

**U.S. Department of Labor**

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**Issue Date: 14 April 2016**

**CASE NO.: 2015-STA-54**

**IN THE MATTER OF**

**WAYNE MAULDIN**  
**Complainant**

**v.**

**G & K SERVICES**  
**Respondent**

**CASE NO.: 2015-STA-54**

**IN THE MATTER OF**

**WAYNE MAULDIN,**  
**Pro-se Complainant**

**vs.**

**G&K SERVICES,**  
**Respondent**

**DECISION AND ORDER**

**Procedural Background**

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (hereinafter the STAA) and the regulations promulgated thereunder at 29 C.F.R. Part 1978. 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.

Complainant filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent had fired him in retaliation for his refusal to operate a vehicle in violation of hours of service regulations on 23 Jul 14. OSHA conducted an

investigation and issued a decision dismissing the complaint. Complainant objected to the findings and requested a *de novo* hearing.

Respondent filed a motion for summary decision, arguing that there was no genuine issue of material fact that would allow finding that it had fired him for anything but substandard job performance unrelated to any protected activity. Complainant filed an answer that was unclear and I conducted a conference call during which Complainant clarified that the only protected activity that he believed played any role in his termination was his refusal to violate the hours of service on 23 Jul 14. I asked and he confirmed that I could disregard any other allegations of protected activity in his complaint.

On 3 Nov 15, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based on the entire record, which consists of the following:<sup>1</sup>

Witness Testimony of

Complainant  
Michael Carter  
Ann Martinez

Exhibits

Complainant's Exhibits (CX) 1-22  
Respondent's Exhibits (RX) 1-25

**STIPULATIONS**

Respondent stipulated that it employed Complainant and at all relevant times was subject to the Act.<sup>2</sup>

**FACTUAL BACKGROUND**

Complainant did not complete his assigned route as a truck driver for Respondent on 23 Jul 14. He was subsequently fired.

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<sup>1</sup> 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.

<sup>2</sup> Tr. 4.

## ISSUES IN DISPUTE AND POSITIONS OF THE PARTIES

Complainant alleges that he was fired by Respondent after and because he refused to drive in violation of the hours of service regulations on 23 Jul 14. Respondent counters that Complainant's actions on 23 Jul 14 did not constitute protected activity under the Act and even if they did, the protected activity did not contribute to his termination.

### 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) the employee ... has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety ... regulation, standard, or order, or ...

(B) the employee refuses to operate a vehicle because--

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security;...

b) Filing complaints and procedures.--(1) An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred. <sup>3</sup>

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.<sup>4</sup>

Although it is not necessary that a complaint expressly cite the specific motor vehicle standard, which it is alleged has been violated, the complaint must "relate" to a violation of a commercial motor vehicle safety standard. For a finding of protected activity under the complaint clause of the STAA, a complainant must show that he reasonably believed he was complaining about the existence of a safety violation.<sup>5</sup> If a complainant's protected activity is a

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<sup>3</sup> 49 U.S.C. § 31105.

<sup>4</sup> 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).

<sup>5</sup> [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-

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.<sup>6</sup>

An adverse action is anything an employer does that could well dissuade a reasonable worker from engaging in protected activity.<sup>7</sup> The implementing regulations prohibit an adverse action and make it a violation for an employer to “intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee[.]”<sup>8</sup>

“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.<sup>9</sup>

Employers found in violation may be ordered to take affirmative action to abate the violation; reinstate the complainant to the former position with the same pay and terms and privileges of employment; pay compensatory damages, including back pay with interest and for any special damages sustained as a result of the violation, including litigation costs, expert witness fees, and reasonable attorney fees; and pay punitive damages in an amount not to exceed \$250,000.<sup>10</sup>

Unless it is impossible or impractical, reinstatement is an automatic remedy under the Act and respondent employers must make a bona fide reinstatement offer.<sup>11</sup> However, reinstatement may be waived.<sup>12</sup> Respondents may be ordered to compensate complainants for having experienced depression and hardship, if the weight of the evidence supports such an award.<sup>13</sup> Complainants are entitled to back pay from the date of discharge to the date when the employer makes a bona fide, unconditional offer of reinstatement, with a reduction in liability for other earnings<sup>14</sup> and an adjustment for pre and post judgment interest.<sup>15</sup> Punitive damages are appropriate where the respondent has acted with reckless or callous disregard or intentionally

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[031, slip op. at 11 \(ARB Sept. 14, 2007\); Ulrich v. Swift Transportation Corp.](#), 2010-STA-41 (ARB Mar. 27, 2012).

<sup>6</sup> [Minne v. Star Air, Inc.](#), 2004-STA-26 (ARB Oct. 31, 2007).

<sup>7</sup> [Strohl v. YRC, Inc.](#), 2010-STA-35 (ARB Aug. 12, 2011).

<sup>8</sup> 29 C.F.R. §§ 1978.102(b), (c).

<sup>9</sup> [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).

<sup>10</sup> 49 U.S.C. § 31105(b).

<sup>11</sup> [Dickey v. West Side Transport, Inc.](#), 2006-STA-26 and 27 (ARB May 29, 2008).

<sup>12</sup> [Young v. Park City Transportation](#), 2010-STA-65 (ARB Aug. 29, 2012).

<sup>13</sup> *Id.*

<sup>14</sup> [Hobson v. Combined Transport, Inc.](#), 2005-STA-35 (ARB Jan. 31, 2008).

<sup>15</sup> [Dale v. Step 1 Stairworks, Inc.](#), 2002-STA-30 (ARB Mar. 31, 2005).

violated the law.<sup>16</sup> Respondents may also be ordered to expunge or correct a complainant's work record<sup>17</sup> and post a workplace notice.<sup>18</sup>

Federal regulations define hours of service limits for drivers:

a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:

(1) More than 11 cumulative hours following 10 consecutive hours off-duty;

(2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of § 395.1(o) or § 395.1(e)(2).

(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—

(1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

## EVIDENCE

*Complainant testified at hearing and his records show in pertinent part:*<sup>19</sup>

He was born in 1970 and grew up mostly in the Dallas or Mesquite area. He was working before he graduated high school and since then. He worked beginning as a cashier in a beer store with his parents. Then he moved to Yellow Freight, working on the freight docks, hustling trucks. He moved to Florida for about five years. He was supposed to transfer out to Yellow Freight, but they were overloaded with workers and he wound up working on a golf course, doing grounds maintenance.

When he moved back, he began delivering again. Originally he worked for a floral wholesaler, delivering all through Texas, from Waco up to Denison. It was all non-CDL driving. For about a year, he went to work for a technical support company, doing HP Computers. Then in 2002 or 2003, he went to a courier service and has been running couriers and driving routes ever since. He has never had a CDL.

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<sup>16</sup> *Smith v. Wade*, 461 U.S. 30, 51 (1983); [Ferguson v. New Prime, Inc.](#), 2009-STA-47 (ARB Aug. 31, 2011).

<sup>17</sup> *Shamel v. Mackey*, 85-STA-3 (Sec'y Aug. 1, 1985).

<sup>18</sup> [Scott v. Roadway Express, Inc.](#), 98-STA-8 (ARB July 28, 1999).

<sup>19</sup> Tr. 5-72; 179-185.

Starting in about 2008, he went to work for Ace ImageWear, which was a laundry linen service, providing uniforms as well dish towels and mats. He worked for them for four years, doing route driving, delivering linens and such. Then in 2102, Respondent bought out the local operations of Ace ImageWear and absorbed the local operations. He started working for Respondent, but the job was essentially the same. The only difference was with Ace, he had a four-day work week, and when he switched over to G&K, it was a five-day work week. They spread out the routes. With Ace, they were getting a commission pay based on routes and he was making approximately \$550 a week. With Respondent, they negotiated flat salaries. He negotiated \$813 a week, at \$20.32 an hour for a 40-hour work week. He was paid a salary of \$813 for a 40-hour week.

When he started with Respondent, they were pulled in for the paperwork. They only had one copy of the handbook, so he didn't get one, but he did have to fill out EX-6, because they reviewed it. He did review the handbook and understood that Respondent's policies included a dress code. The dress code policy basically indicated that he needed to maintain a clean, groomed appearance. His shirt had to be tucked in when he reported for work. Respondent also had a customer promise that was contained not only in the handbook but in signs, also. The customer is supposed to expect excellent service, prompt delivery, and accurate billing.

One time, before November 2013, his manager walked past him as he was getting dressed for work and told him to tuck his shirt in. The manager did not speak to him about professionalism. That same day, he had received EX-16, a written disciplinary notice related to professionalism and the dress code. Respondent said that a junior assistant manager at an In-N-Out Burger had called in to complain that he was unprofessional, didn't wait for an authorized employee to sign the invoice, and his shirt was not tucked in. He disputed the complaint and even had the regular route driver at the time backing him up and saying that the In-N-Out guy didn't have grounds and that he had had issues with him, too. Respondent didn't consider any of that.

Towards the end of his time with Respondent, he worked as a relief driver, starting around November of 2013. As a relief driver, he was responsible for covering for those drivers that were out on vacation or sick.

The safety limitations for hours of service and driving were listed on the time sheets that they turned in every week. It was eleven hours straight time driving, 14 hours a day maximum, and 60 on duty hours maximum for the week. There was also supposed to be a 30-minute break after a number of hours' consecutive duty.

Originally, he was hired for a 40-hour work week, but they just kept piling on the hours, adding on additional stops, and building up the routes, and not paying him for anything over 40. He wasn't necessarily violating any hours of service regs, but was certainly working more than 40 hours and not getting paid for it. That was in November, and he complained to the Department of Labor Wage and Hour Division, who said they were going to investigate.

In January of 2014 he started receiving threats of write-ups that went all the way into February. In January he was told by the regular route driver that he had been called in on New Year's Day to go run some garments to an In-N-Out Burger, because they hadn't received enough. He also asked about one place not getting towels, but they had actually gotten everything that they were scheduled to receive. Those were shortages that he couldn't have controlled and he delivered everything they were scheduled to receive. His manager never said a word about having a warning issued. The acting general manager or assistant general manager at the time did inform him he was going to be written up because of the customer complaints. He told them flat out, if it's not scheduled, he can't deliver it, because that's theft. He never actually received EX-17, but he was told they had written him up.

Then the hours increased even more to the point that they went over the hours of service and he let them know it was a violation. He was doing more than 14 hours a day without any breaks and doing more than 60 hours a week without any breaks. It wasn't every week, but it was every two or sometimes every three weeks, but he was still having continuous 14-plus-hour days. That was going on starting in November of 2013 all the way until his termination in August 2014. Until April he just groused about the hours. It was just normal griping.

In April, he did a 70-hour work week and told his new manager at the time, Mike Carter, that he wasn't going to work anymore; it was wearing him out. He mentioned that they were in violation with what the time sheet said. Carter said he'd look into it and take care of it. He pretty much took Carter at his word, but that was followed by another week of more than 60 hours and all the time he was still getting paid for 40 hours. Mr. Carter also told him that he would try to give him the schedule a week in advance.

On 30 Apr 14, he sent emails to the Department of Transportation complaining that he was being asked to work more than 60 hours per 7 day week and more than 14 hours in a day and not being paid for those hours. He noted that the hours were in violation of the hours of service, but complained that carriers were avoiding paying overtime for those hours.<sup>20</sup>

It continued on until he got hurt on 22 May 14. He was lifting up a bag of linen out of the buggy, trying to put it in the truck, and twisted wrong. It felt like he tore something in his shoulder and arm and the muscles in his neck were killing him. He wound up going to the doctor, who gave him narcotics and told him no lifting, no pushing, or anything else. That meant he couldn't do his regular job. The rails in the truck are almost overhead. They're at shoulder level, but he had to lift up to get hangers off the rails. When he went back to the doctor on Monday, the doctor told him he shouldn't even be driving a truck on his medications.

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<sup>20</sup> CX-1; RX-19.

Another time in May there had been a schedule mix-up that had already put him maybe five or six hours behind schedule. He had let the manager know when he switched trucks that morning that he would not be able to finish. He has never been instructed to give updates in regards to the route being finished or not. They have to let them know whether or not it's going to be finished. If they get out there and know that it's not going to be finished, they call to say so. But if they know from the start it's not going to be finished, Respondent has advance notice. They explain how much didn't get finished when they get back. He wasn't aware that they were supposed to tell Respondent how much won't be finished as soon as possible. He wasn't written up for the May incident.

Later the same week, he had to go renew his DOT physical. He could barely move his arm or grab hold of anything. He failed and the doctor said he wouldn't pass until his shoulder was better.

He went back and told Respondent, but got put right back on the truck. After his injury, Respondent issued work accommodation memorandums which set out his work restrictions and the company's accommodations. Based on those accommodations, which were lifting and then driving, he was given a helper. Respondent put that in writing at EX-10 and added that if he had any questions or difficulties, he needed to contact his manager. He followed that instruction and reported to the manager, so he knew the helpers weren't helping. He was told the routes had to be finished and he needed to get in that truck and drive. Carter told him that at one point. Another time, his helper said he didn't feel comfortable driving and they were already at the stop. He called back to the office and told them the helper was refusing but they said the route has to be finished and he should try to talk the helper into driving, if not, the route had to be finished. Originally, Respondent said that they were giving him a helper, but he was a trainee that didn't want to drive the truck.

He had one helper that was great and did everything. If he had any questions, then he'd ask. He might help the trainee by grabbing a little bag of towels and throwing it into the buggy for him, but that was it. He barely did anything at all and was just there to be there. He rode with that guy three times. The rest of the time, he rode with other drivers or other new people. He had to drive sometimes, because some of the trainees they gave him didn't want to drive or feel comfortable driving. He moved some of the cargo, but had to do it with his right arm, because his left arm was messed up.

He went over Mr. Carter straight to HR and started complaining on the phone. He just kept getting that they would look into it and call him back, but nothing in writing. He started emailing to create a paper trail. He told them flat out, he was on narcotics; he thinks it was tramadol, and asked what happens if he's riding with somebody and gives them directions and goes down a one-way street or if he is driving and suddenly passes out. He didn't feel safe driving, so the days that he knew he was going to have to be driving, he couldn't take the pain meds. He told Respondent it was still dangerous, because he really couldn't control the steering wheel with his left arm. He kept telling them that a lot of these hours are beyond the hours of service and mentioning that it was



not only a safety issue, but illegal. That was in June and July. Instead of dealing with Mr. Carter, he was dealing strictly with HR in regards to the hours of service.

On 30 Jun 14, he sent an email to HR, asking for documentation that would show how 12+ hour days and 60+ hour weeks were light duty.<sup>21</sup>

In early July, Carter told him if he had any problems with work restrictions, to come to him and he'd take care of it. In late July, Carter told all the helpers he was on restrictions and not being lazy, so they needed to work with his restrictions. EX-15 has his signature at the bottom and is a work accommodation memorandum dated 3 Jul 14. It lists his work restrictions and again indicates that they have accommodated those restrictions by providing him with a relief driver and helper.

On 9 Jul 14, he sent HR an email complaining that drivers were being asked to violate the hours of service regulations in order to finish their routes. He also questioned his exempt status because that meant he didn't get paid for working extra hours to finish his route.<sup>22</sup>

He finally got off medical restrictions after they changed his doctor. He got sent for an MRI and the doctor said that it showed no damage to the shoulder, but the issues he was still having showed possible nerve damage from throwing his back out of alignment. The doctor recommended going to a chiropractor for a readjustment. He ended up seeing a specialist that dealt with joints. The specialist didn't think there was anything wrong with the shoulder. When he mentioned numbness and pain, the specialist said that wasn't his field and he didn't know what to do with it. On 11 July 14 he was released to full duty, including driving and loading things. He was still suffering pain, but could do it, if he worked through the pain. He still needed to recertify for his DOT medical clearance. Respondent put him back out on the route by himself. The number of hours driving started increasing a little bit, but he was making certain he kept below 14.

HR emailed him back on 15 Jul 14 to confirm that as an exempt employee, he was not eligible for overtime pay. He replied with a lengthy argument as to why that was incorrect, but also that he and other drivers were being asked to blatantly violate the hours of service and that he was averaging three violations per week. He also pointed out it would be cheaper to pay the drivers overtime than pay the hours of service violation fines.

He is not supposed to drive without the DOT medical certification. It's the responsibility of every driver to ensure that they are adequately certified and the company's responsibility to remind drivers if their registration is out. Carter didn't inform him on 18 Jul 14 that he needed to get his renewal. Concentra is where they are supposed to go to get the medical certifications. Concentra is open on weekends. On 21 Jul 14, he still needed to recertify his DOT medical clearance and Respondent told him to go get it done on his own time when he got a chance. He told them that he has to care for a disabled

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<sup>21</sup> CX-2.

<sup>22</sup> CX-3-4.

parent when he is off work and they needed to get him off early one time so he could get the medical clearance taken care of. He doesn't recall when he got off work that day or the next. Mr. Carter called him around 5:00 on 22 Jul 14, but he missed the call. He hadn't done the medical certification yet, because he was taking care of his mother.

HR emailed him on 22 Jul 14, stating that Respondent takes any allegations about exceeding DOT hours of service very seriously and their review of the logs showed no evidence of any violations. HR asked him to provide any details and documentation of such violations. He responded the same day with a list of eleven weeks in excess of sixty hours and twelve days in excess of fourteen hours, data which he said came from his DOL phone app. He also offered to provide more examples and noted that the electronic logs are fraudulent because they miss pre and post trip paperwork and prep time. He complained that being paid for 40 hours wasn't fair if he was being asked to work 60. On 23 Jul 14, he sent another email, stating that he was told to do whatever it took to get the job done, even if the job was more than 14 hours. He added that when he refused to go over 14 hours, his manager suggested that he quit.<sup>23</sup>

On 23 Jul 14, he was scheduled to run Route 46. He came in to work a little bit before 4:30 and started his route. He got in like normal, loaded the truck, prepared the route, and left. Carter called him to ask if he had gotten his medical certification, and he told him he hadn't. Carter told him he had to go get that and ordered him back. When he came back he started secretly recording what was said:

"Complainant: Okay. So who's running it?"

"Carter: Shut the door. You are. After you get back today, I want you to come back and finish that up.

"Complainant: They don't open till 8:00, and they're --

"Carter: You could have done it yesterday. You got here at a quarter to 3:00, and you could have done it yesterday.

"Complainant: Mike --

"Carter: You're going to do it, Wayne, today.

"Complainant: If I do it, I'm going home after I do it.

"Carter: No. You're going to come back and finish the route.

"Complainant: The hell I am. It's -- you know how many miles?"

"Carter: You're going to do your route. So you get the exam done this morning, and come back and do what you can do on the route.

"Complainant: What I can do on my route. That'll be about five, maybe six stops.

"Carter: Whatever it is.

"Complainant: Okay. Well, I'm going to hang around here till eight o'clock, and then go over there for an hour."

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<sup>23</sup> CX-5; RX-2.

He told Carter that he would go home after getting it, because it was going to take so long. He specifically told Mr. Carter he wasn't going to be able to finish the route in time after the medical exam, because the doctor's office didn't open up till 8:00 and the DOT people wouldn't get there until 8:30 or 9:00. He was going to be far behind before he even left the doctor. He went to get the certificate and didn't get out of the doctor's office and back to the shop until about 9:45 or 10:00. Carter said to do as much as he could and he gave him an estimate of the number of stops he could complete. Mr. Carter said that was fine and if the route wasn't finished, he should just do what he could. He told Carter he could probably finish about five or six stops before he had to return and be within the hours.

He ran the route until he made a judgment call that the round trip for the next stop, would be 40 minutes and the trip back was going to take close to an hour and a half, going through construction zones and everything else. He ended up coming back about 12-1/2 hours after having first shown up for work. If he had done the next stop, it was going to take about an hour, and he hadn't had a 30-minute break in the day as per the time sheets. He cut it off. One stop wasn't going to change much, and he had done more than he told them he thought he was going to do.

He never mentioned traffic, but it was a concern, because he has to pay attention to road conditions as well as construction zones. If he had done the next stop, it would have possibly put him in violation of the regulations, taking into consideration the driving conditions, the construction zones, and rush hour congestion. He would have had to come back through at least four construction zones. There was already slight congestion starting up, and during the heaviest part of rush hour, it would have delayed him by more than 30 or 40 minutes. There was at least some chance that if went to the next stop, he was going to bust his 14 hours, so he came back in. He wasn't sure he was going to bust the 14 hours, but had a good idea that he would. Carter had specifically told him to do what he could and then come back in. There were 22 or 23 stops left undone.

The practice at Respondent was if you weren't going to your finish your route, you need to let the manager know so that they can communicate to the customers and let the customers know whether to expect the product that day or the next day or arrange for alternatives. He gave Carter a general estimate of what he was going to be able to do, and Carter could work backwards from that. Carter knew he was not going to be able to finish the route right then. At no point during the day did he call Carter with an update.

He came back in. He was supposed to park the truck to be unloaded, secure the unused product, and then let the manager know where it is and what stops didn't get finished. That's what he did. He returned back to the facility around 4:30, had to unload the product off the truck, and checked in before 5:00. He could have continued driving for another hour and a half and done maybe one more stop, but would have been pushing hours.

Carter asked him why he didn't stay on and finish the route. He explained that earlier that morning he had told them he wasn't going to be able to finish the route, but Carter said going to the doctor was on his own time. But according to the 14-hour rule, he had to have a ten-hour continuous break to reset the 14-hours. Carter said that didn't matter and he was supposed to stay on and finish the route. He still had the hand-held and printer and everything at that point, so he excused himself to go hang them up. Respondent wasn't frustrated because he could have continued to drive and didn't communicate with them that he was not going to complete his route. It was that he didn't actually finish the route.

When he came back, he started secretly videotaping again:

"Complainant: Now, yesterday I got done after eleven hours. You said that was a light day?

"Carter: Say what now?

"Complainant: I got done in about eleven hours yesterday, and you keep saying that's a light day.

"Carter: You didn't hear me say anything about a light day. This is what I said to you. You could have gotten your DOT done yesterday. You got here at a quarter to 3:00, Wayne. Hold on. Don't say anything. You got here at a quarter to 3:00. I've been asking you for two days to get it done.

"Complainant: Uh-huh.

"Carter: I called you yesterday and Friday. You ignored my call, because you didn't want to get it done. You could have got it done yesterday, man.

"Complainant: After eleven hours, I don't feel like doing anything else, Mike.

"Carter: It doesn't --

"Complainant: No, no. Whether I got done at 3:00 or not, I've been telling you for the past two days before that, get me done early, and I can go get it done. Getting me done at 12 hours, 13 hours, eleven hours, that's not getting me done early. Now, you're saying, Get everything done; get everything finished. Then go get something else done.

"Carter: That's part of what we do.

"Complainant: I've been bitching --

"Carter: Johnny had a situation he had to go do, and he got done at 6:00, and he went and did his DOT.

"Complainant: Okay.

"Carter: I'm going to tell you something. I want to tell you something. This isn't going to ride. You're not going to do this anymore. If you're going to work here, you're not going to do this. I'm telling you.

"Complainant: If it's going to take me 14-plus hour days, huh-uh. I'm not going to do it.

"Carter: Well, why don't you quit.

"Complainant: Huh? Well, why don't you fire me, because I refuse to do 14-plus hour days anymore. I promise you that.

"Ellis: What time are you getting here in the morning.

"Complainant: I'm getting her at 4:30, getting everything loaded when I have a route. Get everything loaded, get everything set up.

"Ellis: So 4:30 to 4:30 is 12 hours, so 14 hours would have been --

"Complainant: 6:30.

"Ellis: -- finishing at 6:30.

"Complainant: Right.

"Ellis: So you could have probably run the route till 5:00 out there, though, couldn't you and still been back here before 6:30?

"Complainant: Not conditions of travel. It was 20 minutes from the next stop one way, so it's adding another 20 minutes on.

"Ellis: Okay. But at 2:45 -- the other thing is, like yesterday if you started at 4:30 and you were back at three o'clock, that was a 10-1/2 hour day.

"Complainant: Right. I'm saying, get me done early. I'm tired of doing these 12-plus hour days, and I'm only getting paid for eight. I've been bitching about this for the past nine, ten months, but it's constantly, You've got to do it, whatever the route requires. I've done 70-hour work weeks. I'm not doing that anymore. Now, you want to tell me to quit, threaten my job. I don't care. I'm not going to do 14-plus hour days anymore. You want to act like I do, tell --

"Carter: I'm telling you, man, I'm telling you, Wayne, this is not going to work for us.

"Complainant: Well, if you hadn't pulled me back to do it -- like I say, get me off of it. You want to put this all on me, saying, Oh, it was your responsibility to do it. I told you, get me off early.

"Carter: Everyone that has to get a DOT done, it's their responsibility.

"Complainant: Well, I got it done on my --

"Carter: Everyone else did, every one of them.

"Complainant: You were the one that decided it needed to be done this morning, so --

"Carter: That's absolutely right.

"Complainant: -- that's it. That's what happened.

"Carter: Okay. Well, we'll see how we're going to deal with it.  
"Complainant: Okay. Okay. You're not going to sit here and say -- tell me to quit if I'm not willing to do that many hours. I'm not going to accept that, so end of story."<sup>24</sup>

He let Carter know he was not going to go past the 14 hours or 60 hours a week anymore. Carter said that's what they have to do and if he wasn't going to do it anymore, he needed to quit. He was a little amped up as it was, because he had already been chewed out for not finishing the route. When Carter told him to quit, he told Carter to fire him, because he was not going to violate hours anymore. He constantly repeated that and let Carter know that he was not going to be threatened with his job and not going to break this law anymore. He wasn't getting paid for the hours to begin with and Respondent can't require him to go and break the hours and refuse to pay him for those hours because they are over the limit.

His issues were both that he was going to go over 14 hours and not getting paid for the extra hours. His main complaint was they were not paying him for those hours. He filed a complaint with the Department of Labor Wage and Hour Division, about the overtime issue. That is still pending and he is not aware of any determination that he is exempt from overtime. He had a similar dispute with Amerivex Vending Company.

Once he left the office after that conversation, he pretty much finished his paperwork and was done for the day. He emailed HR that night and let them know he was put in a position that would have probably put him at 16 or 17 hours, and had blatantly refused to do it.

The following week, he got a few snide comments. He got a couple of calls from HR, but since he was out on a route, he couldn't talk on the phone. They finally were able to schedule a conference call for 30 Jul 14 to deal with the hours of service complaint.<sup>25</sup> He let them know he was not going past hours anymore.

He got an email from Respondent on 1 Aug 14, saying their review showed that he was never asked to drive over 14 hours on any of the dates he alleged, that he was indeed exempt from overtime, and he is required to do what the manager tells him to do and specifically stating that the refusal to finish the route on 23 Jul 14 would be dealt with separately. He responded that Respondent's calculations were inaccurate because they failed to account for work time spent doing administrative tasks at the beginning and end of the shift.<sup>26</sup> He told Respondent that they really couldn't punish him for it, especially since back in May he pretty much had the same issue, except that in May he didn't refuse to go past his hours.

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<sup>24</sup> CX-22, discs 3 and 4.

<sup>25</sup> CX-6; RX-21.

<sup>26</sup> CX-7.

When he came in the following Monday, Respondent fired him for performance. They didn't specifically mention not finishing the route on 23 Jul 14. The reason Respondent fired him was what happened on the 23 Jul 14. Everything else was kind of background noise. He sent an email to HR that day, informing them that he considered himself to be a victim of retaliation for being a whistleblower about excessive hours.<sup>27</sup> He sent an email to OSHA the same day.<sup>28</sup> On 20 Apr 15, Respondent informed OSHA that it no longer had any driving records for Complainant.<sup>29</sup>

He was without work until the end of June 2015, when he started at Keystone Automotive. He applied at numerous places. Most of them were online. It pays \$13.50 an hour, which is about seven bucks an hour less than he was making with Respondent. He gets an average of 10 hours overtime a week. He did get unemployment in the meantime. That was \$405 a week. He wants Respondent to send him back to the doctor. Being unemployed for so long, he had to sell pretty much everything he had. He collected old-school games, but had to sell them for whatever he could get, just to make sure his bills were paid. He also sold off his weapons collection and anything that he could grab.

CX-10 Exhibit 19, pages GK-0042 and GK-0038 show violation of hours, but he doesn't know if they're accurate and they are DOT logs that he did not create. Only drivers can create them. The fact that somebody other than him is filling them out is a violation of DOT regulations. He only did a 70 hour week once. That was in April when he really raised Cain. He was doing an average of maybe one over 14 hour day a week. He was complaining to Carter.

***Michael Carter testified at hearing and made a statement in pertinent part.***<sup>30</sup>

He has worked for Respondent for six years and has been Respondent's route manager for about a year and a half. Before he was a route manager he was a route service representative. As a route manager he oversees the day-to-day operations of a group of routemen that work directly and report directly to him. He is responsible for daily activities, making sure customers are serviced, and making sure the routemen have all the things that they need to service the customers.

He had contact with Complainant before April of 2014, but not as a manager. He and Complainant worked together as a routeman, and Complainant reported directly to him at one point. He became a route manager in March 2014. Complainant was assigned to him probably a week or two later. Complainant was one of four relief drivers. Relief drivers are paid a salary. They do not get overtime. They're going to get the same pay per week, whether they drive three shorts and a long, or three longs and a short.

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<sup>27</sup> CX-8; RX-22.

<sup>28</sup> CX-9.

<sup>29</sup> CX-15.

<sup>30</sup> Tr. 73-153; RX-25.

Complainant is not required to put in 14 hours a day or eight hours a day. There's no requirement on the hours. If it's within the time of his route and he says he has a doctor's appointment, Complainant is required to come back to work. There are no set hours of working anything. Drivers have personal things they may have to do and may divert, but then come back to complete the route. They are required to finish the route. Drivers are hired on salary and their job is to come in and finish the assigned route, whether it's only a little while or a long while. If they want to run a couple personal errands in the meantime, they can, as they get the route done. The only limit is that DOT says they have to stop at 14 hours. The paycheck stays the same, no matter what combination of routes a driver gets over the two-week period.

Right when he became the manager, Complainant seemed to be pretty disgruntled, and he went to Complainant and asked why. Complainant's first complaint to him as a manager was about hours and compensation. Complainant was unhappy that he was working a lot of hours and wasn't being paid for it. He asked Complainant why he was working so many hours. Complainant explained that he has to get there early, because he doesn't know from day to day what he's going to be doing. There wasn't a lot that he could do with the pay issue because they are commissionable or salaried employees and running the route is the job. He told Complainant he would commit to making sure that he wouldn't have to be there for two hours doing nothing but standing around waiting. Complainant didn't mention that he was exceeding his hours of service by working more than 14 hours in a day. It was just that he was working a lot of hours and wasn't being paid.

Not every route starts at the same time. Some routes had a dock time of 6:30, so the driver wouldn't even have to show up until 6:00. If a driver knew what route he was doing he could actually adjust his check-in time in the morning. So they posted the schedule with Complainant's name and route on a daily basis. That way the relief drivers knew what time they would start. If they knew the route, they pretty much knew what time it would start. If they didn't, they could ask the regular routeman. That seemed to help Complainant at first. He eventually told Complainant to take his pay complaints to HR.

Respondent's customer promise has three major points: Deliveries will be consistent, on time, and in good repair. Invoicing will be accurate. Needs will be met promptly. It's talked about in service meetings and when new hires come into the company and posted everywhere in the building.

If someone's on a route and they can't get it done or they think they're not going to be able to make all of their stops, they are supposed to contact a manager, so a customer service representative can call the customer and let them know. That needs to happen as soon as the driver figures out he's not going to be able to get the route done. They expect drivers to go out and stay out as long as he can to get it done. If he's going to exceed his hours, he needs to contact a manager so that they can make adjustments. The drivers are told that, but he doesn't think he personally told Complainant.



There was an incident that happened in May 2014, when Complainant did not complete his route and did not tell a manager. That afternoon they found out that the route had not been completed and had to make adjustments the next day, so he told Complainant he had to let them know when he was not going to complete a route and can't just leave a route undone because he had to beat the traffic. That was a coaching and not a formal write up.

On 20 May 14, Complainant returned without having made 10-15 stops that were on his route. When he asked Complainant why he didn't finish the route, Complainant said he got a late start, was not familiar with the route, and couldn't finish the route. When he asked why Complainant was back at 4:30, rather than trying to do as many customer stops as possible Complainant said he needed to beat the heavy traffic.

Sometime around 22 May 14, Complainant called from out on the route and said he'd hurt his shoulder. They sent him to Concentra so he could be examined and Complainant let them know that he had some restrictions of no heavy lifting, no pulling, no pushing, or anything like that. Because they consider that light duty, they put Complainant on duty in the plant. He was sorting some hangers and doing some light duties at that time.

A few days later, after Complainant saw the doctor again, there were restrictions of no commercial driving. He contacted risk management and they made accommodations so that Complainant would be the person that would speak with customers and get the invoices assigned. They would assign a helper to him to drive and to do all of the physical work.

There were a couple of times that Complainant complained that the hours were getting longer because the helpers were new and didn't really know much about the business. He told Complainant that a couple of helpers said Complainant was doing some of the work and he reminded Complainant not to do that. Complainant responded that if he didn't do some work, they would never get done. He repeated that Complainant was on restrictions, couldn't do any of the physical work, and had to let the helpers do it. He never directed Complainant to work in violation of those work accommodation restrictions, asked Complainant to drive, or say get back in the truck; the route has to get done. He arrived one morning at work and saw Complainant driving out of the parking lot with a helper. He doesn't recall who Complainant was with but said in a statement it was Ladd.<sup>31</sup> He called Complainant and told him not to drive the vehicle and that the helper assigned to him was to do the driving and the work.

Drivers have to be DOT certified. That means they have to go take an examination, urine samples, drug screening, a physical; all those things to be qualified to be able to drive a company vehicle. Complainant was disqualified medically from driving after his injury, but on 14 Jul 14, he took off without his helper because he said he had been released from his restrictions and could drive. He was under the impression that Complainant was still under the restriction and needed the helper when he understood that Complainant left

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<sup>31</sup> RX-25.

without the helper, even though the helper was available. He didn't know the doctor had cleared Complainant.

On a number of occasions he talked to Complainant about refusing to get back on his route after doctor's appointments. Complainant answered that he got the same amount of pay either way and saw no point in doing more work for the same pay. On 14 Jul 14, Complainant had a doctor's appointment, but refused to return to work after, saying that he had to see his lawyer. When he told Complainant he could see his lawyer on his own time, Complainant said that Respondent had to pay him anyway, since he was an exempt employee, so he was going to take advantage of that. He told Complainant it would be in his best interests to return to work, but Complainant refused. Later that day, he got a voice mail from Complainant notifying him that Complainant had to take his mother to a medical appointment on 16 Jul 14 and that he had contacted HR and gotten approval. On 15 Jul 14 Complainant went to serve jury duty, but gave no notice to Respondent. Complainant neither showed up for work nor contacted Respondent on 16 Jul 14.

Complainant still needed to get his DOT certificate and on Friday, 18 Jul 14, he mentioned to Complainant that he had to get that done. He didn't give Complainant a specific time, but it's against company rules and standards to drive a company vehicle without DOT certification. He did not tell Complainant to get it done on his own time. Concentra does all of Respondent's DOT and physical testing. They are open weekends. The following Monday morning he asked Complainant if he had gotten his DOT certificate done over the weekend. Complainant said he had not. On Tuesday afternoon 22 Jul 14, he told Complainant to get his DOT physical done that day. It was about 2:30 that day. He called Complainant about 5:00 to ask if had he gotten it done, but Complainant did not answer.

The first thing Wednesday, 23 Jul 14, he called Complainant, who had just started out on his route. Complainant was assigned Route 46 that day. On that particular service day, there were probably about 28 unique addresses. Complainant had driven that route before and under normal circumstances, with a 5 or 5:30 start, the normal routemen or even Complainant would have been done probably about 2:30 or three o'clock. It would take them about 9 to 10 hours.

Complainant still hadn't completed his physical, so he told him to turn the vehicle around, come back to the facility, and go get his DOT certification completed. Complainant did it, but said he was not going to be able to finish the route. He told Complainant they had to get it done and he should do as much as he could of the route. When Complainant told him before he started that he would only get five or six stops done that wasn't what he needed. He needed Complainant to get out and focus on completing the route.

They have situations where guys get started late for a variety of reasons. When that happens, they call it putting it in third gear. They just have to hustle it up and get it done. If they can't get it done they have to let the manager know while they're out there. That gives him an opportunity to make adjustments to the route and contact customers. He

expected Complainant to stay out as long as he could to get the route as far along as possible and to contact a manager, to let them know that the route didn't get completed or would not be completed.

Complainant never called him back to say he wasn't going to be finishing the route. Complainant is wrong to say that drivers are only supposed to come in at the end of the day and tell managers what they haven't finished. Managers can't react to drivers not communicating until the end of the day. They need to make adjustments as soon as possible.

He finally saw Complainant that afternoon about 3:30. He was in the office with another manager, Allen Ellis, and Complainant came in and said he was done for the day and going home. He knew Complainant couldn't have finished the route and asked how many stops he had left. Complainant said twenty-two, which meant he had done the 6 stops he said he would do. He asked why Complainant was back this early without finishing the route. Complainant said he wasn't staying out there; wasn't doing it; wasn't getting paid for the hours; was going to be stuck in traffic, so he came back. He told Complainant that was unacceptable and that Complainant wasn't going to be able to continue to underperform that way because of the previous incident and other things. He told Complainant if he was unhappy he should quit and Complainant answered that he should fire him.

Complainant hung up his hand-held computer and left for the day. When he told Complainant what he did was unacceptable and he wasn't going to continue to defy the company, he meant Complainant couldn't not perform his job duties and not attempt to do the job that he's being paid for. By that time, the customer service people had begun to call customers as much as they could and let them know that they wouldn't be there that day. They then made adjustments for running that route and completing it the next day.

Complainant could have definitely completed more stops and still stayed within the 14-hours. They expected Complainant to attempt to get as many of those 22 stops done as he could, but not go over 14 hours. He has never directed a driver to go over 14 hours. They look at the DOT logs that routemen turn in on a weekly basis and tell drivers they cannot run that many hours in a day. They have to make adjustments and cut the route down to where they can get in at a decent hour, but they can't violate the DOT regulations.

After Complainant left the office, he told Rodney Johnson, who was the acting service manager, and Beau Murchison, who was the assistant general manager, that they had a situation where Complainant did not complete the route. He didn't make any recommendations. The decision to fire Complainant was made by Rodney Johnson. The only input he had was telling Johnson that Complainant didn't finish the route on 23 Jul 14 and the previous performance of not getting the route done in May. He doesn't know if Johnson had input from HR or anyone else.

A few days after that, Johnson told him he needed to terminate Complainant for performance reasons. Johnson didn't say anything but to terminate Complainant for performance. When he told Complainant his services were no longer needed, Complainant asked if he was being fired and then jumped up and started running out of the room, screaming and ranting and raving, and saying, "Thank God, they finally fired me."

Complainant's complaints about hours of service did not factor into the decision to terminate him. Hours are not a part of the topic there and Complainant didn't bring it to his attention that he was going over 14 hours a day running a route. Complainant never complained that he was violating his hours of service. Complainant complained that he was working hours and wasn't being paid for them. He knew Complainant had been in touch with HR, but didn't have all the details. He recalls Complainant saying he wouldn't want to do more than 60-hour work weeks. He doesn't recall Complainant saying the same thing about 14-hour days. A 14-plus hour day is a violation of DOT. A 70-plus hour week is a violation of DOT.

Complainant did not work 14 hours on 23 Jul 14. It was actually more like about ten or eleven hours. Nor had Complainant worked more than 14 hours on Monday or Tuesday. He doesn't recall Complainant saying he worked 14 hours today. The complaint was always that he was not going to continue to work all these hours and not be paid for it. When he told Complainant this is not going to work, he was referring to performing job responsibilities of servicing customers, and if that wasn't possible, not letting a manager know so that adjustments can be made.

RX-25 are notes from his supervision of Complainant. He created them on instructions from HR after Complainant was fired.

***Ana Martinez testified at hearing in pertinent part:***<sup>32</sup>

She has been Respondent's human resources director since May and before that was the senior human resources manager for two years. She oversees ten locations for human resources. She knows Complainant because she went to Ace and they hired him through him an acquisition. Complainant worked out of Coppell. She worked in the same location.

Respondent's policies are in both electronic and hard copy. Normally they're in the employee handbook. Employees are given a handbook when they're hired and go through employee orientation.<sup>33</sup>

Respondent has a dress code policy. Employees have to wear uniforms maintained in a professional manner. The dress code policy is in the handbook. It includes a clean shirt buttoned down, pants appropriate, shirt tucked in, and safety shoes on. Respondent's

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<sup>32</sup> Tr. 154-178.

<sup>33</sup> RX-7.

customer promise is that deliveries are going to be complete and in good repair. Invoice or the billing is accurate and predictable and customer needs are going to be met promptly.

She advises managers on progressive discipline. She was informed by Complainant's managers that he had received a verbal coaching. Casey Edwards was the route manager and would stop by the office to express frustration in having Complainant just tuck in his shirt and projecting a professional image. Edwards also said that he had gotten some complaints from the customers just on the way Complainant would interact with them at the customer location. Edwards discussed those problems with Complainant. A couple weeks or month later, Edwards came back to say he had given Complainant a written warning for lack of adherence to the dress code policy and an additional customer complaint.

Complainant got a final written warning in January of 2014 issued by a different manager, Beau Murchison, who was an assistant general manager. She was in her office when Complainant and Mr. Murchison come in, both visibly upset. Murchison indicated that he was attempting to provide a written notice to Complainant. She took them back to Mr. Murchison's office and she had Mr. Murchison read the entire disciplinary notice. Complainant did not agree with the actual notice at all and refused to sign. She told Complainant that even though he refused to sign, the warning would stay in his personnel file. She walked outside Mr. Murchison's office and started to make copies of the actual written warning. Complainant started to leave the route room, but she followed him, stopped him, and gave him his copy of the final written notice.

There had been some additional customer complaints on Complainant from two separate customers. After Murchison had the route manager speak to them, it came back that Complainant was not servicing the customers completely and they were not satisfied. She had no further interactions with Complainant, but was made aware by her employee relations team in the corporate office that Complainant had put in two separate complaints or launched investigations, one of them being for DOT hours violation, and the other being that he wanted his exempt status to be researched, because he believed that he should be classified as a nonexempt employee. Her employee relations manager called her back and said that they did not find any DOT violations and that both as an RSR and as a relief driver, Complainant was accurately classified as exempt. She said they had looked at the weekly time sheets the drivers fill out in ink by hand and spoken to Complainant.

She was asked to advise on Complainant's termination. Her understanding was that Complainant had arrived early to run a route, and because he had not received DOT recertification, was requested by his manager, Mike Carter, to return to the location and actually wait until the Concentra clinic opened and get the recertification. After that, Complainant was to start running the route and complete as many stops as possible, communicating how many were left. Complainant did not do that. He did not service 22 of the 28 customers and did not call the manager ahead of time and ask for help, did not give Respondent an opportunity to contact the customers to make alternative plans. The

reason Complainant gave was that he needed to beat traffic. Based on that and his record, she made the recommendation to terminate Complainant. Complainant had more than the coachings that were on paper. There were several more that Mike Carter would have as far as how to ask for time off in a proper way and following directions from the manager.

Complainant was not terminated because he didn't finish his route. It was the lack of communication and following directions with his manager. Not finishing a route is a bad thing, but it's not just that. The key is the communication between that employee who's out on the route and the manager.

Once they have that communication they can launch some alternative action plans and avoid letting customers out there feel abandoned. Complainant refused to call his manager with that information and didn't leave Respondent with many options.

Complainant's complaints or concerns about DOT hours of service were not a factor in his termination. The managers manage the customer side of what's going down. They manage the delivery, attendance, and day-to-day activities. Complainant's complaints about wage status and DOT hours were just beyond their scope of responsibility. None of the managers in-house or even with the region are considered to be experts on DOT and would not have any responsibility to handle DOT hour issues. They were focused on customer issues.

The person that actually made the termination decision was Mr. Charles Bowler. That was communicated to Rodney Johnson and Mike Carter. Keller Service is the vendor that follows the time sheets and holds them for a period of time.

She doesn't know the DOT recordkeeping requirement for logs or where the Keller Services printouts came from. She thinks that drivers enter information on a time sheet. That time sheet is actually faxed or scanned into Keller Services, who uploads the information and then submits it back to Respondent. She doesn't know what is submitted to DOT.

***Complainant's Driving Logs state in pertinent part:***<sup>34</sup>

Work Week	On Duty Time	Date	On Duty Time	Date	On Duty Time
21-25 Oct 13	62:33				
28 Oct – 1 Nov 13	62:15				
4-8 Nov 13	61:11				
16-20 Dec 13	60:41	16 Dec 13	14:50	18 Dec 13	14:23
13-17 Jan 14	60:29	13 Jan 14	14:27		

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<sup>34</sup> CX-18; RX-24.

3-7 Feb 14	61:34	3 Feb 14	14:08		
		17 Feb 14	14:06		
		25 Feb 14	14:36		
		4 Mar 14	14:10		
10-14 Mar 14	60:24	13 Mar 14	15:34		
24-28 Mar 14	64:53	25 Mar 14	14:19	27 Mar 14	14:28
7- 11 Apr 14	60:25	7 Apr 14	14:06		
14-18 Apr 14	70:06	15 Apr 14	14:09	16 Apr 14	14:40
		17 Apr 14	14:12	18 Apr 14	15:09
21-25 Apr 14	62:16				
		15 May 14	14:41		
		10 Jul 14	14:03		

***Respondent's Driving Logs state in pertinent part:***<sup>35</sup>

Date	On Duty Time
25 Feb 14	14.5
4 Mar 14	14.25
13 Mar 14	15.75
25 Mar 14	14.5
27 Mar 14	14.5
7 Apr 14	14.0
15 Apr 14	14.25
16 Apr 14	14.5
17 Apr 14	14.0
18 Apr 14	15.25
15 May 14	14.75

***Respondent's Records state in pertinent part:***<sup>36</sup>

He applied and was accepted to work on 24 May 12. On 8 Jun 12, he acknowledged receiving a copy of Respondent's employee handbook. On 12 Nov 13, Respondent was called by a customer to complain that Complainant had refused to wait for the proper person to sign the invoice and did not have his shirt tucked in. On 14 Nov 13, Respondent issued Complainant a written warning for that event, noting that Complainant had been repeatedly counseled to have his shirt tucked in. Complainant signed to receive the warning letter but noted that he disputed it.

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<sup>35</sup> CX-19.

<sup>36</sup> RX-4-7; 16-17.

On 2 Jan 14, a customer called Respondent to complain that Complainant had not delivered their complete standard inventory on 30 Dec 13. On 3 Jan 14, Respondent issued Complainant a final written warning, noting that Complainant should have communicated to Respondent the fact the inventory for that customer was not complete.

## **Discussion**

### Protected Activity

#### *Factual Context*

The threshold question is whether Complainant engaged in any protected activity. He has agreed that his only alleged protected activity that could have been a factor in his discharge was his refusal to violate the hours of service rules on 23 Jul 14. However, notwithstanding that concession, the history of his relationship with Respondent is relevant in order to put into context what Complainant did on 23 Jul 14 and how it reasonably could have been interpreted by Respondent. The record clearly shows that Complainant was a disgruntled employee for reasons unrelated to concerns about regulatory compliance or safety.

As a relief driver, Complainant was paid a salary. He got the same pay per week, regardless of the routes that he drove, or how long he actually took to drive them. Complainant was not required to put in a minimum or maximum number of hours a day, because there were no set hours. He could deviate to do personal errands, as long as he came back to complete the route. He was a salaried employee whose job was to drive and finish assigned routes. The only limits were the DOT maximum 14 hour day and 60 hour week. Complainant's paycheck stayed the same, no matter what combination of routes he worked over each two-week period. If he went over 40 hours in a week, he still did not get overtime, because his job was salaried and classified as exempt from overtime requirements.

Complainant understood that his salary was for a 40-hour work week, but became increasingly unhappy, because he felt that Respondent was making the routes longer and adding stops. He conceded in his testimony that at first he was not necessarily violating any hours of service regulations, but was upset that he was working more than 40 hours and not getting paid for it. Complainant had had a similar dispute with another employer and decided in November 2013 to file a complaint with the Department of Labor Wage and Hour Division. He also complained to his manager, who said they would try to at least improve scheduling.

Complainant testified that the hours started to increase to a point where they were in excess of the regulation maximum of 14 hours per day and 60 hours per week. He stated that he just groused about it in general until April 2014, when he did a 70-hour work week and told his manager that it was a violation, it was wearing him out, and he wasn't going to do it anymore. He trusted the manager's word that Respondent would do something about it, but that was followed by another week of more than 60 hours and he was still only getting paid for 40 hours. On 30 Apr 14, Complainant sent emails to the Department of Transportation, complaining that he was being asked to work more than 60 hours per 7 day week and more than 14 hours in a day and not



being paid for those hours. He noted that the hours were in violation of the hours of service, but his real complaint was that carriers were avoiding paying overtime for those hours.

In May 2014, Complainant's dissatisfaction with Respondent continued. On 20 May 14, Complainant returned at 16:30 without having made 10-15 stops. Complainant explained that he got a late start, was not familiar with the route, couldn't finish the route and needed to beat the heavy traffic.

Complainant injured his shoulder a couple of days later. In the period that followed, he was unhappy with the people Respondent assigned to him to help him work within his restrictions and continued to be unhappy about scheduling and complaining that his hours were beyond the regulatory maximum. He also complained to HR that the hours he was working were beyond his light duty restrictions. Eventually, Complainant was cleared to drive his route without help and did so, but did not tell his manager, who found out when he learned Complainant was driving without a helper.

Complainant's frustration with his overtime exempt status continued to manifest itself more directly. On a number of occasions, Complainant simply refused to return to finish his route after a doctor's appointment, telling his manager that since he was getting paid the same either way, he saw no point in doing more work. On 14 Jul 14, Complainant again refused to return to work after a doctor's appointment, saying that he had to see his lawyer and since Respondent had to pay him anyway as an exempt employee, he was going to take advantage of that. His manager told him it would be in his best interests to return to work, but Complainant refused. Complainant then left a voice mail saying he had to take his mother to a medical appointment on 16 Jul 14. On 15 Jul 14, Complainant went to serve jury duty, but gave no notice to Respondent.

Also on 15 Jul 14, HR emailed Complainant to tell him again that under the law he was an exempt employee. Complainant replied with an argument to the contrary and to say that he and the other drivers were being asked to violate hours of service. He added that he was averaging three violations a week and observed that it would be a lot cheaper to pay the drivers overtime than to pay fines for violating hours of service. Complainant neither showed up for work nor contacted Respondent on 16 Jul 14.

Although Complainant had recovered from his injury, his DOT medical certificate was invalid. It was against Respondent's policy and DOT regulations for Complainant to drive without a current certificate. On Friday, 18 Jul 14, Complainant's manager told him to go get it done. The medical facility was open every day. When he asked on Monday, 21 Jul 14, Complainant still had not gotten it done.

On Tuesday 22 Jul 14, HR emailed Complainant that they found no hours violations and asked him to provide details and documentation. He responded with specifics, noting that the electronic logs do not include pre and post trip paperwork and prep time. He again complained that being paid for 40 hours was not fair if he was being asked to work 60. Around 14:30 that afternoon, Complainant was told to get the physical done that day, but when his manager tried to call at 17:00 to make sure he had done it, Complainant did not answer.

The next day, 23 Jul 14, Complainant's route had about 28 delivery addresses and should have been completed in nine to ten hours. Complainant arrived at about 04:30, loaded his truck, and started his route. Complainant's manager called him to ask about the physical and when Complainant said he still had not done it, the manager told Complainant to come back, get the physical, and then go back out to finish the route.

Complainant stopped his route to return to the facility and waited for the clinic to open. He secretly videotaped his conversation with his manager. Complainant said that he would just go home after the physical, because it would take so long that he would not be able to go back out and finish his route. When the manager said to go back out and finish as much as he could, Complainant told him that would only be five or six stops. The manager said to do as much as he could. Complainant got the physical, went back out on his route, but never communicated with his manager until he returned to Respondent's facility.

Complainant returned to the facility around 16:00,<sup>37</sup> went into the office and again started secretly videotaping. He told his manager he was going home. When asked, he told the manager he had finished six stops. When his manager asked why he had not gotten the physical after he finished his route on Monday, Complainant said he did not feel like doing it after an eleven hour day and he was not going to do 14 hour days. The manager asked why Complainant did not just quit and Complainant asked why Respondent just did not fire him. The manager pointed out that if Complainant started at 04:40, his 14 hours would not have run out until 18:30 and asked why Complainant did not run his route until at least 17:00 and still could have been back within 14 hours. Complainant replied that he wanted to get done early and was tired of working 12 hour plus days and only getting paid for eight. He added that he had been complaining about it for months and done 70-hour work weeks, but was no longer going to do that or 14-plus hour days anymore.

Later that day he sent HR another email, complaining that he was told to do whatever it took to get the job done, even if the job was more than 14 hours and when he refused to go over 14 hours, his manager suggested that he quit.

### *Analysis*

Complainant was paid a weekly salary to drive and complete routes. His pay had no relation to the number of hours he actually worked and aside from the DOT hours of service regulations, he had no minimum or maximum weekly or daily hours. Indeed, since the drivers are not paid based on hours, it appears that Respondent's managers have limited motivation to monitor the logs and Respondent largely relies on a third party administrator to collect and oversee driver hour data for DOT compliance .

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<sup>37</sup> Complainant testified it was 16:30. His manger testified it was 15:30. Complainant's log showed he checked out at 16:52.

The record indicates that Complainant's routes regularly required him to work more than 40 hours per week. Complainant may have understood that he was hired as salaried employee but came to resent that Respondent was abusing him by piling on more hours. He also clearly disagreed with the legal premise that he was exempt from the requirements to pay employees overtime for working more than 40 hours in a week. That frustration built up and he no longer worried about whether or not he completed a run, even telling Respondent that since he was not getting paid more for running a longer route, he saw no point in trying to finish it. Complainant's frustration further manifested itself by his failure to let his manager know he would miss work or what deliveries he would not make in time to cover them with someone else.

Complainant then started using DOT hours of service compliance as leverage in trying to get Respondent to pay him for more hours. One of the most probative pieces of evidence in this regard was Complainant's own testimony that he told Respondent it would be cheaper to pay drivers overtime than to pay fines for hours of service violations. Complainant noted that hours of service limits were being exceeded, but his real complaint was that Respondent was getting away with not paying the drivers by making them exempt employees. Any DOT violation aspect was a coincidental factor to be used in drawing attention to his complaints about the pay.

That said, in order to establish protected activity, a whistleblower does not have to show that his actions were motivated by concern for public safety or regulatory compliance. He need only show that he refused to drive in a situation where to do so would violate the regulations, even if the real reason he refused to drive was a dispute about pay.

That presents the central issue in this case, which is whether the record establishes that it is more likely than not that had Complainant not refused and instead followed Respondent's instructions, he would have violated the hours of service regulations. That, in turn, raises the threshold question of what Complainant was instructed to do. Complainant argues that Respondent wanted him to complete the entire route. A theme of Complainant's testimony was that Respondent expected him to do whatever it took to get the routes done, and if he did not want to do that, he should quit. He also testified that he might have been able to complete one more stop on 23 Jul 14, but he would have been pushing the limit. Respondent replies that it expected him to do as much as he could without breaking the rules and keep them advised in the meantime so they came make other plans.

I found Complainant's testimony to be credible in some regards, but significantly tainted by his anger that Respondent was not paying him fairly and his decision to use hours of service and a whistleblower claim in retaliation. He appeared to me to be inclined to overstate time in order to establish a potential hours of service violation, particularly since from his point of view, he was being cheated every time he exceeded eight hours in a day or forty hours in a week. Moreover, Complainant's manager testified that the drivers knew they were not supposed to go over 14 hours and if it looked like they would not be able to finish a route without going over the limit, they were to call so alternative arrangements could be made to make the scheduled deliveries. On the other hand, the logs indicate multiple days in excess of 14 hours and weeks in excess of 60 hours. It is not clear whether any there was any overstating involved in those logs, but Respondent's managers seemed relatively uninterested in them, since they carried no payroll implications, but rather were reviewed by a third party for DOT compliance.

Thus, I find the most probative evidence as to Complainant's refusal to complete his route on 23 Jul 14 to be the actual conversation between Complainant and his manager, which Complainant secretly recorded for what he apparently anticipated would be his legal case against Respondent. Complainant's manager told Complainant that after the DOT medical examination, Complainant was to come back and finish the route. When Complainant asked if the manager understood how many miles that was, the manager amended the order to finish the route to "do what you can do on the route". When Complainant said that would be five or six stops, his manager said "whatever it is." The evidence shows that it is more likely than not that on 23 Jul 14, Complainant's instructions were to get his DOT physical and then finish as much of the route as he could without violating the maximum hours.

Complainant submits that he did just that and could not have done another stop without having been in violation of the hours of service. Respondent maintains that he could have done another stop and it was his early return and failure to communicate that resulted in his termination.

Complainant testified at hearing that he could have continued driving for another hour and a half and completed maybe one more stop, but would have been pushing the maximum hours. His manager testified that Complainant could have definitely completed more stops and still stayed within the 14-hours. Some of the most probative evidence on this point comes from Complainant's covert recording. Complainant complained that routes lasting 11, 12 or 13 are not getting done early and he wanted to start getting done early. He was tired of working 12 hour days and only getting paid for 8. That, particularly when combined with his previous refusals to come back to resume his route after a doctor's appointment significantly impeaches his hearing testimony, which in itself was equivocal as to whether he could have completed more deliveries before exceeding 14 hours.

I find that the evidence fails to establish that completing another stop would have resulted in a violation of DOT hours of service regulations. Given Complainant's stipulation that his refusal was the only factor in his termination, the complaint is dismissed.<sup>38</sup>

**ORDER**

The complaint is **dismissed**.

**ORDERED** this 14<sup>th</sup> day of April, 2016, at Covington, Louisiana.

**PATRICK M. ROSENOW  
ADMINISTRATIVE LAW JUDGE**

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<sup>38</sup> Notwithstanding the fact that Complainant was citing hours of service as leverage to get more pay, he clearly did communicate to Respondent his belief that he was working in excess of the maximum hours. Respondent argues that he was never asked to do that and insists that its drivers understood they were not to exceed the limits. Respondent also notes that its log reviews disclosed no violations. Complainant answers that Respondent's calculations are incorrect because they do not include all duty time. In order to qualify as a protected activity Complainant would only have to show that he had a reasonable belief in his statements. However, even if it fell short of a stipulation, Complainant's disavowal of any causative link between his communications and his termination would be highly probative as to whether or not they played any role in his firing and I would have found that they did not. Moreover, the record in this case establishes by clear and convincing evidence that had Complainant never mentioned hours of service at all the result would have been the same. Complainant was unhappy he was not being paid what he thought he deserved and was cutting routes short because of it. That he attempted to use the hours of service as leverage made no difference in Respondent's decision to fire him.

**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](mailto: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).