U.S. Department of Labor

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

IN THE MATTER OF:

CURTIS DICK,

COMPLAINANT,

v.

USAA,

and

CONTRACTED DRIVER SERVICES,

RESPONDENTS.

ARB CASE NO. 2022-0063

ALJ CASE NO. 2018-STA-00054
ALJ TRACY A. DALY

DATE: April 16, 2024

Appearances:

For the Complainant:
Curtis Dick; *Pro Se*; Cedar Hill, Texas

For the Respondent USAA:
Gary Visscher, Esq. and Diana Schroeher, Esq.; *Law Office of Adele L. Abrams P.C.*; Beltsville, Maryland

For the Respondent Contracted Driver Services:
Julie A. Pace, Esq. and David A. Selden, Esq.; *Pace Selden Gilman Marks PLLC*; Phoenix, Arizona

Before HARTHILL, Chief Administrative Appeals Judge, and THOMPSON, and ROLFE, Administrative Appeals Judges

DECISION AND ORDER

ROLFE, Administrative Appeals Judge:

This case arises under the Surface Transportation Assistance Act of 1982 (STAA), as amended, and its implementing regulations.[1] Curtis Dick (Complainant) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that United Services Automobile Association (USAA) and Contracted Driver Services (CDS) (collectively, Respondents) retaliated against him in violation of the STAA's whistleblower protection provisions. Following a hearing, a United States Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) denying Complainant's complaint. Complainant appealed the matter to the Administrative Review Board (ARB or Board).

Because substantial evidence supports the ALJ's determinations Complainant did not engage in protected activity while assigned to USAA, and that the protected activity he engaged in while assigned to Thunder Ridge did not contribute to his termination, the Board affirms.

BACKGROUND

CDS is a personal staffing firm that provides intermittent, on-demand commercial motor vehicle drivers to client companies on an as-needed basis.[2] CDS hired Complainant as a commercial motor vehicle driver in February 2017.[3]

USAA provides financial services to members of the United States military, veterans, and their families.[4] USAA contracted with CDS to provide drivers to transport a specialty commercial motor vehicle (disaster CMV) to natural disaster sites.[5] The contract with USAA required CDS to dispatch a standby driver within twenty-four hours after USAA requested one.[6] CDS would identify drivers it believed qualified as standby drivers, and USAA screened the drivers, and if

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1 49 U.S.C. § 31105(a); 29 C.F.R. Part 1978 (2023).

2 D. & O. at 6.

3 *Id*.

4 Appellate Exhibit (AX) 1 at 4.

5 D. & O. at 6

6 *Id*.

satisfied with their qualifications, would approve them.[7] USAA approved Complainant as a standby driver.[8]

Upon accepting a USAA driving assignment, a standby driver was required to commence the job within twenty-four hours, pick up the disaster CMV at a designated location, and travel to a disaster site.[9] Standby drivers were also obligated to timely notify USAA representatives of any delays in arriving to the designated departure location.[10]

On December 5, 2017, USAA requested a driver to transport the disaster CMV from San Antonio, Texas to Southern California.[11] CDS offered Complainant the assignment, and Complainant accepted.[12] Jeff Durante, an operations specialist for CDS, informed Complainant of the time-sensitive nature of the job specifying that Complainant needed to arrive in San Antonio within twenty-four hours.[13] When USAA contacted Complainant to schedule his travel plans, however, Complainant informed USAA that he could only make the flight arriving at 9:58 p.m. on December 6, outside of the required twenty-four-hour deployment schedule.[14]

To prevent further delay, Calvin Schlafke, a contemporary fleet and logistics coordinator for USAA, drove the disaster CMV from San Antonio to El Paso.[15] Schlafke contacted Complainant to discuss the adjusted travel schedule and reiterate that the job was time-sensitive.[16] In addition, Schlafke reminded Complainant to complete his required hours-of-service form before arriving in El Paso.[17] USAA requires drivers to have the hours-of-service form completed before arriving to pick up a vehicle.[18]

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7 *Id.*

8 *Id.*

9 *Id.*; Hearing Transcript (Tr.) at 202-03.

10 D. & O. at 6.

11 *Id.* at 7.

12 *Id.*

13 *Id.*; Tr. at 421-22.

14 D. & O. at 7.

15 According to Schlafke, this was unprecedented and highly unusual to transport the disaster CMV to an alternative location. *Id.*; Tr. at 74, 81-82, 205.

16 D. & O. at 7.

17 *Id.*; Tr. at 83-85, 99, 125.

18 D. & O. at 7; Tr. at 103.

Complainant missed his scheduled flight without notifying USAA.[19] Schlafke, however, arrived in El Paso at 9:00 p.m. with the disaster CMV as planned.[20] Complainant eventually arrived in El Paso around 1:00 a.m. on December 7, nearly thirty-six hours after he accepted the job.[21] Upon arrival, Complainant did not have his required hours-of-service form completed.[22] Complainant and Schlafke worked together to prepare the form, finishing at approximately 2:30 a.m.[23]

Schlafke also explained the Electronic Logging Device (ELD) application to Complainant.[24] USAA uses an ELD to track and record vehicle location, travel routes, and time operating the disaster CMV.[25] Complainant expressed opposition to using the ELD several times and insisted he would record his own driving hours, but he did not say that he thought the system presented a safety issue.[26] Schlafke reiterated that the ELD was a redundant, but different system than the driver's hours-of-service log used by Complainant (and other drivers), and that the ELD was used to track the disaster CMV's hours of operation and location.[27] Conversely, Complainant believed that Schlafke wanted him to input his past seven-days' driving history in an incorrect manner on the ELD.[28]

Complainant departed El Paso at approximately 8:25 a.m. on December 7—nineteen hours after the required twenty-four-hour dispatch time.[29] At approximately 8:37 p.m., Complainant called USAA to report heavy traffic and advise that he needed to stop in Blythe, California, rather than Palm Desert, California for his required driving break.[30] Complainant had not advised USAA

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19 D. & O. at 7.

20 *Id*. USAA requested Complainant to arrive in El Paso on an earlier flight than the flight that he ultimately took because USAA wanted Complainant to take his required ten-hour break and be on the road between 6:00 a.m. and 7:00 a.m. the next day. Tr. at 207.

21 D. & O. at 7.

22 *Id*. at 8; Tr. at 122-25, 518-19.

23 D. & O. at 8.

24 *Id*.; Tr. at 125-27.

25 D. & O. at 8; Tr. at 123-27, 156-57.

26 D. & O. at 8; Tr. at 125-27, 140.

27 D. & O. at 8; Tr. at 125-27.

28 D. & O. at 8. "Complainant had driven only 11 hours over two days during the past seven-day time period. He did not assert that he was being asked to drive in a manner that would violate regulations on hours of driving service limits." *Id.*

29 *Id*.

30 *Id*.

earlier of the traffic delays, and his late notice forced USAA to cancel a hotel reservation and incur a late cancellation charge.[31]

The USAA assignment required Complainant to depart Blythe at 6:00 a.m. on December 8, but he did not leave until approximately 7:14 a.m.[32] Around 11:05 a.m., Complainant stopped at a truck wash.[33] Complainant spent more than three hours at the truck wash before leaving at 2:23 p.m.[34] A portion of that time was spent obtaining a second wash because Complainant did not believe the disaster CMV was washed thoroughly the first time.[35]

After leaving the truck wash, Complainant drove for approximately twenty-six minutes before stopping at a truck stop in Ontario, California to take a mandatory hours-of-service driving break.[36] Complainant did not inform USAA of his decision to stop at the truck wash, which he split with his upcoming required hours-of-service driving break.[37] USAA became aware of Complainant's stop when Schlafke contacted Complainant to inquire about his lack of progress toward the wildfire destination area.[38]

Upon departing from the truck stop at 5:14 p.m., Complainant took a route contrary to the directions Schlafke provided him in El Paso.[39] USAA expected Complainant to follow the route mapped for him.[40] While tracking the vehicle's route, Schlafke realized Complainant was driving toward a portion of the highway impacted by fire activity, and on several occasions, called Complainant or sent him text messages to inform him that he was not driving on the mapped route.[41]

On December 8, Schlafke called Durante and requested CDS remove Complainant from service as a driver for the USAA program due to his multiple

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31 *Id.*; Tr. 14, 93, 118, 130-31, 219.

32 D. & O. at 9.

33 *Id.*; Tr. at 130-31.

34 D. & O. at 9.

35 *Id.*; Tr. at 164-67.

36 D. & O. at 9; Tr. at 131-32, 168, 171-73, 425.

37 D. & O. at 9; Tr. at 171-73.

38 D. & O. at 9; Tr. at 173-74.

39 D. & O. at 9; Tr. at 134-35, 208-09, 236-37.

40 *Id.*

41 *Id.*

service failures.[42] In a follow-up e-mail, Schlafke provided CDS with a list of reasons for USAA's request to remove Complainant as a program driver.[43]

After being removed from the assignment, Complainant called Lydia Eschler, a compliance specialist for CDS.[44] During the call, Complainant told Eschler he felt it was unsafe for him to answer USAA's calls or respond to text messages while he was driving, but he did not report any other safety concerns.[45]

On December 9, Complainant sent Durante a one-page e-mail recognizing "timeliness concerns regarding [his] performance," explaining the stops he made while driving the disaster CMV, and rebutting USAA's opinion that he was wasting time.[46] Complainant also noted his excellent safety record, that he stopped driving to respond to USAA's phone calls and text messages, which hindered his driving progress, and that he put forth "100% in [his] efforts."[47] Notably, the e-mail contained no reference to safety concerns or efforts by USAA representatives to have him violate commercial motor vehicle safety regulations.[48]

On December 11, Complainant sent a second e-mail to Durante stating, "for some reason USAA got mad at me about something."[49] Complainant acknowledged that he misunderstood USAA's twenty-four-hour standby policy and made comments about receiving calls and text messages from USAA staff while driving.[50] But the e-mail again contained no reference to safety concerns or efforts by USAA representatives to have him violate commercial motor vehicle safety regulations. To the contrary, Complainant acknowledged USAA was "so safety cautious . . . ."[51]

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42 D. & O. at 9; Tr. at 91-92.

43 Schlafke listed the following reasons: (1) deployment failures that resulted in Complainant not commencing the driving job within the required twenty-four-hour period; (2) driving failures on December 6 and 7 that delayed delivery of the disaster CMV; (3) failing to communicate with USAA to inform it of delays; and (4) interacting with USAA personnel in an argumentative manner. CDS replaced Complainant, which resulted in CDS incurring approximately $767.00 in additional expenses. D. & O. at 9-10; Tr. at 91-95, 108-09, 118-22, 128-35, 137, 207-10.

44 D. & O. at 10.

45 *Id*.

46 *Id*.

47 *Id*.

48 *Id*.

49 *Id*.

50 *Id*.

51 *Id*.

Moreover, Complainant indicated that he remained interested in driving for USAA.[52]

On the afternoon of December 14, Clarke consulted with CDS senior management and his business partner and decided to terminate Complainant's employment[53] based upon Complainant's failure to perform his job satisfactorily,[54] his unprofessional and disrespectful interactions with CDS employees and managers,[55] and his disregard for customer service.[56] According to Clarke, Complainant did not accept responsibility for his poor job performance and client interaction with USAA and he and Walker "were 'not getting along.'"[57] The ALJ credited Clarke's testimony that while making the decision to terminate Complainant's employment, Clarke was unaware of any safety concerns Complainant had reported either stemming from Complainant's assignments with USAA or the assignment Complainant was working that day at Thunder Ridge.[58]

Separately, but also on December 14, CDS gave Complainant a driving assignment for Thunder Ridge.[59] During this assignment, Complainant observed a truck with a cracked mirror and an inoperable headlight.[60] Complainant called Eschler at 9:54 p.m., informed her of his observations, and requested contact

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52 *Id*.

53 D. & O. at 12; Tr. at 487-88, 504-05.

54 D. & O. at 11-12.

55 *Id*. at 11; Tr. at 485-87. Clarke also testified:

> Curtis may not be aware of that, that whenever he communicates with others that he puts people in sort of prospective, but when you're aggressive and you're aggressive consistently, it puts people on edge and on defensive motion. So, our teams were - - they want to work with people, but if they like they can't work with them, then my teams usually instead of being combative, they'll shut down. They're those types, right, so we typically will not raise our attention to that other individual. We don't want to get into a fight. It's just not a good fit. We'd rather move on so that's what we decided.

Tr. at 500.

56 D. & O. at 12; Tr. at 487-88.

57 D. & O. at 11-12. Complainant complained to CDS employees that Walker was being idle, ignoring him, that she "can't help with nothing," and that she "can't usually do too much." *Id*. at 10.

58 *Id*. at 12; Tr. at 492.

59 D. & O. at 11.

60 *Id*.

information for senior management at Thunder Ridge.[61] The next day, Eschler e-mailed Justin Clarke, CDS' owner and chief executive officer, Victoria Anderson, CDS' operations manager, and Mary Ann Pennella, Clarke's business partner, summarizing her discussion with Complainant. The e-mail noted Complainant's displeasure with his removal from the USAA assignment, that Complainant had safety concerns with Thunder Ridge's trucks, Complainant's request for Thunder Ridge's management's contact information, and potential lawsuits Complainant stated he may file against USAA and Thunder Ridge.[62]

On December 16, 2017, Lydia Evanson, a CDS contracted human resources manager, called Complainant to notify him that Respondent was terminating his employment.[63] Complainant informed Evanson on the call that CDS recently assigned him to work at Thunder Ridge, and Evanson told Complainant to continue working for the duration of the assignment.[64] Complainant's last day of employment with Respondent was December 19.[65] Complainant submitted safety concerns regarding the Thunder Ridge assignment to CDS on December 20.[66]

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61 *Id.*; Tr. at 277-79, 283, 345.

62 Tr. at 282, 286-88. According to Eschler's e-mail, Complainant "talked [her] ear off about being pulled off of USAA job . . . [and] that he may be filing a DOT Law suit against USAA for pulling him off this job with no reason. (his words, not mine)[.]" Later in the e-mail, Eschler stated:

> Now, last night on call, he called me at 9:54 pm asking for an email address to Thunder Ridge higher ups so he could send them a list of everything wrong with their trucks, per DOT he feels that there may be a law suit there too! I told him to send the list to us, did not get anything as of yet.
>
> I'm just sending this because I see a problem with him in the future, and maybe he's looking for a law suit with anyone or any company he can find one at? So just an FYI.

Respondent CDS' Exhibit (RX) 9.

The record also contains a second e-mail discussing a potential lawsuit against USAA. On December 14, 2017, April Walker, CDS' Texas branch manager, sent an e-mail to Anderson and copied Durante to the e-mail, which stated "[Complainant] talks about USAA continuously but yesterday he mentioned filing a Federal complaint against them for constantly calling him while he was driving." RX-7.

63 D. & O. at 11; RX-11; Tr. at 490-92.

64 D. & O. at 11.

65 *Id.* at 12.

66 *Id.* at 11.

PROCEDURAL HISTORY

On December 18, 2017, Complainant filed a complaint against USAA and CDS with OSHA alleging Respondents violated the STAA.[67] On April 17, 2018, OSHA concluded no reasonable cause existed to believe Respondents violated the STAA and dismissed the complaint.[68] On April 26, 2018, Complainant objected to OSHA's findings and requested a hearing before the Office of Administrative Law Judges (OALJ).[69]

On July 27, 2018, USAA filed a Motion for Summary Decision. On October 3, 2018, the ALJ issued a Ruling on Respondent USAA's Motion for Summary Decision dismissing Complainant's claims against USAA because the ALJ found USAA did not employ Complainant.[70] Complainant filed an interlocutory appeal of the order with the Board. On July 23, 2020, the Board dismissed the appeal and returned the case to the ALJ to conduct a formal hearing and render a decision in the case against CDS on its merits, including considering whether any violation of the statute occurred when Complainant completed the USAA assignment while CDS employed him.[71]

The ALJ conducted the hearing on July 21-22, 2021. On September 2, 2022, the ALJ issued a D. & O. denying Complainant's complaint against CDS, finding Complainant did not engage in any protected activity while working for CDS on the USAA job assignment and that any protected activity on the Thunder Ridge assignment played no part in his termination from CDS. On September 9, 2022, Complainant filed a petition for review of the ALJ's D. & O. with the Board.[72]

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67 *Id*. at 1.

68 *Id*.

69 *Id*.

70 *Id*. at 2. On July 30, 2018, CDS filed a Motion to Dismiss. On October 3, 2018, the ALJ issued a Ruling on Respondent Contracted Driver Services' Motion to Dismiss denying CDS' Motion.

71 *Id*.

72 The Board acknowledges Complainant appealed the ALJ's Ruling on Respondent USAA's Motion for Summary Decision dismissing Complainant's claims against USAA on the basis USAA did not employ him. Complainant's Opening Legal Brief (Comp. Br.) at 10-11. In its order denying the interlocutory appeal, however, the Board found that argument "not collateral to his Complaint," and instead "integrated with his overall claim against Respondents[,]" which it remanded for a hearing on the merits against CDS. Order Dismissing Interlocutory Appeal at 4. Given that we affirm the ALJ's post-hearing finding Complainant did not engage in protected activity while assigned to the USAA job while working for CDS, any whistleblower claim against USAA also necessarily fails, whether it employed Complainant or not. *Halm v. Schwan's Home Serv., Inc.*, ARB No. 2011-0005, ALJ No. 2009-STA-00034, slip op. at 4 (ARB Sept. 28, 2012) (failure to prove any one of the

JURISDICTION AND STANDARD OF REVIEW

The Secretary of the Department of Labor has delegated to the Board the authority to review ALJ decisions under STAA.[73] In STAA 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.[74] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[75] The Board reviews an ALJ's determinations on procedural and evidentiary rulings under an abuse of discretion standard.[76]

DISCUSSION

1. Governing Law

The STAA provides that a person may not "discharge," "discipline," or discriminate" against an employee "regarding pay, terms, or privileges of employment" because the employee has engaged in protected activity.[77] To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that: (1) they engaged in activity that STAA protects; (2) their employer took adverse action against him; and (3) their protected activity was a contributing

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elements of a claim necessarily requires dismissal of a whistleblower complaint) (citations omitted). The Board thus declines to review the ALJ's initial dismissal of USAA as a party as moot. *Id.*

[73] 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. 13,186 (Mar. 6, 2020).

[74] 29 C.F.R. § 1978.110(b); *Stokes v. Albertson's, LLC*, ARB No. 2022-0007, ALJ Nos. 2020-STA-00080, -00082, slip op. at 5 (ARB May 20, 2022) (citing *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019)).

[75] *Stokes*, ARB No. 2022-0007, slip op. at 5 (citing *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)); *see also Hanna v. Global Nuclear Fuel-Americas, LLC*, ARB No. 2023-0015, ALJ No. 2020-ERA-00002, slip op. at 6 (ARB Mar. 19, 2024) (citing *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019)).

[76] *May v. AGL Servs. Co.*, ARB No. 2022-0015, ALJ No. 2020-PSI-00001, slip op. at 6 (ARB Sept. 14, 2023) (citing *Furlong-Newberry v. Exotic Metals Forming Co., LLC*, ARB No. 2022-0017, ALJ No. 2019-TSC-00001, slip op. at 22 (ARB Nov. 9, 2022)).

[77] 49 U.S.C. § 31105(a)(1). STAA complaints are governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21). *Id.* § 31105(b)(1); *see* 49 U.S.C. § 42121.

factor in the adverse action.[78] If the complainant meets this burden of proof, the respondent may avoid liability if it establishes an affirmative defense, proving by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.[79]

2. Dick Did Not Engage in Protected Activity While Assigned to USAA But Did Engage in Protected Activity While Assigned to Thunder Ridge

Under the STAA, a complainant engages in protected activity by filing a complaint or refusing to operate a vehicle for safety reasons.[80] For the complaint clause, a complainant must demonstrate that they had a reasonable belief the conduct complained of violated pertinent law or regulations.[81] This requires establishing a subjective belief that is objectively reasonable.[82] Showing the complainant actually believed the conduct constituted a violation of relevant law satisfies the subjective component.[83] The objective component is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.[84]

Before the ALJ, Complainant asserted that he engaged in protected activity during the USAA assignment when he: (1) expressed concerns regarding the disaster CMV's ELD system; (2) was ordered to work during a DOT break; and (3) refused to answer phone calls or text messages.[85] The ALJ concluded

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78 29 C.F.R. § 1978.109(a).

79 *Id*. § 1978.109(b).

80 49 U.S.C. § 31105(a)(1). This case pertains to § 31105(a)(1)(A)(i)-(ii). Under § 301105(a)(1)(A), a person may not discharge an employee, or discipline or discriminate against an employee because: (i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. *Id*.

81 *Tocci v. Miky Transp.*, ARB No. 2015-0029, ALJ No. 2013-STA-00071, slip op. at 8 (ARB May 18, 2017) (citing *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 2011-0019, ALJ No. 2010-STA-00022, slip op. at 7 (ARB Nov. 28, 2012); *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 2010-0036, ALJ No. 2009-STA-00061, slip op. at 6 (ARB Nov. 16, 2011)).

82 *Tocci*, ARB No. 2015-0029, slip op. at 8 (citations omitted).

83 *Id*.

84 *Id*.

85 D. & O. at 13-15; Complainant's Post Hearing Brief Against Contracted Driver Services at 4, 6; Complainant's Post Hearing Reply Brief Against Contracted Driver Services at 1-2.

Complainant did not engage in protected activity as it related to his work on the USAA driving assignment.[86] As it pertained to Complainant's ELD system complaints, the ALJ held "while Complainant's belief *may have been* subjectively sincere . . . it *was not* objectively reasonable."[87]

Complainant's appeal on protected activity concerns only the ELD system.[88] Upon review, we hold substantial evidence supports the ALJ's finding that even if Complainant held a subjective belief the use of the system violated a safety rule, that belief was not objectively reasonable.

First, the ALJ's factual determinations establish it is questionable whether Complainant subjectively believed the mere use of the ELD system violated a safety regulation. The ALJ found: (1) Schlafke clearly conveyed the ELD system's purpose and use to Complainant;[89] (2) Schlafke acknowledged that Complainant was independently obligated to retain his own driving record;[90] and (3) Complainant took no action to inform his CDS managers about any safety concerns or that Schlafke requested he misrepresent his driving history. Rather, Complainant sent two e-mails to CDS following his removal from the USAA job that at no point alleged safety concerns.[91] To the contrary, Complainant acknowledged in one e-mail that "[USAA] are so safety cautious . . . ."[92] Complainant does not allege error in any of these factual findings, nor can we independently discern any.

As recognized by the ALJ, given the temporal proximity to Complainant's removal from the USAA job, it thus would have been expected for him to describe any prior safety concerns he subjectively believed contributed to his removal from

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86 D. & O. at 15.

87 *Id*. at 14 (emphasis added).

88 Comp. Br. at 6-7. Complainant does not address or challenge the ALJ's other USAA protected activity finding that "Complainant's asserted protected activity related to work during a break and refusing to answer phone calls or texts lacks convincing evidentiary proof." D. & O. at 14. Nor have we independently found any such proof.

89 D. & O. at 14. Schlafke described the difference between a driver's logbook, a seven-day service form, and USAA's ELD system. The logbook is a journal that a commercial motor vehicle driver has to keep every single day; the seven-day hour service form tracks the hours that a driver provided to their previous client, and the USAA's ELD system is an application that drivers can download on their phone or use the application on the provided iPad in the disaster CMV, which tracks the vehicle location, hours driving, and breaks. Tr. 122-24.

90 D. & O. at 14; Tr. at 122-24.

91 D. & O. at 14; RX-4; RX-5.

92 RX-5.

the assignment within these e-mails.[93] Instead, the Complainant's e-mails reflect he had no safety-related problems with either USAA or Schlafke.

Second, regardless of Complainant's subjective point of view, substantial evidence supports the ALJ's determination that Complainant did not establish an objectively reasonable belief that the ELD system was unsafe. The simple use of a system to track a truck's location does not intrinsically suggest a violation of any safety regulation, standard, or order. Indeed, other drivers routinely used it (or similar systems) without any concern that doing so would misrepresent past driving hours, cause safety concerns, or violate regulations.[94]

Nor did Complainant submit any evidence or attempt to develop any argument beyond his conclusory allegation suggesting the mere use of an ELD system violates a safety rule or regulation. Given that complete lack of proof, substantial evidence supports the ALJ's determination that even if Complainant subjectively believed the ELD system presented safety concerns, he did not meet his burden to establish that belief was objectively reasonable.[95] We therefore affirm the ALJ's determination Complainant did not engage in protected activity while performing the USAA assignment for CDS.[96]

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93 D. & O. at 14.

94 Tr. at 127.

95 *Stokes*, ARB No. 2022-0007, slip op. at 5 (holding substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

96 Although Complainant did not engage in protected activity while assigned to USAA, the Board agrees with the ALJ and Complainant that Complainant's safety complaints during the Thunder Ridge assignment constituted protected activity under the STAA. D. & O. at 15; Comp. Br. at 7. Complainant notified Eschler and Thunder Ridge's management that he observed a vehicle with a broken mirror and inoperable light. D. & O. at 15. And the ALJ correctly determined Complainant suffered two forms of adverse action: CDS removed Complainant from the USAA assignment and terminated Complainant's employment. D. & O. at 15. We accept these findings as final because they are unchallenged by the parties on appeal. *See* 29 C.F.R. 1978.110(a) ("The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived."); *Leiva v. Union Pac. R.R.*, ARB Nos. 2014-0016, -0017, ALJ No. 2013-FRS-00019, slip op. at 8 (ARB May 29, 2015) (affirming ALJ's finding as unchallenged on appeal under a parallel whistleblower statute). As explained above, however, the lack of any protected activity on the USAA job eliminates any potential liability for USAA. *Halm,* ARB No. 2011-0005, slip op. at 4.

3. Dick's Protected Activity While Assigned to Thunder Ridge Did Not Contribute to His Employment Termination

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[97] The Board has noted that this is a relatively low standard for an employee to meet—the activity need only play some role and "need not be 'significant, motivating, substantial or predominant."[98]

The ALJ concluded Complainant's Thunder Ridge safety complaint "played absolutely no role in him being removed from the USAA wildfire driving job, nor was it considered when his employment as an at-will, intermittent driver for CDS was terminated."[99] In coming to this conclusion, the ALJ permissibly determined that Clarke: (1) had no knowledge of any safety concerns raised or reports made by Complainant prior to deciding to terminate his employment; and (2) based the decision to terminate Complainant on non-retaliatory reasons.[100]

On appeal, Complainant claims his concerns regarding the electronic logs and efforts "to report truck (CMV) defects" were a contributing factor in CDS' decision to terminate his employment.[101] CDS counters that the ALJ correctly determined CDS terminated Complainant solely for his "intolerable job performance" and "not for engaging in any protected activity."[102]

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97 *Simpson v. Equity Transp. Co.*, ARB No. 2019-0010, ALJ No. 2017-STA-00076, slip op. at 8 (ARB May 13, 2020) (quoting *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 53 (ARB Jan. 4, 2017)).

98 *Id.* at 9 (quoting *Palmer*, ARB No. 2016-0035, slip op. at 53). The United States Supreme Court recently issued *Murray v. UBS Securities, LLC*, a whistleblower case under the Sarbanes-Oxley Act of 2002 (SOX) examining whether a whistleblower must prove "retaliatory intent" to satisfy the contributing factor element. *Murray v. UBS Secs., LLC*, 601 U.S. 23 (2024). The Court held a whistleblower bears the burden to prove his protected activity "was a contributing factor in the unfavorable personnel action alleged . . . but he is not required to make some further showing that his employer acted with 'retaliatory intent.'" *Id.* at 39. The Court noted that Congress "incorporated the easier-to-satisfy 'contributing factor' framework" into whistleblower statutes that protect employees in industries where whistleblowing plays an especially important role in protecting the public welfare, including the airline industry (AIR21) and securities industry. *Id.* at 28. As noted previously, the STAA applies the legal burdens of proof set forth within AIR21. *Supra* note 77. Thus, the Board uses this "easier-to-satisfy" contributing factor framework in STAA cases.

99 D. & O. at 17.

100 *Id.*

101 Comp. Br. at 5-8.

102 Respondent Contracted Driver Services, Inc.'s Response Brief at 33.

We agree with CDS that substantial evidence supports the ALJ's finding that any protected activity Complainant engaged in on the Thunder Ridge assignment did not contribute to either his removal from the USAA assignment or his termination. As a preliminary matter, Complainant's removal from the USAA assignment occurred well-before his Thunder Ridge safety complaints. Complainant was removed from the USAA assignment on December 8, 2017. Complainant first reported his safety concerns to Eschler on December 14, 2017, and later submitted a written summary of his concerns to CDS managers on December 20, 2017.[103] Given that timeline, the Thunder Ridge safety report could not have been a contributing factor in his removal from the USAA assignment as a matter of both law and logic.[104]

Moreover, the record further supports the ALJ's determination Clarke likewise did not know about Complainant's Thunder Ridge safety concerns before deciding to terminate his continued employment with CDS.[105] Clarke testified that he consulted with CDS senior management and his business partner in the afternoon on December 14, while Complainant reported his initial concerns to Eschler at 9:54 p.m. later that day.[106] Clarke also testified Complainant's removal from the USAA assignment and employment termination resulted from service failures, performance issues, and unacceptable personal interaction with CDS clients and employees.[107] The ALJ, in his role as factfinder, found Clarke's testimony "reliable" and "well-supported" and noted that it contained "no internal inconsistencies."[108] He therefore gave it "considerable weight."[109]

We reject Complainant's invitation on appeal to reinterpret Clarke's testimony. The Board gives great significance to an ALJ's credibility determinations, deferring to an ALJ unless their witness evaluations are "inherently incredible or patently unreasonable."[110] Complainant neither points to

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103 D. & O. at 11; RX-2; RX-3; RX-18; RX-19.

104 *Kirschmann v. Hampton Rds. Transit*, ARB No. 2023-0002, ALJ No. 2021-NTS-00006, slip op. at 9 n.30 (ARB Feb. 14, 2024) (stating "[i]t is axiomatic that, to constitute actionable retaliation, the alleged action must post-date the protected activity.") (citing *Nieman v. Se. Grocers, LLC*, ARB No. 2018-0058, ALJ No. 2018-LCA-00021, slip op. at 14 n.85 (ARB Oct. 5, 2020) (internal citations omitted)).

105 D. & O. at 12; Tr. at 492.

106 D. & O. at 12; RX-11; Tr. at 487-89, 504-05.

107 D. & O. at 11-12; RX-1; RX-8; Tr. at 485-88.

108 D. & O. at 6.

109 *Id.*

110 *Jacobs*, ARB No. 2017-0080, slip op. at 2; *Cottier v. Bayou Concrete Pumping, LLC*, ARB No. 2020-0069, ALJ No. 2019-STA-00046, slip op. at 15 (ARB Jan. 18, 2022) (holding

any evidence the ALJ did not consider in crediting Clarke's testimony about the timeline of his termination, nor does he identify any error of law. And while Complainant makes various arguments regarding different aspects of Clarke's testimony that he alleges impact his overall credibility, they concern facts unrelated to the timeline of his termination.[111]

On its face, Complainant's argument thus falls far short of meeting the high burden to demonstrate the ALJ's crediting of Clarke's testimony about the termination decision was inherently incredible or patently unreasonable.[112] Moreover, other contemporaneous record evidence corroborates Clarke's account, including, for example: USAA's e-mail requesting CDS to replace Complainant as a driver;[113] e-mails amongst CDS staff regarding Complainant's inappropriate behavior;[114] and witness testimony.[115]

Complainant, in effect, thus simply asks us to reweigh the evidence in his favor, something our standard of review does not permit.[116] We instead affirm the ALJ's contributing factor causation analysis as related to the decision to terminate his CDS employment as supported by substantial evidence.[117] While that affirmance is fatal to Complainant's claim, CDS's successful establishment of its affirmative defense is equally dispositive.

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that "[t]he Board affords such deference because the ALJ is able to observe the 'witnesses' demeanor while testifying. . . .'") (citations omitted).

111 *See, e.g.*, Comp. Br. at 7-8, suggesting Clarke's testimony is incredible regarding: (1) not receiving information from Durante about the USAA assignment; (2) not communicating with Walker about voicemails or e-mails she had received from Complainant; (3) his knowledge that CDS was looking for a replacement driver for the USAA assignment; and (4) other drivers vetted for USAA assignments.

112 *Folger v. SimplexGrinnell, LLC*, ARB No. 2015-0021, ALJ No. 2013-SOX-00042, slip op. at 4 (ARB Feb. 18, 2016) (noting that "[m]aking credibility determinations of this sort is exactly why ALJs hold elaborate, trial-like hearings . . . and exactly why we afford great deference to an ALJ's credibility determinations.") (citations omitted).

113 RX-1.

114 *Id.*; RX-7; RX-9; RX-10.

115 Tr. at 92-93, 118.

116 *See Clem v. Comput. Scis. Corp.*, ARB 2020-0025, ALJ Nos. 2015-ERA-00003, -00004, slip op. at 13 (ARB Mar. 10, 2021) (holding that the substantial evidence standard "limits the reviewing court from 'deciding the facts anew, making credibility determinations, or re-weighing evidence.'") (citations omitted).

117 *See Butler v. Neier, Inc.*, ARB No. 2016-0084, ALJ No. 2014-STA-00068, slip op. at 9-10 (ARB June 22, 2018) (affirming the ALJ's causation findings based on, in part, the ALJ's witness credibility determination and reliance on the witness' uncontradicted timeline of events).

4. CDS Demonstrated by Clear and Convincing Evidence It Would Have Terminated Dick's Employment in the Absence of His Protected Activity

If a complainant demonstrates that their protected activity was a contributing factor in the adverse action, the 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 complainant's protected activity.[118] The Board has previously held an employer satisfies this burden when it shows that it is "highly probable" it would have taken the action in the absence of protected activity.[119]

The ALJ determined CDS proved by clear and convincing evidence that it would have taken the same action against Complainant in the absence of Complainant's protected activity.[120] The ALJ relied upon the same reasons that were discussed in his contributing factor analysis, including service failures, performance issues, and unacceptable personal interaction with CDS clients and employees.[121] On appeal, Complainant argues that the ALJ erred in finding that Respondent met its burden. In so doing, Complainant does not point to any error of law the ALJ committed, but once again asks us to reweigh facts in a different light.[122]

We decline to do so. The record contains ample evidence from which any reasonable observer could determine that CDS terminated Complainant's employment because Complainant failed to provide adequate, time-sensitive service to USAA.

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[118] 29 C.F.R. § 1978.109(b).

[119] *Simpson,* ARB No. 2019-0010, slip op. at 9 (citing *Palmer*, ARB No. 2016-0035, slip op. at 52)).

[120] D. & O. at 18-19.

[121] *See id.* at 16-17, 19. The ALJ noted Clarke's persuasive testimony pertaining to these interactions, the timeline of events leading up to Complainant's termination, and his lack of knowledge of Complainant's alleged protected activities. *Id.* at 19.

[122] Comp. Br. at 4. Complainant states:

> Respondent CDS, has cited the primary reason for Complainant's termination was for service failures at Respondent USAA. (TR. 560). Then CDS makes a blanket statement that Complainant was acting rude, and dignified. (Tr. 561, lines 17 thru 23). Respondent CDS cited three (3) telephonic events, that contributed to Complainant's termination. (Tr. 562), which CDS decision-maker misrepresented the content of the phone call conversations (CX-29 & CX-30) [sic throughout].

Comp. Br. at 4.

For example, according to USAA's email requesting Complainant's removal from the assignment and credible witness testimony, Complainant: (1) failed to commence the driving job within the required 24-hour period; (2) committed several driving failures that delayed delivery of the disaster CMV to California; (3) failed to communicate with USAA and inform it of delays, which caused additional costs for USAA; and (4) interacted with USAA personnel in an argumentative manner.[123] Complainant even acknowledged USAA's dissatisfaction with his job performance in an e-mail to Durante.[124]

In addition to the significant problems with the USAA assignment that occurred while in CDS's employment, the record also contains distinct evidence that CDS terminated Complainant's employment due to additional professionalism and customer service concerns. The ALJ reasonably credited Clarke's persuasive testimony that he considered Complainant's interactions and conduct toward Schlafke and CDS employees to be combative, unprofessional, and unacceptable, and the timeline of Complainant's termination corroborates that testimony.[125]

Conversely, Complainant has not provided any evidence or argument to establish the ALJ erred in making these factual determinations. While Complainant may have legitimate concerns regarding his termination that go beyond raising safety issues, the STAA is not a general employee grievance statute.[126] Accordingly, the Board affirms the ALJ's affirmative defense finding as supported by substantial evidence and in accordance with law.[127]

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123 D. & O. at 18-19; RX-1; Tr. at 92-93, 118.

124 RX-5.

125 D. & O. at 19; RX-7; RX-9; Tr. at 535-36.

126 The purpose of the STAA is to promote highway safety and protect employees from retaliatory discharge. *Cottier*, ARB No. 2020-0069, slip op. at 9 (citations omitted). The STAA is not a general remedy for employment grievances unrelated to commercial vehicle safety. *See e.g. Kirschmann*, ARB No. 2023-0002, slip op. at 9 n.31 (noting the NTSAA and other whistleblower statutes administered by the Board are not general anti-retaliation statutes).

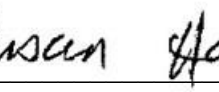
127 We further reject Complainant's suggestion the ALJ abused his wide discretion in conducting procedural matters during the hearing in this claim. Complainant claims the ALJ did not permit Complainant to question witnesses and present his case in the manner that he desired which prejudiced him. The Rules of Practice and Procedure for the Department of Labor's Office of Administrative Law Judges, however, authorize the ALJ to exercise reasonable control over the mode and order of interrogation and presentation of evidence, which includes making the interrogation and presentation effective for the

CONCLUSION

For the foregoing reasons, the Board **AFFIRMS** the ALJ's D. & O., and **AFFIRMS** the ALJ's Ruling on Respondent USAA's Motion for Summary Decision.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge



SUSAN HARTHILL
Chief Administrative Appeals Judge

ANGELA W. THOMPSON
Administrative Appeals Judge

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ascertainment of the truth, avoiding needless consumption, and protecting witnesses from harassment or undue embarrassment. 29 C.F.R. § 18.611(a).

Here, the ALJ originally permitted Complainant to take the lead in questioning witnesses until it became apparent Complainant was argumentative and did not understand evidentiary rules. On numerous occasions, Complainant asked compound questions, irrelevant questions, and/or failed to lay proper foundation before questioning witnesses. Tr. 68, 72-73, 78, 105, 121, 135-36, 175-76. After several failed attempts by Complainant and unnecessary time spent on witnesses, the ALJ took the lead in questioning witnesses to expedite the process, rephrased questions for Complainant, and then, permitted Complainant to follow-up with additional, relevant questions. *Id*. at 62, 79-80, 83, 85, 94-95, 112, 116, 120-22, 140-41, 151, 155, 163, 167, 174, 261, 283, 286, 288, 293, 296-98. The ALJ aided Complainant throughout the proceedings with explanations and extended deadlines, which are not typically afforded to litigants at that stage of the proceedings. *Id*. at 21, 33, 48-51, 142, 179-80, 191-92. Accordingly, the Board finds that ALJ did not abuse his discretion.