



In the Matter of:

CEDRIC CHEELEY,

ARB CASE NO. 2019-0019

COMPLAINANT,

ALJ CASE NO. 2017-STA-00032

v.

DATE: DEC 19 2019

**IESI PROGRESSIVE WASTE
SOLUTIONS,**

RESPONDENT.

Appearances:

For the Complainant:

Cedric Cheeley; *pro se*; Dallas, Texas

For the Respondent:

**Timothy R. Newton, Esq.; *Constangy, Brooks, Smith & Prophete, LLP*;
Atlanta, Georgia**

**BEFORE: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie,
*Administrative Appeals Judges***

FINAL DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended. 49 U.S.C. § 31105(a) (2007); *see also* 29 C.F.R. Part 1978 (2018) (implementing regulations). To prevail on a STAA claim, an employee must prove by a preponderance of the

evidence that he engaged in protected activity that was a contributing factor in unfavorable personnel action taken against him. 49 U.S.C. § 42121(b)(2)(B)(iii).

Respondent Progressive Waste hired Cheeley as a Rear Load Driver of a garbage truck in April 2016. As a driver, he was also required to help empty residential garbage cans into the rear loader. Cheeley did not complete the probationary training period and his employment was terminated in June 2016.

Cheeley filed a timely complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on October 12, 2016, alleging that Progressive Waste fired him in retaliation for making safety complaints regarding fatigue, overweight trucks, and trucks being driven at unsafe speeds while other employees were holding on to the back. The STAA prohibits employers from discriminating against employees when they report violations of commercial motor vehicle safety rules or when they refuse to operate a vehicle when such operation would violate those rules.¹ After an investigation, OSHA determined on January 12, 2017, that Progressive Waste was not a covered employer under the STAA. Cheeley objected and timely requested a hearing with the Office of Administrative Law Judges (OALJ), which was held on May 31, 2018. A Department of Labor Administrative Law Judge (ALJ) dismissed Cheeley's complaint after conducting a hearing and receiving evidence because he found that Cheeley had failed to prove that any protected activity was a contributing factor in his termination.

The ALJ concluded that Cheeley had engaged in protected activity when he reported his concerns that the trucks would speed while he was holding on to the back, the trucks could be in excess of the maximum allowable weight, and that he was unable to throw trash and drive safely through a full shift. However, he found that Cheeley's concern regarding fatigue making the job inherently unsafe was unreasonable as he had information available to him at the time that the other employees were able to complete the routes in a much quicker time, and concluded that this did not establish protected activity. The ALJ then reviewed the evidence regarding the relationship between Complainant's protected activity and his termination, including the testimony of Respondent's operations manager. The ALJ noted that Respondent's operations manager at the location where Cheeley worked had concerns about Cheeley's performance before he complained about the weight or speed of the trucks. Decision and Order at 12. Thus, the ALJ found that the

¹ See 49 U.S.C. § 31105(a).

evidence established that Progressive Waste terminated Cheeley's employment due to his inability to consistently complete his work in the time allotted, and the protected activity played no role in his termination.

Cheeley petitioned the Administrative Review Board for review of the ALJ's decision.² Upon review of the ALJ's Decision and Order, the pleadings, and the administrative record, we conclude that the ALJ's factual findings are supported by substantial evidence and his conclusions of law are correct and well-reasoned. Accordingly, we hereby **ADOPT** the ALJ's decision, attach it to this document, and **DENY** Cheeley's complaint.

SO ORDERED.

² In its response brief, Progressive Waste raised issues regarding the ALJ's finding that Cheeley had engaged in protected activity. We will not address these contentions as they were not properly raised in a cross-appeal.

U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)



Issue Date: 17 December 2018

CASE NO.: 2017-STA-32

In The Matter Of:

CEDRIC CHEELEY,
Complainant

v.

IESI PROGRESSIVE WASTE SOLUTIONS OF TEXAS, INC.,
Respondent

APPEARANCES:

Jason Richerson, Esq.
For Complainant

Timothy Newton, Esq.
For Respondent

DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act¹ (the "Act") and the regulations promulgated thereunder.² The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to the terms and conditions of employment because they refused to operate a vehicle when it would violate a regulation, standard, or order of the United States related to commercial motor vehicles.

PROCEDURAL BACKGROUND

Complainant filed his initial complaint with the Occupational Safety & Health Administration (OSHA) on 12 Oct 16. OSHA dismissed that complaint on 12 Jan 17 and on 6 Feb 17 Complainant objected to the dismissal and requested a hearing before the Office of Administrative Law Judges (OALJ). Complainant filed a formal Bill of Particulars specifying his alleged causes of action and Respondent filed a Motion for Summary Decision, which I granted in part and denied in part. On 31 May 18, I held a hearing at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

¹ 49 U.S.C. § 31105.

² 29 C.F.R. § 1978.

My decision is based on the entire record, which consists of the following:³

Witness Testimony of

Complainant
William Arnold

Exhibits

Respondent's Exhibits (RX) 1-6, 8-9, 12

STIPULATIONS

Respondent employed Complainant and at all relevant times was subject to the Act.⁴

FACTUAL BACKGROUND

Respondent hired Complainant to be a driver of one of its rear loading garbage trucks, serving residential areas. Respondent require drivers to help empty residential garbage cans into the rear loader. Complainant never completed what was essentially probationary training and Respondent fired him.

ISSUES IN DISPUTE AND POSITIONS OF THE PARTIES

Complainant maintains that he communicated to his supervisors his concerns that (1) fatigue from throwing trash made him an unsafe driver; (2) trucks were overweight; and (3) trucks were being driven at an unsafe speed with employees hanging on the back. He argues that he was terminated in retaliation for doing so. Respondent disputes whether those communications qualify as protected activity under the Act and also argues that in any event his termination had nothing to do with those communications, but was a function of his poor job performance.

LAW

The Act provides that

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

(A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial

³ I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

⁴ Tr. 7.

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

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order⁵

To prevail on his claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that the respondent took an adverse employment action against him, and that his protected activity was a contributing factor in the unfavorable personnel action. If the complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the unfavorable personnel action, a respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.⁶

For a finding of protected activity under the complaint clause of the Act, a complainant must show that he reasonably believed he was complaining about the existence of a safety violation.⁷ If a complainant's protected activity is a refusal to drive because it would have resulted in a violation of a regulation, standard, or order, he must prove that was the case; his belief, even if in good faith, is irrelevant.⁸

“Contributing factor” causation may be proven indirectly by circumstantial evidence such as

temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.⁹

EVIDENCE

Complainant testified at hearing in pertinent part.¹⁰

Before he worked for Respondent, he had a job as a security guard. He thought he would like that job because he could sit around and not have to do anything.

⁵ 49 U.S.C. § 31105.

⁶ 75 Fed. Reg. 53545, 53550; 49 U.S.C.A. § 42121(b)(2)(B)(ii); *Salata v. City Concrete, LLC*, 2008-STA-12 and -41 (ARB Sept. 15, 2011).

⁷ *Bethea v. Wallace Trucking Co.*, ARB No. 07-057, ALJ No. 2006-STA-023, slip op. at 8 (ARB Dec. 31, 2007); *Calhoun v. United Parcel Serv.*, ARB No. 04-108, ALJ No. 2002-STA-031, slip op. at 11 (ARB Sept. 14, 2007); *Ulrich v. Swift Transportation Corp.*, 2010-STA-41 (ARB Mar. 27, 2012).

⁸ *Minne v. Star Air, Inc.*, 2004-STA-26 (ARB Oct. 31, 2007).

⁹ *DeFrancesco v. Union R.R. Co.*, 2009-FRS-009, (ARB Feb. 29, 2012); *See, e.g., Id.; Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op at 13 (ARB June 24, 2011).

¹⁰ Tr 18-90.

However, he decided he wanted something more physical and took a job with Respondent. He wanted to be a front load driver, but was told he had to start as a rear load driver.

He was hired by Respondent on 18 Apr 16 to be a rear load driver. The job requires a class B license. A class B license requires a physical and a driving test. Some of the training included how to properly enter or exit a vehicle. It requires maintaining three points of contact. When he first started, he was assigned to be a second helper to an experienced crew of a driver named Colton and helper named Dion. The helper's job is to throw trash. The driver drove the truck up to trash cans, stopped the truck, and got out of the truck, the driver would empty trash on one side of the street and the helper would empty trash on the other side. Sometimes, it was just him and Colton.

He never actually completed training and they never gave him his own route. They told him they didn't think he could handle it. Respondent was wrong though, because he and Colton hauled more trash than anyone else after the Memorial Day holiday, which is a heavy trash day. They actually were faster without Dion. Respondent did not think he could handle the job, but he could. There were other drivers a lot heavier than him doing the exact same job. He was able to do the job according to Respondent's expectations.

The problem was doing the job safely. There is no way a driver could get in and out of the truck that many times in a day and not become fatigued and unsafe. When he took the job, he did not expect the cans to be that close together and require that many stops in a short time. It is impossible to do what Respondent expects in the time they are given to do it and do it safely.

He talked to Respondent about the trucks being overweight. He doesn't remember the date, but he spoke to Colton about the weight issue because a CDL driver caught driving a truck overweight will get fined. If the truck is packed with the blade coming up all the way over, it will be inherently overweight. He was told to compact the truck until it was full. At that point it would be overweight. He doesn't remember today what the weight limits were, but knows that at the time the trucks were overweight all the time. He also knows of one time that Colton got a ticket for being overweight.

He also complained about the trucks going too fast. He was not comfortable holding 300 pounds hanging on the back of the truck while it sped down the street. The speed limit should be 10 mph, but they had to go faster than that to complete the routes. They couldn't go more than 10 miles an hour between houses, but they could go more than 10 miles an hour when they went between neighborhoods. He was told that when they went between neighborhoods he should get in the cabin and put his seatbelt on. He never actually refused to do the job because it was unsafe. He just did it as safely as he could.

He could do the job in a safe manner if it were matter of 20 or 30 stops a day. He cannot do 150 or 200 stops a day safely. When he worked with Colton and Dion, they looked fatigued. They had discussions about it and they thought it was unsafe, also. Anyone out there in Texas would be fatigued and any company that requires their employees to do that is unsafe. He was having trouble doing the job and catching his breath.

He had a meeting shortly after he started with Mr. Arnold and Mr. Glenn. They told him he was working too slowly and they were concerned whether he could perform the duties of the rear loader position. He told them the job was whipping him and asked for a specific performance standard, but was never given it. He also asked if the job requirement for a driver indicated that part of the job was getting out and throwing trash. He was told that technically he would not be required to do that, because it was not in his job description.

Mr. Arnold told him that the position required both driving and getting out of the truck to throw trash. He told them he wasn't going to quit and was getting back in shape and doing better, but if he couldn't get himself into shape by August, he would tap out. When he said that he didn't mean that he would quit.

They had a second meeting about two months after he started to discuss the same thing. He does not recall Mr. Arnold emphasizing safety. At his deposition he testified that Mr. Arnold said that they stressed safety. He told them he needed more time to get into shape. He demanded to see the job description that stated part of the rear load driver's job was to exit the truck and throw trash. He had been told that it was and had seen other drivers do it, but he still asked. They told him he was fired.

He recorded both of the meetings, but they knew he was recording. He didn't complain about the job being inherently unsafe during those meetings, but he mentioned it at other times. He made the recordings because he wanted to make sure he understood what the job expectations were. RX-8 is the transcript of his recording of the first meeting.

RX-1 is a picture of Colton in the front and him in the back. The picture was taken because of an accident. Page three shows damage to the truck. The accident happened while he was driving. When the accident occurred, he had been throwing trash by himself without Colton getting out, because he wanted to prove he could do it. He had been throwing trash for ten hours and they were behind on the route. Respondent sent Justin Glenn to come help them catch up. They told him to drive and Colton and Justin threw trash from the back. That's when he hit the other truck and damaged his truck. The accident happened because he was rushing and tired. RX-2 is the corrective action he received for the accident. He told Mr. Arnold he had the accident because he was rushing.

DOT regulations limited him to no more than 60 hours of work per week. His normal schedule was five days a week Monday through Friday. That means a maximum average of 12 hours a day. RX-3 are residential route sheets. The sheets show that they worked over 12 hours four times. RX-5 also shows route sheets that indicate that he worked over 12 hours. Leaving trash on the ground means they were unable to complete the route. He does recall there were times where they worked more than 12 hours in a day. That would require Respondent to adjust the schedule to make sure that he did not go over 60 hours. The route sheets indicate that Colton was able to complete those routes more quickly with other helpers.

William Arnold testified at hearing in pertinent part:¹¹

He is Respondent's operations manager at the Dallas East location. He is responsible for about 65 drivers. Respondent has three different lines of business; frontload, roll-off, and residential. Roll-off is commercial grade large-scale dumpsters. Frontload drivers pick up smaller dumpsters at businesses such as restaurants and hotels. Rear load drivers pick up residential trash from smaller garbage cans. They have 13 rear load routes out of the Dallas East facility.

Rear load trucks typically have a driver and helper who work as a team. Sometimes both team members are drivers. There are no DOT regulations prohibiting truck drivers from also helping throw trash. Both employees are required to exit the truck and throw trash. It is a very, very strenuous job. It requires stamina and a certain level of physical fitness.

New drivers have initial classroom training and paperwork completion. That is followed by an off-site driving academy that ends with a test.¹² Then, they team new hires with an experienced driver and typically train for two to three weeks. At that point, the new hire takes over that route. 90% of their drivers are ready to take over the route within 3 weeks.

Rear load drivers are subject to DOT regulations of 14 hours in a day or 60 hours in a week. Drivers who work Monday through Friday need to be able to complete their routes within 12 hours each day. That's the maximum, so the goal is to be under 12 hours and have some allowance for mishaps or other unexpected delays. Most of the drivers are able to meet that standard of completing a route in less than 12 hours. It's a problem if someone goes over 12 hours, because they cannot be counted on to complete the rest of the week under 60 hours and have to be taken off the schedule.

Justin Glenn was Complainant's immediate supervisor. Complainant was assigned to train with Colton Bodine and once the training was complete, take over that route. The route was typical residential neighborhood. Homes and trash

¹¹ Tr. 91-150.

¹² RX-12.

cans were close together, so there was not much driving distance from one-stop to the next.

The job was very challenging for Complainant. They discussed it a number of times and Complainant admitted that he was overweight and working to get in shape. Even though he may have felt that he was getting in better shape and was not in as much distress, the output in terms of pace stayed the same. He was unable to complete the route in the same time that other employees could do it. RX-3 and RX-5 are examples of Complainant's crew being unable to complete the route in the requisite 12 hours. They were over time on 5, 9, 10 and 13 May 16. On 6 Jun 16, they left trash on the ground because they ran out of time. That is a significant problem in terms of customer service.

RX-1 is a collection of photographs from Complainant's accident and RX-2 is the corrective letter he received for the accident. On the day of the accident, Complainant was running way behind, so he told Glenn to go out and help. Complainant drove and Glenn and Bodine were on the back throwing trash. Complainant was going between two vehicles when he sideswiped a truck.

He does not recall Bodine having any regular problems working over 12 hours with other helpers and it's unusual to have to assign three people to a truck to finish a route. He talked to Bodine about it and Bodine said Complainant was just out there to work his hours and didn't appear to be in a hurry or motivated to get things done.

They had a couple of meetings to discuss the problems with Complainant. He did not know Complainant was recording the first one. He mentioned that the job wasn't for everyone and asked Complainant if he was really interested in doing the job and thought he would be able to do it in a safe manner. They didn't want to push him into doing something he couldn't do. Complainant said he was working on improving his stamina and had lost an inch and a half around his waist. However, it wasn't enough that Complainant felt better doing the job, he had to do the job more efficiently. They decided to give him more time and he said he would improve. However, the time stayed about the same, he went over 12 hours a few times, and he ended up leaving trash on the ground on 6 Jun 16.

They made the decision to let Complainant go and had a second meeting with him. They were hoping to explain their position and convince Complainant it was better for him to leave, so the departure would be a mutual decision. They were aware that he was recording the meeting. As he started trying to lay the groundwork to get Complainant to realize it wasn't working, Complainant insisted that he was going stay in the job and kept asking where the handbook said he had to get out at every stop. Complainant talked about fatigue, but never mentioned safety. The fact that Complainant still did not understand or accept the fundamental nature of the job was the last straw and they went ahead and fired

him. RX-6 is the termination paperwork, indicating he was fired for poor performance on 8 Jun 16.

On the routes Complainant had, there is no way he could go over ten miles an hour from stop to stop. It would be impossible to accelerate and decelerate the truck that fast. At the point where they transited from one neighborhood to another and could go faster, Complainant was supposed to get into the cab and put his seatbelt on. Respondent's rule was that if the truck went more than 10 miles an hour or further than 0.2 of a mile without stopping, the helper was required to get in the cabin put his seatbelt on.

Their trucks are various sizes and weights. Their process is to feed the trash trucks until the hydraulics start working slowly, at which point they go to the landfill. They are told not to keep cramming trash into the truck, because they will become overweight or break the hydraulic equipment. They have had trucks ticketed for being overweight doing commercial work, but not really in the residential business. The rear loaders can be overweight and get ticketed, because an axle will exceed the limit. If the drivers do what they are told, overweight should not be a problem.

Complainant's termination was related solely to performance and had nothing to do with him raising anything about weight, speed, or safety. He and other employees have done the same routes and not had trouble making the time. Because of the way they have restructured routes, they were actually more homes to service when he was doing it. Because the routes change and vary, there is no set standard. They go by history and see how long it took other drivers and helpers to complete the route.

Respondent's records show in pertinent part:¹³

Bodine and his helper completed the Kaufman route in less than 8 hours on 7 Apr 16, 11.6 hours on 11 Apr 16, and 10.3 hours on 14 Apr 16. Complainant was hired on 18 Apr 16. On 5, 9, 10, 13 and 17 May 16, Bodine and Complainant took more than 12 hours to complete the Kaufman route. On 4 May 16, Complainant was issued a warning letter for sideswiping a parked vehicle while driving his truck on a route. On 6 Jun 16, Bodine and Complainant took almost 14 hours on the Heartland route and were unable to complete it. Respondent terminated Complainant on 8 Jun 16 for poor performance.

¹³ RX-2-7.

*Complainant's recordings of his conversations with his supervisors show in pertinent part:*¹⁴

First Conversation

Complainant said he did not understand why he was asked to come meet his supervisors. He was losing weight and throwing trash as fast "as his old fat tail could do it." He chunked trash for four hours and all of a sudden was tired for the rest of the two hours when he tried to throw trash.

Arnold asked if Complainant thought he could meet Respondent's expectations and do the job safely.

Complainant answered that that was the problem, when he rushed he hit a truck.

Arnold answered that they did not want to push Complainant to do something he couldn't do and have an accident and asked if Complainant could drive safely when he was tired.

Complainant said that the job was whipping him now and he had to get to that point. He needed to get his wind up, but was getting better.

Arnold agreed that it was a hard job that not everyone can do. He just wanted to make sure whether Complainant was capable of doing it or if they should part ways.

Complainant answered that he was giving himself until August and if he couldn't do better by then, he would tap out, but wasn't going to quit.

Arnold explained that they have routes that they have groomed for years and have established times they have to meet. They did not intend to push anybody to do something that could not be done safely.

Complainant answered that it was impossible to do the route driving no more than 10 mph with people hanging on the back.

Arnold responded that the stops were too dense in the housing areas to go more than 10 miles an hour. On the occasions that it was possible to go more than 10 miles an hour, both employees should be in the cab with their seatbelts buckled.

Complainant observed that he was working much faster than the other helper, Dion. Complainant said he just needed more time to get in better shape.

¹⁴ RX-8-9.

Arnold told Complainant that he could not pay him to be a driver if he was going to be on a crew with another driver and Complainant needed to be in shape to drive and throw trash, both of which are required for the job.

Complainant answered that he might be able to drive and throw on a rural route, but could not do that on a route like he was currently running. Complainant observed that it's a disgusting job, but had never quit anything in his whole life and his pride and ego would not let him quit.

Arnold told Complainant that they would continue to monitor his performance and make sure he could meet their standards.

Complainant asked what those standards were and if he could read them.

Arnold explained that the standards were based on each individual route and were not written. The standards were based on what other employees had been able to do. He did not expect Complainant to be at the top but he could not leave trash on the ground and had to meet the minimum time.

Complainant said it was just going to take some time and he had dropped an inch and a half off his waist.

Arnold said they would see how Complainant does and come back in a week to assess his performance and if things didn't improve they would have to make a decision.

Complainant answered that if he couldn't cut it he would let them know. He added that he just figured out that the truck would be fully packed after six or seven streets and to stay legal for weight on one axle, the truck could be only halfway full.

Arnold answered that gross weight and axle weight are two different things and that trucks would be overweight on axle before they would be over gross weight. Trucks should not be packed until they have to undo the turn buckle and stuff more. Respondent stresses safety and has many rules to keep everyone safe.

Complainant agreed that the truck would not be going 50 miles an hour, but Bodine might run between 30 and 40 mph with him hanging on the back.

Second Conversation

Complainant asked why he was called in and asked why he never got any specific production standards. He added that he was much stronger than he was during their previous conversation 3 weeks before.

Arnold explained that Bodine was normally able to finish his routes in between 48 and 51 hours with a helper and wasn't able to do that with Complainant.

Complainant answered that he had told Bodine to stay in the truck and he would do both sides of the street by himself, to prove it could be done. He also asked if he was required as a driver to get out of the truck and throw trash. He indicated he had talked to HR, reviewed the guidebook, and was given no indication that a driver was required to get out of the truck throw trash. He asked how Respondent could balance safety and fatigue. He added that he continued to build his stamina and lose weight.

Arnold clarified that rear load drivers were required to get out and help throw trash. He explained that until Complainant was able to complete the routes in an acceptable time, it didn't make any difference if he felt better and it did not appear that rear load driver was a good fit for him. It was not enough that he tried hard, he had to be able to complete the route. He indicated that they looked for other jobs that might be a good fit, but there were none.

DISCUSSION

Protected Activity

Complainant alleges that he engaged in three protected activities by raising the issues of (1) driver fatigue leading to unsafe operation, (2) excessive speed with riders on the back, and (3) operating overweight trucks. Respondent answers that his actual communications on those subjects were so vague as to fall short of protected activity.

The starting point in the analysis of protected activity is that the concerns expressed need not necessarily be true, so long as they are reasonably held. In this case, Complainant observed that he was concerned about the speed at which the truck was operating while he was on the back. While it seems highly unlikely that the truck could be operating at an unsafe speed when traveling a few yards at a time between houses, the same is not true for those periods when the truck is traveling between neighborhoods. Indeed, Arnold observed that during those times, the helper should be in his seat rather than riding on the back. Consequently, the evidence indicates that although Complainant's concerns may not be ultimately correct, they are not unreasonable and therefore his communication of those concerns constitutes protected activity.

The same is generally true of concerns related to the possibility of operating trucks in excess of the maximum allowable weight. Although the record falls short of establishing that those concerns were correct, even Arnold conceded that weight could be a problem and in the past drivers may have been ticketed for being overweight. As a result, Complainant's concerns were not unreasonable and his expression of those concerns constitutes protected activity.

On the other hand, Complainant's observation that the routes could never be safely completed because they would lead to driver fatigue was unreasonable, given the information he had available to him that indicated other employees were able to complete the routes in a much quicker time. Thus, his complaint that the job was inherently unsafe was unreasonable and did not qualify as protected activity. At the same time, his complaint that he was unable to throw trash and drive safely through a full shift was not unreasonable and did constitute protected activity, but only as it related to him.

Causation

Complainant bears the burden to initially establish that his protected activity played some role in his termination. In that regard, I note that I found Arnold's testimony to be highly credible, as it was consistent with and corroborated by the transcripts of the recorded meetings and the driving records. The clear weight of the evidence is that Respondent terminated Complainant because even after two months of training and acclimatization, Complainant was unable to consistently complete his work in the time allotted.¹⁵ Any discussions about weight or speed played no role in Respondent's decision to terminate Complainant, as indicated by the fact that Arnold had significant concerns about job performance even before those discussions. The discussions about fatigue and driver safety similarly had no impact, even though they were tangentially related to the only reason for the termination, which was Complainant's inability to do the job Respondent hired him for. Although Complainant did engage in protected activity, that protected activity played no role in his termination.

The complaint is dismissed.

ORDERED this 17th day of December, 2018, at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge

¹⁵ Complainant focused on the absence of specific performance standards, but the record indicates one objective standard was to be able to complete a week's work without violating the DOT 60 hour maximum. Moreover, the relevant question is not whether Respondent's termination decision was wise or even fair, so long as it was not being used as a pretext. I find no evidence of pretext..

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

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).