety . . . ."[139] The relevant adopted rules, (AIR-21 Final Rule) discuss AIR-21's deliberate violation provision in greater detail, in part by acknowledging that "[t]here is case law involving analogous provisions of other employee protection statutes defining the phrase 'deliberate violations' for purposes of denying protection to an employee who causes a violation of the applicable safety laws."[140] The AIR-21 Final Rule cites to *Fields v. U.S. Department of Labor Administrative Review Board*, a case interpreting the ERA's deliberate violation provision,[141] and states that the agency "anticipates that a similar construction of that term would be applied under AIR-21."[142]

*c. Caselaw Interpreting Deliberate Violation Provisions*

In *Fields*, the Eleventh Circuit Court of Appeals affirmed the ARB's finding that three employees deliberately caused an ERA violation and therefore lost any protection under the statute.[143] The employees were control room operators at a nuclear power plant who were concerned with maintaining hydrogen pressure in

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136 Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provisions of Six Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as Amended, 76 Fed. Reg. 2808 (Jan. 18, 2011) (ERA Final Rule).

137 ERA Final Rule, 76 Fed. Reg. at 2810.

138 49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102(b).

139 49 U.S.C. § 42121(d); 29 C.F.R. § 1979.102(c).

140 Procedures for the Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 68 Fed. Reg. 14100 (Mar. 21, 2003) (AIR-21 Final Rule).

141 *Fields v. U.S. Dep't of Lab. Admin. Rev. Bd.*, 173 F.3d 811 (11th Cir. 1999).

142 AIR-21 Final Rule, 68 Fed. Reg. at 14102.

143 *Fields*, 173 F.3d at 814.

accordance with the power plant's mandated procedure.[144] After notifying the engineering department of their safety concerns and being reassured that maintaining the pressure was "accurate and reasonably conservative,"[145] the employees felt that their safety concerns had not been adequately addressed and so conducted their own tests to obtain data to verify their concerns.[146] The nuclear power plant disciplined the employees upon learning of these employee-conceived and directed tests.[147] After an evidentiary hearing on the employees' filed whistleblower complaints,[148] an ALJ concluded that the employees had acted deliberately and without direction from the nuclear power plant's management when they conducted unauthorized tests on a nuclear reactor.[149] On appeal, the ARB accepted the ALJ's recommendation and concluded that the nuclear power plant's decision to discipline the employees was based on the employees' "reckless disregard" as to whether a nuclear violation would occur and that they "deliberately caused a violation" of nuclear safety regulations.[150]

The Ninth Circuit affirmed the ARB's interpretation of the ERA's deliberate violation provision and held that the employees' "unauthorized frolics were just what Congress envisioned when it made the whistleblower statute inapplicable to 'any employee who, acting without direction from his or her employer . . ., deliberately causes a violation . . . .'"[151] In support of its decision, the court determined that "regardless of their motives, . . . [the employees] moved knowingly and dangerously beyond their authority when, on their own, and fully aware that their employer would not approve, they conducted experiments inherently fraught with danger."[152]

Since *Fields*, the Board has examined other ERA cases involving the deliberate violation provision. In *Siemaszko v. First Energy Nuclear Operating Co.*,[153] the Board noted that the deliberate violation provision is an affirmative defense, devised a three-part test to determine whether an employer had

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144 *Id.* at 812.

145 *Id.*

146 *Id.* at 813.

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.* at 814.

152 *Id.*

153 *Siemaszko v. First Energy Nuclear Operating Co.*, ARB No. 2009-0123, ALJ No. 2003-ERA-00013 (ARB Feb. 29, 2012).

established the defense, and cautioned that the defense should be applied narrowly."[154] Thus, to establish the deliberate violation defense, an employer must show that: (1) the employee caused a violation of the pertinent statute(s); (2) the violation was deliberate; and (3) the employee's conduct occurred without the employer's direction.[155]

*ii. The ALJ Erred in Determining that Complainant "Deliberately Violated" MAP-21*

The ALJ's deliberate violation analysis reads, in full, as follows:

> Complainant attests that she became aware that jobs were being performed by uncertified technicians on December 4, 2017, and refused to process claims after learning that Jagar Bingham was performing CRC recall-related services two days, [sic] later on December 6, 2017. Yet, Complainant admitted to approving the CRC-related work performed on vehicles . . . on December 14, 2017, based on a phone call from Team Leader Ryan Brown. Complainant stated that she needed to trust the process. However, Ryan Brown was not Complainant's superior or supervisor, and by her own testimony, was someone she did not trust. Her clear distrust for Ryan Brown and the "system" in place after she discovered the issue at the heart of this case, and her subsequent failure to even inspect the repair order for customer Green, after specifically questioning its legitimacy, prevents Complainant from now availing herself with MAP-21's protections. Complainant cannot object to the system in place, then continue to operate as normal because of a misplaced trust [sic]that very system. By continuing to process repair orders without further investigation [sic] demonstrates her acquiescence in the system, and is counter to either her refusal or objection to follow Respondent's processes. Complainant's approvals and processing of the McGrath and Green repair orders, without direct instruction from a supervisor, especially after becoming aware of the certification issue and making her objection, eviscerates her prior objection. Therefore, the protection afforded by MAP-21 does not apply to

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154 *Id*. at 10-12.

155 *Id*. (citation omitted).

> Complainant's December 6 and 20, 2017 objections to processing CRC claims.[156]

On appeal, Complainant argues that she did not deliberately violate the Act when she processed the two CRC claims.[157] Complainant claims that her actions cannot be found willful or reckless because she had a good faith belief that Ryan Brown had rechecked the repair orders[158] and that processing the two orders did not deliberately violate the Act because there is no evidence to suggest that these specific repairs were not done properly.[159] Moreover, Complainant insists that Respondent should not be afforded protection under 49 U.S.C. § 30171(d) because it failed to raise this affirmative defense before the ALJ.[160]

Respondent insists that substantial evidence supports the ALJ's conclusion that Complainant is not protected under MAP-21 as a result of her actions.[161] Respondent asserts that assuming, *arguendo*, that certified technicians were required under MAP-21, then: (1) Complainant's actions caused the violations of a requirement relating to motor vehicle safety;[162] (2) her conduct was deliberate;[163] (3) Complainant's actions were done without direction from the employer;[164] and (4) Complainant's claim that Respondent failed to raise these issues before the ALJ is incorrect.[165]

In reviewing the parties' arguments on appeal, the Board liberally interprets MAP-21, a remedial statute, in order to protect employees of discrimination and to further Chapter 301's underlying purpose of reducing "traffic accidents and deaths and injuries resulting from traffic accidents."[166] While the Board interprets MAP-21's remedial protections broadly, we interpret this affirmative defense narrowly in

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156 D. & O. at 28.

157 Comp. Br. at 16-21.

158 *Id*. at 18-20.

159 *Id*. at 20-21.

160 *Id*. at 21.

161 Response Brief for Respondent Employer (Resp. Res. Br.) at 8.

162 *Id*. at 11-19.

163 *Id*. at 19-24.

164 *Id*. at 24-29.

165 *Id*. at 29-33.

166 49 U.S.C. § 30101; *see Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) (stating that "it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws.").

order to provide protection to employees who work within the bounds of safety.[167] Thus, to have sufficiently established the deliberate violation defense under MAP-21, the record below must establish, by a preponderance of the evidence[168] that: (1) Complainant caused a violation of any requirement relating to motor safety under Chapter 301; (2) the violation was deliberate; and (3) Complainant's conduct occurred without Respondent's direction.

*a. The Affirmative Defense was Sufficiently Raised Below*

As a preliminary matter, Complainant argues that Respondent failed to raise the affirmative defense and cannot now be afforded its protection.[169] In response, Respondent claims that: (1) 49 U.S.C. § 30171 is not an affirmative defense; (2) assuming, *arguendo*, that Section 30171(d) is an affirmative defense, Respondent's technical failure to plead the affirmative defense does not bar its consideration because it did not result in unfair surprise; and (3) Respondent asserted facts relating to the defense "in its papers and at trial."[170] Although the Board rejects Respondent's initial argument in its entirety in that the Board consistently interprets Section 30171(d) as an affirmative defense, it addresses Respondent's remaining arguments in turn.

Respondent argues that its technical failure to plead an affirmative defense does not bar that defense if it does not result in unfair surprise. Respondent cites to *Bradberry v. Jefferson County*,[171] in which the Fifth Circuit Court of Appeals held that "if [a] defense is later presented 'in a manner that does not result in unfair surprise[,] . . . technical failure to comply precisely with'" a rule requiring a party to affirmatively state any affirmative defense in its answer to a complaint is not fatal.[172] *Bradberry* is distinguishable from the present case because while the *Bradberry* respondent failed to raise its defenses in its initial filing, it did raise the affirmative defenses before the district court.[173] In the present case, although Respondent never formally raised the defense before the ALJ, Respondent is correct

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167 *See Siemaszko*, ARB No. 2009-0123, slip op. at 12 (applying same logic to the ERA's deliberate violation provision).

168 *See Hibler v. Exelon Generation Co.*, ARB No. 2005-0035, ALJ No. 2003-ERA-00009, slip op. at 20 (ARB Mar. 30, 2006) (citing *Fields v. Florida Power Corp.*, ARB No. 1997-0070, ALJ No. 1996-ERA-00022, slip op. at 2 n.3, *aff'd sub nom. Fields v. U.S. Dep't of Lab.*, 173 F.3d 811 (11th Cir. 1999)).

169 Comp. Br. at 21.

170 Resp. Res. Br. at 30-31.

171 *Bradberry v. Jefferson Cnty.*, 732 F.3d 540 (5th Cir. 2013).

172 *Id*. at 553.

173 *Id*.

that the deliberate violation affirmative defense is clearly listed in Section 30171, the same section which underlies Complainant's entire complaint. Thus, it should not be a surprise to Complainant that the ALJ considered this provision while assessing the merits of her claim.

Respondent's more persuasive argument is that it asserted facts relating to the defense "in its papers and at trial." While Respondent never formally argued to the ALJ that Complainant "deliberately" violated MAP-21, Respondent's brief before the ALJ is replete with arguments invoking such sentiment. [174] These arguments include, but are not limited to, "[i]nstead of discovering the certification issue, Complainant was the warranty administrator who improperly processed the uncertified technician claims[,]"[175] "[repair orders] should not be processed by a warranty administrator if they are not compliant with the Toyota manual[,]"[176] and "it is undisputed that Complainant processed [a repair order] on December 14, 2017, and did so knowingly that Jagar Bingham had performed the underlying work."[177] Similarly, several witnesses testified that Complainant processed claims for work performed by uncertified technicians.[178] The arguments and testimony presented to the ALJ consistently alleged that Complainant may have improperly processed two CRC claims on December 14—the same actions the ALJ held were deliberate violations under MAP-21. Accordingly, Respondent's Post Hearing Brief and the witnesses' testimony sufficiently triggered the ALJ's consideration of the affirmative defense. The Board finds that the ALJ did not err in considering the affirmative defense based on the specific facts of this case.

*b. The ALJ Erred in his Analysis of the Deliberate Violation Defense*

Proper analysis of the deliberate violation defense requires specific consideration of whether: (1) the employee caused a violation of the pertinent statute(s); (2) the violation was deliberate; and (3) the employee's conduct occurred without the employer's direction.[179] The ALJ did not specifically address these elements in the D. & O. Having reviewed the record in light of these requirements, the Board determines that the ALJ erred in his analysis of the affirmative defense for the reasons addressed below.

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174 Post Hearing Brief on Behalf of Respondent Employer Hoselton Automotive Group (Resp. Post Hearing Br.).

175 *Id*. at 17.

176 *Id*.

177 *Id*. at 41.

178 Tr. at 653, 1015, 1066, 1076, 1132.

179 *See Siemaszko*, ARB No. 2009-0123, slip op. at 12 (applying three-part test to analyze the ERA's deliberate violation defense); 49 U.S.C. § 30171(d).

To properly analyze MAP-21's affirmative defense, the first element requires proof that the employee caused a violation of the pertinent statute. In *Siemaszko*, the Board focused on the finding that the employee falsely provided information to or concealed material information from the Nuclear Regulatory Commission.[180] The Board determined that the elements of these criminal charges paralleled the material components of 10 C.F.R. § 50.5(a)(2) and § 50.9(a), and that violations of those regulations were also violations of the AEA and ERA.[181] Comparatively in the present case, the ALJ erred by not identifying "a violation of any requirement relating to motor vehicle safety under [chapter 301]."[182] Prior to the deliberate violation analysis, the ALJ concluded that "Respondent violated Toyota's safety standards that required the use of certified technicians, which falls under MAP-21's purview."[183] In the deliberate violation analysis, the ALJ notes that Complainant "admitted to approving the CRC-related work performed on vehicles . . . on December 14, 2017."[184] These findings, separately or in conjunction with one another, do not satisfy Section 30171(d)'s affirmative defense for the same reasons that they do not constitute protected activity as discussed above: violation of Toyota's safety standards is not a violation of a standard under Chapter 301. Even if it were, the ALJ was required to, and did not, identify the specific violation relating to motor safety under Chapter 301 that resulted from Complainant's actions.

Establishing the second element of the defense requires proof that the employee "deliberately" caused the violation to the pertinent statute. The Board has specified that "deliberate" includes an element of "willfulness" or "recklessness" but does not require a specific intent to cause a violation.[185] In the present case, the ALJ erred by not making a finding that Respondent proved that Complainant's conduct was "willful" or "reckless." The Board notes that the ALJ's analysis appears to conclude that Complainant's actions were at least reckless but does not explicitly make that finding. For example, the ALJ focused on Complainant's distrust for Ryan Brown and Respondent's "system" during the CRC campaign, Complainant's failure to inspect repair orders after questioning Respondent's system, and the fact that Complainant needed to trust the process after questioning and objecting to Respondent's system only a week prior.[186] To satisfy the second element, however,

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180 *Siemaszko*, ARB No. 2009-0123, slip op. at 13-14.

181 *Id.* at 14.

182 49 U.S.C. § 30171(d).

183 D. & O. at 25.

184 *Id.* at 28.

185 *Fields*, ARB No. 1997-0070, slip op. at 12-13; *Siemaszko*, ARB No. 2009-0123, slip op. at 15.

186 D. & O. at 28.

the ALJ should have made a clear finding about whether Complainant's actions were "willful" or "reckless," and erred in not doing so.

The third element of the deliberate violation defense requires proof that the employee acted without the employer's direction. The phrase "without direction" is not defined or further discussed in the MAP-21 regulations, but the Board has discussed this phrase in previous cases. In these cases, the Board has recognized: (1) "direction" could be expressed or implied;[187] (2) "mere presence of a supervisor during the illegal conduct is not enough;"[188] and (3) negligent management oversight may not be sufficient.[189] Examining the phrase "without direction," the Board in *Siemaszko* focused on "whether the employer was sufficiently involved such that a reasonable factfinder could conclude that there was expressed or implied 'direction' or 'pressure' on the complainant to commit the acts that led to the violation."[190] The Board reasoned that this should be the main consideration when determining whether the employee acted "without direction" because, without weighing this consideration, an employer would in effect gain a windfall from having violated the statute as a result of the employee's misconduct, and the statute's safety purposes would be undermined.[191]

In the present case, the ALJ erred by not determining whether Complainant acted "without the employer's direction." The Board acknowledges that the ALJ's analysis infers that Complainant's actions were done without the employer's direction by discussing the events leading her to process the two CRC claims on December 14, 2017, but again the analysis does not explicitly include that finding. Specifically, the ALJ stated: "Complainant admitted to approving the CRC-related work performed on vehicles . . . based on a phone call from team leader Ryan Brown . . . . However, Ryan Brown was not Complainant's superior or supervisor, and by her own testimony, was someone she did not trust."[192] As an initial matter, the D. & O. and the record are inconsistent as to whether Ryan Brown or Specht called Complainant regarding the two vehicles' repairs.[193] This inconsistency is

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187 *Siemaszko*, ARB No. 2009-0123, slip op. at 16-17 (citing *Fields*, ARB No. 1997-0070, slip op. at 9).

188 *Id.* (citing *Dotson v. Anderson Heating & Cooling, Inc.*, ALJ No. 1995-CAA-00011 (ARB July 17, 1996)).

189 *Id*. at 16-17 (citing *Fields*, ARB No. 1997-0070, slip op. at 8-9).

190 *Id*. at 17 (citations omitted).

191 *Id.* (citing *Willy v. The Coastal Corp.*, Case No. 1985-CAA-00001, slip op. at 14 (Sec'y June 1, 1994)).

192 D. & O. at 28.

193 *Id*. at 20, 28; Tr. at 653.

problematic because the ALJ's analysis relies heavily upon the fact that Ryan Brown made the phone call and he was not Complainant's superior or supervisor.

In addition, the ALJ did not address Section 30171(d)'s preclusion of protection to an employee "acting without direction from such motor vehicle manufacturer, part supplier, or dealership (***or such person's agent***) . . . ."[194] The ALJ correctly identifies that Ryan Brown was not Complainant's superior or supervisor but did not address the issue of agency. The deliberate violation provision unambiguously uses the term "person's agent," a term that is not defined.[195] Nevertheless, the ALJ does not explicitly find that Ryan Brown was not Respondent's agent. Ryan Brown was a "team leader" and a person in such a position could constitute a "person's agent" under the Act. To properly analyze the third element, the ALJ should have: (1) clearly identified who, if anyone, called Complainant regarding processing the two claims; (2) determine whether this individual was a "person's agent" under Section 30171(d); and (3) if the individual was a "person's agent," examine whether the individual was sufficiently involved such that a reasonable factfinder could conclude that there was expressed or implied direction or pressure put upon Complainant to commit the acts.

Accordingly, the Board **VACATES** the ALJ's determination that Complainant deliberately violated MAP-21. Although the Board finds that the ALJ did not err in considering the deliberate violation defense, the ALJ erred in analyzing the defense by not addressing the three-part test enumerated above. Rather than conduct a de novo review of the record to determine whether Complainant deliberately violated MAP-21, the Board would remand to the ALJ to reassess the deliberate violation analysis consistent with our instructions. Yet, as noted in Part 2**Error! Reference source not found.** above, remand is unnecessary because we agree with the ALJ's finding that Respondent proved by clear and convincing evidence that would have terminated Complainant's employment even in the absence of any protected activity. Nevertheless, the Board continues its review and examines the ALJ's contributing factor analysis.

### 3. Although the ALJ erred in his Contributing Factor Analysis, the Error was Harmless and We Affirm on Other Grounds

Assuming, *arguendo,* that Complainant established that she engaged in protected activity and suffered an adverse employment action,[196] Complainant must demonstrate that the protected activity was a contributing factor in the adverse

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194 49 U.S.C. § 30171(d) (emphasis added).

195 *See id*. § 30102.

196 The ALJ found that Complainant's employment termination was an adverse action. D. & O. at 28-29. Neither party challenged the ALJ's adverse action finding.

action.[197] The ARB has held that a contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.[198] Employees may meet their evidentiary burden with circumstantial evidence.[199] Circumstantial evidence may include, but is not limited to, temporal proximity, inconsistent application of an employer's policies, pretext, shifting explanations by the employer, or antagonism.[200]

Respondent argues that the ALJ erred: (1) by stating that a complainant "automatically prevails" on contributing factor if she can prove both knowledge and temporal proximity; (2) by failing to consider Respondent's legitimate non-discriminatory reasons for terminating her employment; and (3) by failing to consider Respondent's intervening events arguments.[201] However, regardless of the phrasing he used in his analysis, the ALJ did consider Respondent's legitimate non-discriminatory reasons, the intervening events, and other evidence, in addition to knowledge and temporal proximity, to find that Complainant's protected activity was a contributing factor in her termination. This evidence includes: the events between Kalpin's initial contact with RS&A in August 2017 and Complainant's termination on January 8, 2018; Complainant's prior work history—working for Respondent for 25 years without a prior action plan or significant documented performance or behavioral issues; the fact that 14 of Respondent's 16 technicians were not properly certified for the CRC work; Kalpin and Complainant's contentious working relationship; and Complainant being treated differently than a similarly situated employee (Palmer).[202]

On this latter point, we find that the ALJ erred in concluding that Complainant was treated differently than similarly situated employees. While the ALJ correctly recounted that Carroll testified that he felt that Palmer and Complainant were equally responsible for the CRC issues, and that Palmer was not

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197 29 C.F.R. § 1988.109(a).

198 *Williams v. QVC, Inc.*, ARB No. 2020-0019, ALJ No. 2018-SOX-00019, slip op. at 12 (ARB Jan. 17, 2023) (citation omitted).

199 *Id*. (citation omitted).

200 *Id*. (citation omitted).

201 *See* Resp. Br. at 90-91, Resp. Res. Br. at 64-65, 87-89. Respondent claimed that there was a series of intervening events between Complainant's alleged refusal to process uncertified CRC claims and the effective date of the outsourcing of Hoselton Automotive's warranty administration, including, but not limited to: (1) Hoselton's discovery that Complainant was processing claims with errors on them without even looking at them; (2) the other warranty administrator was processing claims he believed to contain fraudulent signatures; and (3) Complainant's husband came to Hoselton Automotive in order to engage in an altercation with Kalpin. *See* Resp. Br. at 90-91; Resp. Post Hearing Br. at 77-78.

202 D. & O. at 30-32.

fired, the ALJ merely accepted Carroll's conclusion that the two employees were similarly situated without performing any legal analysis or considering the distinguishing circumstances of their actions and positions.[203] For example, the record reflects that Palmer and Complainant had different job titles, different supervisors, and different job duties. Moreover, unlike Complainant, Palmer did not process CRC claims relating to work performed by uncertified technicians.[204] These factors should have been considered by the ALJ.

However, as noted in Part 2**Error! Reference source not found.** above, remand for additional fact finding is not necessary because we agree with the ALJ's finding that Respondent proved by clear and convincing evidence that it would have made the same decision to terminate Complainant's employment, in the absence of any protected activity. We address the ALJ's affirmative defense finding in turn.

### 4. Affirmative Defense: The ALJ's Finding that Respondent Established its Same-Action Defense is Supported by Substantial Evidence

If a complainant demonstrates that her protected activity was a contributing factor in the adverse action, the employer may avoid liability if it "demonstrates, by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of that behavior."[205] An employer satisfies this burden when it shows that it is "highly probable" or "reasonably certain" that it would have taken the action in the absence of protected activity.[206]

Although the ALJ concluded that Complainant did not engage in protected activity,[207] he nevertheless determined that Respondent proved by clear and convincing evidence that it would have taken the same action against Complainant if Complainant had not engaged in protected activity.[208] Upon making this determination, the ALJ relied upon Respondent's intentions to outsource

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203 *Id*. at 31; Tr. at 961.

204 D. & O. at 4-6, 14-15, 20-21, 28; Tr. at 235-36, 260, 950, 961, 1124.

205 49 U.S.C. § 30171(b)(2)(B)(iv); 29 C.F.R. § 1988.109(b).

206 *Petitt v. Delta Airlines, Inc.*, ARB No. 2021-0014, ALJ No. 2018-AIR-00041, slip op. at 19 (ARB Mar. 29, 2022) (citation omitted); *see Cottier v. Bayou Concrete Pumping, LLC*, ARB No. 2020-0069, ALJ No. 2019-STA-00046, slip op. at 17 (ARB Jan. 18, 2022) (citing *Simpson v. Equity Transp. Co.*, ARB No. 2019-0010, ALJ No. 2017-STA-00076, slip op. at 9 (ARB May 13, 2020)).

207 D. & O. at 32.

208 *Id*. at 33.

Complainant's job long before the CRC issues arose" and Complainant's poor working relationship with Kalpin.[209]

On appeal, Complainant argues that the ALJ erred in finding that Respondent met its burden.[210] Complainant contends: (1) Respondent never advised RS&A about the Limited Service Campaign or gave RS&A technician codes, after it outsourced its warranty administration, to ensure compliance with the Limited Service Campaign;[211] (2) the communications between Respondent and RS&A, in which the ALJ relied upon, demonstrate that Respondent was interested in a "mini-audit" and not to outsource its entire warranty processing department;[212] (3) Respondent's effort to terminate Complainant's employment occurred after the CRC issues came to light;[213] (4) Respondent's hesitance in terminating Complainant's employment is shown throughout the record;[214] and (5) Complainant was a twenty-five-year employee with no performance issues and was highly regarded by Hoselton and Segrue.[215]

Conversely, Respondent avers that the following substantial evidence supports the ALJ's conclusion: (1) Respondent wanted to outsource the warranty administration department long before Complainant's alleged protected activity;[216] (2) Respondent did not have any animus towards Complainant for allegedly engaging in her alleged protected activity;[217] (3) Complainant's performance and behavioral issues led to her employment termination and Respondent's outsourcing decision;[218] (4) Complainant continued to process CRC claims following her alleged refusal;[219] (5) Respondent was aware of and remedying the uncertified technician issue before Complainant became aware of such issue;[220] (6) "Complainant and Kalpin had a terrible working relationship [and t]hey never got along;"[221] (7)

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209 *Id*.

210 Comp. Br. at 22.

211 *Id*. at 25.

212 *Id*. at 25-26.

213 *Id*. at 27.

214 *Id*. at 29.

215 *Id*. at 30-31.

216 Resp. Res. Br. at 38-58.

217 *Id*. at 58-63.

218 *Id*. at 64-67, 87-105.

219 *Id*. at 67-71.

220 *Id*. at 72-80.

221 *Id*. at 81-82.

Complainant was responsible for processing uncertified technician claims;[222] (8) Complainant and Robert Frantz "testified that they knew that they were marked to go out the door prior to Complainant's alleged protected activity;"[223] (9) Robert Frantz's employment was terminated at the same time as Complainant, but he had not raised any concerns related to processing CRC claims;[224] and (10) Respondent's decision to outsource its warranty administration department was based on its assessment that the warranty administration department was performing unsatisfactorily and was not a pretext for retaliation.[225]

Substantial evidence supports the ALJ's finding that Respondent proved by clear and convincing evidence that it would have terminated Complainant's employment in the absence of protected activity. The record reflects that Respondent intended to outsource Complainant's job long before Complainant's protected activities on December 6 and December 20, 2017. Carroll credibly testified that tensions between Kalpin and Complainant escalated in the summer of 2017 and that Kalpin wanted to make a change in the warranty administration department.[226] The record contains evidence that Kalpin and Carroll exchanged e-mails discussing possible changes in the warranty department. For example, in an email entitled "Warranty Training + Processing," the two discussed outside vendors who could potentially replace Complainant and Robert Frantz to perform warranty training and processing.[227]

Kalpin's communications with RS&A also reflect that Respondent intended to outsource its warranty administration department before Complainant engaged in any protected activity. While Complainant is correct that the ALJ mischaracterized Kalpin's initial communications with RS&A, which only involved contracting with RS&A to conduct a mini-audit, future communications between the parties concerned Respondent's intention to outsource its warranty administration department to RS&A. Respondent's intention to outsource its warranty administration department was corroborated by Watkins, a service manager at RS&A.[228] Between November 28 and December 4, 2017, Kalpin and Watkins discussed Respondent's intention to outsource its warranty administration via phone and e-mail.[229] Watkins credibly testified that, during these communications

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222 *Id*. at 83-86.

223 *Id*. at 86-87.

224 *Id*. at 105-06.

225 *Id*. at 106-08.

226 *Supra* note 118; D. & O. at 33; Tr. at 951-52, 1125-26.

227 Tr.at 951; JX 1, HOS041-42.

228 D. & O. at 17, 33; Tr. at 889-91, 913.

229 D. & O. at 17, 33; Tr. at 889-91, 913; JX 1, HOS043-44.

with Kalpin, she explained RS&A's warranty administration services, provided an RS&A brochure, requested Respondent's labor volumes (which Kalpin provided), indicated their service rates, and answered Kalpin's questions.[230] Watkins concluded that Respondent was "definitely interested in bringing . . . all [of the franchises] on for processing services."[231]

Moreover, as recognized by the ALJ, the record clearly reflects that Complainant and Kalpin could not work collaboratively and their working relationship continued to devolve. Kalpin actively pursued multiple options to terminate Complainant's employment, outsource the warranty administration department, as described above, and even "tested and trapped" Complainant with internal audits.[232] Carroll testified that Kalpin tested Complainant to see if she would process claims without physical paperwork.[233] Russo Brown corroborated that Kalpin tested Complainant to determine if she was processing repair orders without looking at actual documents.[234] Additionally, other employees were aware of Complainant and Kalpin's poor working relationship.[235] Hoselton ultimately asked Complainant to write a letter to Kalpin in hopes that it would reconcile their working relationship, but Complainant refused.[236]

In addition to the reasons set forth by the ALJ, the record contains evidence that further supports the finding that Respondent established its same-action defense, including that Kalpin trained other employees for warranty processing administration[237] and that Complainant's husband appeared at the dealership to confront Kalpin.[238] Therefore, the Board **AFFIRMS** the ALJ's affirmative defense finding as supported by substantial evidence and in accordance with law.

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230 D. & O. at 17, 31-32; Tr. at 889-91.

231 Tr. at 891.

232 D. & O. at 33.

233 Tr. at 971-72.

234 *Id*. at 1076-78; Russo Brown also testified that she questioned whether Complainant had access to the hard copies of the repair orders. *Id*. at 1077.

235 *Id*. at 164, 253-54, 924-25, 929, 1233.

236 D. & O. at 21; Tr. at 841.

237 Kalpin advised Carroll that he wanted to start training Randy Whitlock "[a]s a potential option in the future if [among other things, Respondent] decided to make a change." Tr. at 931. Whitlock took online warranty administration courses in September, November, and December 2017. *Id*. at 936-37.

238 *Id*. at 980-82. Carroll testified that on December 21, 2017, Complainant's husband arrived at the dealership and appeared very angry. *Id*. at 981. According to Carroll, Complainant's husband was in the showroom and told Carroll, "[y]eah. We need to talk, because I'm about ready to lose my cool. I'm going to find that guy Guy and let him know

Accordingly, as discussed above, the Board **AFFIRMS** the ALJ's determination that Complainant established a subjective good faith belief that she objected to a MAP-21 violation,[239] **VACATES** the ALJ's determination that Complainant deliberately violated MAP-21, **VACATES** the ALJ's determination that Complainant established her protected activity was a contributing factor in her employment termination, and **AFFIRMS** the ALJ's determination that Respondent proved by clear and convincing evidence that it would have taken the same action against Complainant regardless of whether Complainant engaged in protected activity.

**5. Attorney Fee Order**

Complainant's attorney filed a petition for review of the Attorney Fee Order. The ALJ denied Complainant's attorney's fee petition for services rendered because he determined that Respondent did not violate MAP-21.[240]

The ALJ did not err in denying the attorney's fee petition. MAP-21's regulations provide that "[i]f the ALJ concludes that the respondent has violated the law, the ALJ will issue an order that will require, where appropriate . . . payment of compensatory damages, including" attorney fees.[241] The Board affirms, in part on other grounds, the ALJ's D. & O., thus concurring in the ALJ's conclusion that relief may not be ordered against Respondent for a violation of MAP-21. Accordingly, the ALJ correctly denied Complainant's attorney's fee petition and the Board **AFFIRMS** the Attorney Fee Order.

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what I really think about what happened yesterday. He's going to know where I stand." *Id.* at 980. Carroll brought Complainant's husband into an office near the showroom to explain that he orchestrated the December 20, 2017 meeting and his rationale for the meeting. *Id.* Carroll further testified that while in the office, Complainant's husband stated "[w]hen I'm doing with you I'm going to find that guy Guy and he's going to know what I really feel." *Id.* at 981. Carroll feared that a confrontation between Complainant's husband and Kalpin would get "verbal and/or physical . . . somewhere in that building." *Id.*

239 As noted above, the Board is not affirming or vacating the ALJ's conclusion regarding objective reasonableness. The ALJ provided no analysis or explanation to support his conclusion. However, we need not to remand on this issue because substantial evidence supports the ALJ's finding that Respondent proved by clear and convincing evidence that it would have terminated Complainant's employment in the absence of any protected activity.

240 Attorney Fee Order at 1.

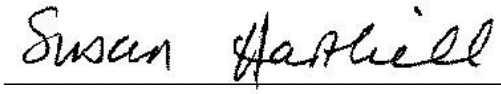
241 29 C.F.R. § 1988.109(d)(1).

## CONCLUSION[242]

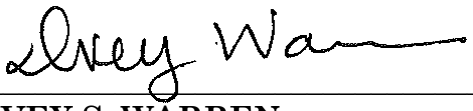
For the foregoing reasons, the Board **AFFIRMS**, in part, and **VACATES**, in part, the ALJ's D. & O., and **AFFIRMS** the ALJ's Attorney Fee Order.

**SO ORDERED.**

**TAMMY L. PUST**
**Administrative Appeals Judge**



**SUSAN HARTHILL**
**Chief Administrative Appeals Judge**



**IVEY S. WARREN**
**Administrative Appeals Judge**

[242] In any appeal of this Decision and Order that may be filed, the Board notes that the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.