

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 March 2010

In the Matter of
JOEL P. JORDAN, II,
Complainant

v.

Case Number 2009-STA-00062

IESI PA BLUE RIDGE LANDFILL CORP.,
Respondent

APPEARANCES:

Kimberly H. Ashbach, Esquire
For the Complainant

Bradley C. Mall, Esquire
For the Respondent

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

DISMISSAL OF CLAIM

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (“the Act” or “STAA”), 49 U.S.C. § 31105, and the implementing regulations promulgated at 29 C.F.R. § 1978. Section 405 of the STAA protects a covered employee from discharge, discipline or discrimination due to the employee’s engagement in protected activity pertaining to commercial motor vehicle safety and health matters. This matter is before me on the Complainant’s request for a hearing and objection to findings issued on behalf of the Secretary of Labor by the Regional Administrator of the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) after investigation of the complaint.

Procedural History

The Complainant was terminated by the Respondent on November 20, 2007. On November 28, 2007, he filed a timely complaint with OSHA, claiming that he was terminated for discriminatory reasons in violation of the STAA. After investigating the matter, OSHA dismissed the claim. On July 16, 2009, the Complainant timely objected to OSHA’s findings and requested a hearing before the Office of Administrative Law Judges.

This matter was heard on October 6-8, 2009, in Frederick, Maryland. During the

hearing, I received live testimony and admitted Administrative Law Judge Exhibit (“ALJX”) 1 through 4, Complainant’s Exhibit (“CX”) 1 through 41, and Respondent’s Exhibit (“EX”) 1 through 54 into evidence. At the conclusion of the hearing, the record was left open for sixty (60) days for the submission of post-hearing briefs. The parties were afforded an additional ten (10) days to submit rebuttal briefs. Both parties submitted timely briefs.

FACTUAL BACKGROUND

Testimonial Evidence

Complainant’s Testimony:

Complainant testified that he was the Respondent’s safety traffic coordinator. Hearing TR (“TR”) at 8, 9. Immediately before hire by Respondent, he worked for Masters Plumbing and was responsible for helping design a sprinkler system for his volunteer fire department. *Id.* at 15. Prior to that, he was a tractor-trailer driver for Aker Plastics. *See id.* at 8, 9. In addition to his driving duties, Aker Plastic also sent the Complainant to Penske’s safety meetings where Department of Transportation regulations were discussed. *See id.* at 10. Prior to working for Aker Plastic, the Complainant was employed as a tractor-trailer driver and dispatcher for Sealy Mattresses. *Id.* The Complainant also worked as a correctional officer for the State of Maryland and has served as a volunteer firefighter. *Id.* In becoming a volunteer firefighter, the Complainant received extensive safety training and a number of certifications. *See id.*

The Complainant testified that he earned his CDL and class A driver’s license in 1996, through Hagerstown Junior College. *Id.* He further stated that he gained a certain amount of familiarity with Department of Transportation safety regulations through his family’s history of truck driving and his junior college education. *Id.* at 12. The Complainant explained that it is part of a professional truck driver’s job to know the safety regulations. *Id.* at 13. Additionally, the Complainant stated that “being the go-to-guy . . . with Aker Plastics, going to the Penske meetings, just things like that, [allowed him to] accumulate[] knowledge over the years.” *Id.*

The Complainant found an advertisement for the “safety and traffic coordinator” position with the Respondent through his local newspaper, the *Herald-Mail*. *Id.* at 16. About two to three weeks after applying for the position, he received a phone call from Mr. Chuck Blough, the Respondent’s regional safety manager, to schedule an interview. *Id.* The Complainant was interviewed by Mr. Blough and Mr. Ken Murdock. *Id.* Mr. Murdock was in charge of running the Respondent’s hauling division. *Id.* at 17.

The Complainant stated that during the interview, Mr. Blough and Mr. Murdock expressed that they liked that he had a class A license, had experience in rescue service, and was a correctional officer. *Id.* at 15-16. According to the Complainant, Mr. Blough and Mr. Murdock were impressed that he had the “rare combination of truck driver, safety, fire service, and correctional officer.” *Id.* at 17. The Complainant claimed that later in the interview, Mr. Blough mentioned a driver who is blind in one eye. *Id.* at 18. The Complainant stated that he told Mr. Blough that the regulations address vision issues, but Mr. Blough responded, “oh, don’t worry about it, we have our paper work all straightaway on that, everything is fine.” *Id.*

Two hours after the interview, the Complainant received a call from Mr. Blough

offering him the job. *Id.* at 18. Initially, there was a discussion on whether the Complainant preferred the title, “safety and traffic coordinator” or “district safety manager.” *Id.* at 19. However, the Complainant told Mr. Blough that it was up to him to decide. *Id.* The Complainant began working for the Respondent on August 7, 2006. *Id.* at 20.

The Complainant testified that according to his acceptance letter, he was supposed to report to Mr. Blough and the division managers, Mr. Sam Donato, the landfill manager in Bethlehem, Pennsylvania, Mr. Murdock, the hauling company manager, and Mr. Don Hallock, the landfill manager in Chambersburg, Pennsylvania. *Id.* at 21. Mr. Murdock was responsible for the employees who helped unload the garbage and operate the compactors, and Mr. Donato and Mr. Hallock were responsible for the drivers. *See id.* at 26. Despite what was written in his acceptance letter, the Complainant testified that it was never really clear to him that a chain of command existed. *Id.* at 22.

The Complainant confirmed that his job description included “[m]onitor[ing] truck traffic and local access roads for speeding, stopping, school buses, and Act 90 compliance.” *Id.* at 23. He was also responsible for “[c]omplete monthly employee observations and driver ride-along evaluations.” *Id.* at 23-24. The Complainant testified that when he was hired, Mr. Blough told him to do everything he could to keep the company safe. *Id.* at 33. Additionally, the Complainant stated that he was responsible for maintaining and updating Occupational Safety and Health Administration (“OSHA”) and Department of Transportation (“DOT”) records. *Id.* at 26. The Complainant stated that maintaining the DOT records was a big part of his job. *Id.* Under the purview of this authority, the Complainant also administered random drug tests. *Id.* at 27. The Complainant testified that he never received any “onsite training from IESI” regarding DOT regulations or compliance. *Id.* He did attend an OSHA compliance program, but never anything “DOT-specific.” *Id.* at 27-28.

The Complainant further testified that he was responsible for investigating accidents to determine the cause of the accident, whether the accident could be prevented, and how to prevent similar accidents from occurring in the future. *Id.* at 28. The Complainant stated that sometimes he was directly sent information about an accident, but other times he would find out through word-of-mouth. *Id.*

The Complainant described several instances when his safety recommendations were rejected. On one instance, the Complainant and Mr. Blough agreed that it would be a good idea to install special indicators on the trucks’ lug nuts that warned when the truck was in danger of losing a wheel. *Id.* at 30. The two came up with the idea after considering ways to prevent another accident caused by driver’s wheel coming off. *See id.* at 29. According to the Complainant, Mr. Murdock dismissed the idea because he felt it would be a waste of time and money to have his mechanics install the devices. *Id.* at 31.

On another occasion, the Complainant recommended that cameras be installed in the trucks in case of an accident. *Id.* at 32. However, Mr. Murdock rejected the idea because he believed it would be a waste of money and that the truckers would use the cameras for their personal use. *Id.*

The Complainant also offered recommendations about controlling on-site traffic. *Id.* at 33. He recommended to Mr. Murdock and Mr. Hallock that jersey walls or concrete barriers be installed so that incoming trucks were not so close to each other. *Id.* The Complainant believed that this would prevent the trucks from backing into each other or another person. *Id.* However, the Complainant stated that Mr. Murdock refused to make the

changes as he again felt it would cost too much time and money. *Id.* at 34.

The Complainant described another incident when he discovered that Mr. Hallock was allowing non-trained drivers to operate the tipper. *Id.* at 35. The Complainant explained that the tipper is a machine that elevates the tractor trailers in order to dump the trash they have collected. *Id.* The Complainant asserted that the regulations only permit trained personnel to operate the tipper. *Id.* at 36. The Complainant stated that Mr. Blough and Mr. Hallock discussed the situation, but he was not aware of Mr. Hallock ever being disciplined. *Id.* at 36-37.

Describing another incident that took place on November 9, 2007, the Complainant stated that he was contacted by Mr. Dough Key, the operations manager, regarding an accident involving one of the Respondent's drivers. *Id.* at 44-45. According to the Complainant, Mr. Key informed him that the driver, Mr. Berkheimer, tore down a wall during his pick-up at a Burger King. *Id.* at 45. The Complainant went to the Burger King to investigate the accident. *Id.* Upon investigating the accident site, the Complainant observed that the left mason-block wall surrounding the Burger King dumpster was knocked down. *Id.* at 47.

During the investigation, Mr. Key and the Complainant called Mr. Berkheimer to discuss the accident. *Id.* Mr. Berkheimer eventually arrived at the Burger King and denied having any part in damaging the wall. *Id.* at 52. The Complainant stated that Mr. Berkheimer continued denying the incident even after being informed that his operations manager believes he is the only one who could have hit the wall. *Id.* at 53. The Complainant instructed Mr. Berkheimer to lower the forks on his truck to simulate picking up the dumpster can. *Id.* The Complainant stated that the outside arms of Mr. Berkheimer's truck perfectly matched the separation in the wall. *Id.* According to Mr. Berkheimer, the Complainant then admitted that he may have caused the accident. *Id.*

After visiting the accident scene, the Complainant decided to investigate Mr. Berkheimer's records, because he was worried that Mr. Berkheimer was knocking down walls without knowing it. *Id.* at 54. The Complainant stated,

Doug and I set [sic] there and we talked a little bit longer. And I said—you know, I said I got to check into this. I said, if this man is knocking this wall down and he really doesn't know it, I was told when I took the job that all the paper work was in line with this gentleman, that they had everything they need for this man to drive a commercial motor vehicle. This is on my watch now. . . . I'm the one ultimately responsible.

Id. at 54. The Complainant stated that he was aware that Mr. Berkheimer had total loss of vision in one eye when he began his investigation. *Id.*

The Complainant went back to his office and pulled Mr. Berkheimer's file to search for a DOT vision exemption. *Id.* at 55. The Complainant explained that "in federal motor carriers, commercial drivers, commercial vehicles, if you have a vision issue, you have to get an exemption from the DOT, Federal Motor Carrier Safety Administration." *Id.* The Complainant asserted that the regulations are clear that an exemption cannot be given by a doctor. *Id.*

Initially, the Complainant did not find an exemption in Mr. Berkheimer's file. *See id.* at 56. Therefore, he went to the hauling company to see Ms. Connie Freidinger, the Respondent's office manager. *Id.* Reviewing Ms. Freidinger's files, the Complainant found a

letter from the FMCSA denying Mr. Berkheimer's application for an exemption. *Id.* at 57. The Complainant also found a letter dated November 29, 2005, from Mr. Berkheimer's optometrist requesting that he send additional information. *Id.* at 59. The Complainant stated that he later found out that the Respondent's doctor failed to qualify Mr. Berkheimer to drive. *Id.* at 60.

After reviewing the files, the Complainant approached Mr. Key and Mr. Murdock and informed them that he was unable to find an exemption for Mr. Berkheimer. *Id.* at 64. He explained that he could only find paperwork indicating that Mr. Berkheimer's exemption was denied, which would mean he is not qualified to drive. *Id.* Mr. Murdock told the Complainant that he would need more information before discontinuing Mr. Berkheimer's services as a driver. *Id.*

After his conversation with Mr. Key and Mr. Murdock, the Complainant decided to continue searching for an exemption in case it was misplaced. *Id.* at 65. However, the Complainant claimed that later in a meeting, Mr. Berkheimer told him that the Respondent's doctor failed to qualify him, so Mr. Murdock sent him to another doctor. *See id.* at 65. Based on Mr. Berkheimer's statement, the Complainant called the Respondent's doctor. *Id.* at 66. The doctor's office confirmed that Mr. Berkheimer was examined and denied qualification to drive. *Id.* at 67. At the Complainant's request, the office sent him a copy of doctor's report, which was dated October 1, 2006. *Id.*

The Complainant also decided to contact the second doctor who examined Mr. Berkheimer, Dr. Charlesworth. *Id.* at 69. The Complainant stated that he discussed contacting Dr. Charlesworth to see if he actually existed with Mr. Blough. *Id.* According to the Complainant, Mr. Blough told him go ahead and look into the situation. *Id.* Upon calling Dr. Charlesworth, the Complainant discovered that he did exist. *Id.* at 70.

At this point, the Complainant determined that the Respondent has the ultimate responsibility of ensuring that only medically qualified personnel operate its commercial motor vehicles. *Id.* He stated,

I'm going over the regulations in my head, you know, who is ultimately responsible to ensure medically qualified personnel are operating commercial motor vehicles. And it clearly states it falls back to the carrier, which is us. I'm the safety guy for the carrier, that's my job.

Id. The Complainant was referring to 49 C.F.R. § 391.41. *See id.* at 70, 71. The Complainant believes that according to this provision, it was his responsibility as the safety traffic coordinator to ensure that the examining physicians understand the regulations. *Id.* at 71. The Complainant reiterated that a doctor cannot grant a driver an exemption for his vision. *Id.*

The Complainant stated that he eventually recommended that Mr. Key place Mr. Berkheimer in another job. *Id.* at 72-73. However, he was informed that the recommendation would not be followed. *See id.* at 73. The Complainant stated,

It was at the end of the day, and I keep thinking they're not going to take him out of the truck. I done showed the regulations, I showed the—when I showed [Mr. Murdock] and [Mr. Key] the letter where he was denied exemption, I had my book there and I read that to them, you know, a doctor cannot grant an exemption only the Federal Motor Carrier Safety Administration can. And I showed that to [Mr. Murdock] and [Mr. Key].

After I showed them—that’s all I needed as safety was, he was denied an exemption. And, after [Mr. Key] told me what he said, he goes, he’s not taking him out

Id. at 73.

After his discussion with Mr. Key, the Complainant went to the Pennsylvania State Police Barracks to discuss the situation with Trooper Campbell, a Department of Transportation field inspector. *Id.* at 74. Trooper Campbell printed out the Department of Transportation regulations for the Complainant to show his managers. *See id.* at 74.

The following Monday, the Complainant asked Mr. Key about Mr. Berkheimer’s status. *Id.* at 76-77. He was shocked to hear that Mr. Berkheimer was going to continue driving. *See id.* at 77. The Complainant stated,

I said, are you serious? I said, after what I showed you guys on Friday, you guys had no change of heart on this, you guys still want him to drive? . . . So I said, well, look at this.

Again, I showed [Mr. Key] and I showed [Mr. Murdock] the letter where [Mr. Berkheimer] was denied exemption. I showed them where it clearly states that nobody can give an exemption except DOT. I showed him the letters that were in the file where the optometrist wrote on his behalf to give him the exemption and I showed that DL-102 form. And I said this is not an exemption.

Id. The Complainant stated that Mr. Murdock contended that there was a difference between interstate and intrastate regulations. *Id.* at 78. However, the Complainant told Mr. Murdock that the difference did not apply to drivers’ physicals. Nevertheless, Mr. Murdock demanded more proof. *See id.* at 78-79.

The Complainant went back to the State Police Barracks and spoke with a lieutenant and Troopers Mecklin and Garcia. *Id.* at 79. The Complainant stated that Trooper Mecklin gave him a form explaining the difference between interstate and intrastate physicals. *Id.* at 80. The form, CX 43, is a copy of “Pennsylvania Vehicle Law, title 69.” *Id.* at 81.

The Complaint gave the form to Mr. Murdock. *Id.* at 81. However, according to the Complainant, Mr. Murdock indicated that the form was still not sufficient. *Id.* at 84. The Complainant claimed that he then reverted back to the regulations and explained that it was his responsibility to inform the medical examiner of the requirements for qualifying a driver. *Id.* The Complainant stated that Mr. Murdock still asked for more information. *Id.*

After his conversation with Mr. Murdock, the Complainant visited Dr. Charlesworth to discuss Mr. Berkheimer’s situation. *Id.* The Complainant told Dr. Charlesworth that he is sure Mr. Berkheimer is not qualified to drive a commercial vehicle, but that the company manager is relying on his medical form to allow him to drive. *Id.* at 84. The Complainant advised Dr. Charlesworth of the regulations and specifically told him that a physician does not have the discretion to exempt a driver for his “hearing, insulin usage, diabetes, [or] vision.” *Id.* at 85.

At the end of his discussion with Dr. Charlesworth, the Complainant requested that the doctor put in writing that he was misinformed when he cleared Mr. Berkheimer. *Id.* at 88. The Complainant then went back and informed Mr. Key and Mr. Murdock that he spoke with Dr. Charlesworth and “[he] is basically going to revoke his certification, [because] he based it on false information.” *Id.* The Complainant claimed that Mr. Murdock and Mr. Key

maintained that a physician's letter qualified as an exemption. *Id.* In response, the Complainant suggested they contact Trooper Mecklin. *Id.* at 89. The Complainant stated that Mr. Murdock spoke with Trooper Mecklin over the phone. *Id.* at 89-90. After the phone call, Mr. Murdock scheduled a meeting with Mr. Berkheimer. *Id.* at 91.

The Complainant stated that in his last correspondence with Mr. Blough before the meeting with Mr. Berkheimer, Mr. Blough irately told him that he was only supposed to check to see if Mr. Berkheimer's doctor existed. *Id.* at 97. Mr. Blough was upset because he was getting e-mails from Mr. Murdock indicating that "[the Complainant] moved further with the DOT side of things." *Id.* at 97. The Complainant continued corresponding with Mr. Blough via e-mail. *See id.* at 97-102.

Both Mr. Key and Mr. Murdock were present at the meeting with Mr. Berkheimer. *Id.* at 103. The Complainant stated that during the meeting, he expressed to Mr. Berkheimer that all he needed was an exemption for his vision. *Id.* at 105. After Mr. Berkheimer referred to his DL-102 form, the Complainant told him that the form did not qualify as an exemption. *Id.* The Complainant claims that Mr. Berkheimer then said, "well, [Mr. Murdock], you knew IESI doctor failed me and would not qualify me for a physical, that's why you sent me to that other doctor." *Id.* The Complainant claims he was asked to leave the meeting shortly after he asked Mr. Berkheimer to verify his allegations. *Id.* at 105-06. The Complainant stated that this was the first time he heard that the Respondent's doctor failed Mr. Berkheimer. *Id.* at 106.

After the meeting, the Complainant received a fax from Dr. Charlesworth stating that he was misinformed in regard to Mr. Berkheimer's physical examination. *Id.* at 109. However, the fax was of poor quality. *Id.* The Complainant stated that he told Mr. Murdock that he was going to get the original from the doctor's office, but Mr. Murdock just looked at him without responding. *Id.* The Complainant retrieved the original and had the doctor's office staff transcribe the doctor's handwriting. *Id.* at 110-11. The Complainant stated that while he was at Dr. Charlesworth's office, he received an e-mail from Mr. Murdock, which basically stated, "if you're at Mark's doctor I suggest you back off." *Id.* at 113. However, by the time he received the e-mail, he had already retrieved the document. *Id.* at 113, 117.

Later, the Complainant received an e-mail informing him that the Respondent was in contact with Rep. Kauffman's office regarding Mr. Berkheimer's commercial driving privileges and that he would be driving a toter delivery truck. *Id.* at 117-19. After receiving the e-mail, the Complainant contacted Rep. Kauffman's office to explain Mr. Berkheimer's situation. *Id.* at 120-21. After contacting the Representative's office, the Complainant received an e-mail from Mr. Christopher Lloyd, the Representative's legislative aide, explaining that there was a misunderstanding with PENNDOT and that Mr. Berkheimer was not eligible for a CDL license in the Commonwealth of Pennsylvania. *Id.* at 121. The Complainant forwarded the e-mail to Mr. Murdock who in turn sent it to Mr. Blough, Mr. Key, and Mr. LoVerde. *Id.* at 122.

The Complainant also e-mailed the FMCSA requesting an interpretation of the terms interstate and intrastate under the regulations, as well as any information that would help him keep Mr. Berkheimer out of a commercial motor vehicle. *Id.* at 125.

On the morning of Tuesday, November 20, 2007, the Complainant noticed that his company issued blackberry was no longer receiving e-mails. *Id.* at 131. He claims that he knew then what was transpiring. *Id.* Shortly thereafter, he received a phone call from Mr.

Blough and he asked Mr. Blough if he was being fired. *Id.* at 132. According to the Complainant, Mr. Blough replied, “Well, you put this company at risk, we’ll talk about it when you get here.” *Id.* The Complainant told Mr. Blough that he was on his way to the office. *Id.*

On his way to the office, the Complainant saw Trooper Garcia on Interstate 81, so he pulled over to discuss the situation with him. *Id.* The Complainant stated that he was talking with Trooper Garcia when Mr. Blough called him again and informed him that he was fired. *See id.* The Complainant proceeded to go to his office to collect his belongings. *Id.* at 133-35. After collecting his belongings, the Complainant went to Mr. Hallock’s office to return his computer, phone, and a \$3,500 check for Mr. Key. *Id.* at 135. While he was leaving the landfill, the Complainant realized that he still had the company credit card and his wireless key. *Id.* at 136.

The Complainant went to the Respondent’s accountant to return the credit card and wireless key, but the door was locked and no one was responding to his knocking. *Id.* The Complainant called the office and told Ms. Freidinger that he was trying to return his credit card and key. *Id.* at 137. Meanwhile, the Complainant decided to destroy the company credit card, because he did not trust the Respondent. *Id.* at 137-38. The Complainant stated that Mr. Alex Smith, the Respondent’s accountant, and Ms. Freidinger met him at the door and handed him termination papers filled out by Mr. Blough. *Id.* at 138. The Complainant refused to sign the papers until he spoke with his attorney. *See id.* at 139. The Complainant stated that he was neither threatening nor abusive towards Ms. Freidinger. *Id.* at 140. The Complainant testified that he was never warned about his performance being unacceptable, being insubordinate, or violating company rules. *See id.* at 141.

Upon further questioning, the Complainant testified that he is still unemployed. *Id.* at 147. He explained that his family is currently living off his wife’s beauty consultant salary and borrowed money. *See id.* at 147, 150. The Complainant further stated that he has never been unemployed for this long. *Id.* He believes that employers are not hiring him because the Respondent has been telling them that he is a whistleblower. *Id.* The Complainant claims he has sent out hundreds of resumes without any response. *Id.* at 148.

On cross-examination, the Complainant acknowledged that he does not have any proof that anyone associated with the Respondent has labeled him a whistleblower to the public. *Id.* at 152. The Complainant stated that he has a valid CDL license and is qualified to be a firefighter. *Id.* at 153-54. He claimed to have applied for a job with both trucking and firefighting companies. *Id.* He has also asked one of his previous employers, Master Plumbing, for a job. *Id.* at 154.

The Complainant recalled an accident that occurred when one of the Respondent’s employees, Stan Shoop, hit a light pole in a parking lot. *Id.* at 155. The Complainant confirmed that Mr. Shoop’s truck was towed, but no citation was issued for the accident. *Id.* at 156. The Complainant further confirmed that he sent Mr. Shoop to be screened for drug and alcohol abuse as a result of the accident. *Id.*

The Complainant stated that he tried to call Mr. Blough before ordering the drug and alcohol screening, but could not reach him. *Id.* at 157. The Complainant acknowledged sending an e-mail to Mr. Blough explaining that no one was hurt in Mr. Shoop’s accident and that he sent Mr. Shoop to get screened, because his truck had been towed. *Id.* The Complainant stated that he is aware that this was not a requirement under the Department of

Transportation regulations. *Id.* Asked whether he intentionally misstated the regulations in his e-mail to Mr. Blough, the Complainant stated,

Misstake the regulation? No, I was -- I acted upon what my boss told me when I took the job, because companies can vary DOT regulations. They can send you for anything, bumping a curb. I mean, anything. And when I took the job I asked Chuck -- because it was a crash course, I took the job on a Monday. He was there Monday and a Tuesday, gone.

So that was one of the topics I brought up. I said, Chuck, what do you - I said, does this company have a separate policy from DOT as it regards to drug testing? He says, if you ever get confused call me, but just always remember tow-and-go. He says, if a truck -- or, vehicle gets towed, you send them.

Id. at 157-58. The Claimant stated that he was not referring to any regulations in his e-mail.

Id. at 159. Rather, he was referring to Mr. Blough's instructions to screen every employee who gets towed after an accident. *Id.*

The Complainant acknowledged that one of his duties as a safety and traffic coordinator was understanding the Department of Transportation regulations. *Id.* at 160. He also acknowledged that Mr. Blough was his supervisor. *Id.* at 163.

Regarding an incident that took place between him and Mr. Hallock on October 30, 2007, the Complainant stated,

The confrontation went down, safety-traffic coordinator, my job was to come in the mornings, keep an eye on traffic, trucks not getting onto the interstate at 5:30. That's what the rules said. That's what the laws say.

The day before this incident you're talking about, Don Hallock and I had a conversation. We was just talking. I said, me and my son has got a football game up in western Maryland, I said, I'll be getting back late tonight. Don says, well, don't worry about traffic tomorrow, I'll come in early and take care of it for you.

On my way to work, I get a phone call from IESI drivers because they had my number because I was the safety guy, Joel, we can't get out, the traffic out here is a mess, it's lined up down the lane, it's around the corner, we can't get out, it's a big safety issue, I just watched a truck swerve to miss a school bus. This is what I'm hearing from my drivers, okay?

So I go in. Sure enough, traffic backed up like crazy. And I just asked Don, I said, Don, I said, did we miss-communicate yesterday, I thought you said you was coming in to handle this. And then immediately he just snapped, this is my damned landfill, I'll run it how I want to run it, I'll see to it -- this is mine.

Id. at 167-68.

The Complainant was not sure who initiated the conversation, but he did speak to Mr. Blough later that day regarding the incident with Mr. Hallock. *Id.* at 169. However, the Complainant denied telling Ms. Freidinger that he put Mr. Hallock in his place and that she should let him know if she ever has any problems with the Respondent because he would take care of it. *Id.* at 169-70.

The Complainant recalled the November 16, 2007 meeting with Mr. Key, but denied

asking the Respondent's drivers to bring copies of their birth certificates and social security cards. *Id.* at 171. The Complainant acknowledged that the regulations do not require collecting employees' social security cards and birth certificates, but he stated that he was "proving due diligence [sic] if [he] could get them." *Id.* at 175. The Complainant explained that he never interpreted the regulations at section 391.21 to require copies of birth certificates and social security cards. *Id.* at 180. He interpreted the regulations to mean that gathering copies of those documents would show his due diligence. *Id.* at 180. The Complainant did not believe he was violating any laws by asking employees for copies of their social security cards and birth certificates. *Id.* at 185.

Upon further questioning, the Complainant stated that he "knew nothing about Mr. Berkheimer having a waiver that limited him to intrastate driving." *Id.* at 190. He stated that there was no such thing, because there is no difference between interstate and intrastate driving. *See id.* at 190-91.

The Complainant confirmed that Mr. Blough instructed him to discuss possibly terminating Mr. Berkheimer with Mr. Murdock. *Id.* at 193-94. However, he stated that Mr. Blough never instructed him "not do anything else with regard to Mr. Berkheimer's physical qualifications until he returned from vacation because he specifically wanted to be involved personally." *Id.* The Complainant believes that Mr. Blough and Mr. Murdock conspired to allow Mr. Berkheimer to drive even though he was medically unqualified. *Id.* at 196.

The Complainant acknowledged that Mr. Key told him that it was not his decision to "pull a driver out of a truck." *Id.* at 214. He stated that he was fully aware of this as it was the managers' responsibility to terminate and reprimand employees. *Id.* at 214. The Complainant stated that his job was limited to identifying safety issues. *Id.*

The Complainant confirmed that he received a copy of the company rules when he was first employed by the Respondent. *Id.* at 215. The Complainant stated that he understood "when he came to work for IESI there were no guarantees that [he] would be given a set level of escalating discipline . . . [and he] knew that [he] could be terminated for any offence." *Id.* at 216.

The Complainant testified that he was not required to ask Mr. Murdock if he could speak to a driver's doctor. *Id.* at 227. He did not ask Mr. Murdock or the Respondent's human resources office for such permission before contacting Mr. Berkheimer's doctor. *See id.* at 227-28. The Complainant stated,

My job is safety. Read the regulations. I did what I was hired to do. . . . Look, the regulations say it's the motor carrier's ultimate responsibility to make sure medically qualified personnel operate commercial motor vehicles. Well, the DOT files are mine. I'm the one who takes care of that. So, in that the company has medically qualified personnel operating commercial motor vehicles. That's my job.

Id. at 227. Asked if he requested permission from Mr. Blough to see Mr. Berkheimer's physician, the Complainant stated, "Chuck Blough knew I was going to call and see if the doctor existed." *Id.* at 228.

The Complainant acknowledged that he received a voicemail from Mr. Blough after the meeting with Mr. Berkheimer. *Id.* at 233-34. Describing the voice message, the Complainant stated, "[Mr. Blough] was angry . . . because [he felt I] disregarded his direct instructions not to pursue Mr. Berkheimer's qualifications until he returned from vacation."

Id. at 234. The Complainant believes Mr. Blough was upset because he felt the Complainant “engaged in something that wasn’t [his] job.” *Id.* at 236. The Complainant stated that everything in Mr. Blough’s November 13th e-mail regarding the incident is untrue, except for his instruction that the Complainant speak with Mr. Murdock about possibly terminating Mr. Berkheimer. *Id.* at 241.

The Complainant denied getting angry at the meeting with Mr. Berkheimer. *Id.* at 245. He acknowledged raising his voice, but maintained that he did not get “animated” or leave his chair. *Id.* at 246. The Complainant stated that he was asked to leave the meeting when “Mr. Berkheimer told [him] that [the Respondent’s] doctor failed [him].” *Id.*

The Complainant testified that he wrote the FMCSA before he received the e-mail from Mr. Murdock informing him that Mr. Berkheimer would be put in a non-CDL truck. *Id.* at 278, EX 43. Further, the Complainant stated that his statements in this letter regarding Mr. Murdock were appropriate. *Id.* at 282. The Complainant stated that Mr. Murdock “was going to try to put [Mr. Berkheimer] back on” after the meeting. *Id.* at 278. He stated,

At the meeting it should have been, Joel, thank you for uncovering something that could have cost our company millions of dollars. It wasn’t that way. Why was it ever said, pending an investigation? You had everything you wanted right then and there, from letters from the doctors, DOT, you’ve spoken to DOT. This should have never been. This should have been it. Mark, you’re not cleared to drive a commercial motor vehicle, we can find something else for you to do here.

Id.

Recapping the day he was terminated, the following exchange took place:

Q Let me run through what I think happened, and you tell me if I’m wrong.

A Okay.

Q Mr. Blough called you and said, I’m at the landfill office, where are you?

A Okay.

Q And you said, I’m on my way, I’ll be there shortly, correct?

A Okay, yes.

Q All right. An hour later, Mr. Blough calls you and says, Joel, where are you? And you tell him, I’m covering my ass, I’ll be there shortly.

A Okay.

Q Half an hour later he calls you again.

A And I say --

Q And then he terminates you over the phone at that point in time?

A And I tell him I’ll be there in 15 minutes, I got a trooper behind me.

Q A state trooper. At that point in time, he had waited an hour and a half for you -- I’m sorry, more than an hour and a half for you to show up?

...

Q Do you disagree with the fact that Mr. Blough waited for you for over an hour and a half when he told you that he wanted to meet with you on Monday?

A I won’t disagree to that.

Q Okay.
A But if he drove three hours to see because he lived in Scranton, what's another 15 minutes?
Q Did he also not tell you that he had another appointment that afternoon?
A No, he did not.
Q He did not tell you that?
A No.
Q Did he tell you when he discharged you over the phone specifically the reasons for why he was discharging you?
A I put the company at risk, is what he told me.
Q Did he tell you that you failed to follow his directions --
A No.
Q -- and that was one of the reasons you were being terminated?
A The one that jumps out at me -- it's been two years -- it was I put the company at risk.
Q So it's possible he told you that you failed to follow his instructions, you just can't recall today, true?
A Possible.
Q And that you failed to follow company procedure, do you recall that?
A Very possible.
Q And then he said you placed IESI in jeopardy by unilaterally contacting Mr. Berkheimer's doctors and making inquiries into Mr. Berkheimer's medical condition without authorization from Mr. Berkheimer or the company, told you that, didn't he?
A Could he have said that? He could have said that.
Q All right.
A Because he doesn't know regulations. I did what the regulations said I had to do.
Q Did he say that or not?
A He could have.

Id. at 288-92.

On re-direct, the Complainant testified that Mr. Murdock reviewed and used the letter from Mr. Berkheimer's doctor in his decision making, despite e-mailing the Complainant to "back-off" the doctor. *Id.* at 312. He further testified that when he approached Dr. Charlesworth, he did not ask about any of Mr. Berkheimer's medical information. *Id.* at 329-30. The Complainant explained that he simply informed Dr. Charlesworth that he had no discretion under the regulations when it pertains to a driver's vision. *Id.* at 330. The Complainant stated that he never received any HIPPA training from the Respondent and he does not know if the Respondent is a "HIPPA-covered entity." *Id.*

The Complainant further testified that he never specifically mentioned Mr. Murdock's name in the e-mail he sent to the FMCSA. *Id.* at 335, EX 43. He stated that he was trying to be discrete and protect the company. *Id.*

In the interest of justice, I also asked the Complainant some question. *See id.* at 340. In response to my questions, the Complainant testified that he received about \$452 a week in unemployment benefits subsequent to his termination. *Id.* He has been receiving benefits

from December 2007 until the date of the hearing, and he believes that his benefits will end in five weeks. *Id.* In order to receive his unemployment benefits, the Complainant has been doing two monitored work searches per week. *Id.* at 341. The Complainant confirmed that his unemployment benefits were challenged by the Respondent on the basis of his alleged insubordination. *Id.*

Mr. Charles Blough:

Mr. Blough testified that he is currently the risk management vice president for DeAngelo Brothers Services, a vegetarian management company. TR at 352-53. Mr. Blough began working for DeAngelo Brothers Services on December 12, 2007. *Id.* at 353. He gave notice to the Respondent a month before starting his new job. *Id.* Mr. Blough explained that he left the Respondent because his new job requires less travel, which allows him to spend more time with his children. *Id.* at 354.

Mr. Blough testified that prior to his new job, he was the Respondent's safety and compliance manager. *Id.* at 355. He worked for the Respondent for about nine years. *Id.* at 356. As the safety and compliance manager, Mr. Blough performed various safety functions, including ensuring compliance with OSHA and DOT regulations, as well as training personnel and investigating accidents. *Id.* at 355. Mr. Blough testified that some of the Respondent's drivers were part of a bargaining unit, which also required him to be involved in some labor relations. *See id.* at 356.

Discussing the Respondent's hierarchy of employees, Mr. Blough testified that Mr. Key reported to Mr. Murdock, who reported to Mr. LoVerde. Mr. LoVerde was in charge of the hauling operations in the northeast. *Id.* at 357. Mr. Hallock, the landfill manager, reported to Mr. Appuzzi, the regional vice president for the northeast region. *Id.* at 358.

Mr. Blough testified that his job was to oversee and make safety recommendations. *Id.* at 358. He reported to Mr. Appuzzi and Mr. Russell Yates. *Id.* at 359. Mr. Yates is the Respondent's director of risk management. *Id.*

As the regional safety and compliance manager, Mr. Blough oversaw the Respondent's business in New York City, Long Island, upstate New York, New Jersey, and Pennsylvania. *Id.* at 360. Mr. Blough had a number of people, including the Complainant, who reported to him from these locations. *Id.* Mr. Blough explained that the Complainant reported to him as his superior, and worked alongside Mr. Murdock and Mr. Hallock. *Id.* Mr. Blough further explained that the Complainant was responsible for assisting Mr. Murdock and Mr. Hallock with compliance issues. *Id.* at 361. The Complainant was to contact Mr. Blough if he were asked to do something non-safety related or out of the norm. *Id.*

Mr. Blough testified that on October 3, 2007, he received a phone call from the Complainant and Mr. Hallock regarding an argument. *Id.* at 363. Mr. Blough recalled both of them being irate. *Id.* Mr. Blough stated,

From what I gathered from both of them during the calls was that a driver had come to [the Complainant] about waiting, and [the Complainant] approached Mr. Hallock about that waiting, and Mr. Hallock told [the Complainant] that, hey, that's not your area, once the trucks are on our site waiting time is my concern, my responsibility. And from there it got heated. What was exactly said, I can't remember, but I know it got heated because they were both upset when I spoke to them. I talked to both.

I talked to [the Complainant]. I told him that, you know, once the trucks are on the site waiting time was Mr. Hallock's responsibility and that he needed to, you know, understand that. And you know, I asked Mr. Hallock and [the Complainant] both to calm down. I thought the situations had calmed down, but I got a call later on that day from Connie Freidinger . . . regarding the confrontation at the landfill.

Id. at 363-64. Based on his conversation with Ms. Freidinger, Mr. Blough called the Complainant and told him that it was unacceptable for members of the safety department to state that they put certain employees in their place. *See id.* at 364.

Mr. Blough confirmed that part of the Complainant's responsibilities for the Respondent included monitoring truck traffic to the landfill. *Id.* at 366. The Complainant was also responsible for any speeding trucks or unsafe practices at the landfill. *Id.* However, he was not responsible for waiting times. *Id.* Mr. Blough stated that problems or complaints about waiting times did not fall under the Complainant's responsibility to monitor traffic. *Id.* at 367. Regardless, Mr. Blough stated that he did not write-up either the Complainant or Mr. Hallock for the incident. *Id.*

Mr. Blough confirmed that the Complainant sent Mr. Shoop for drug and alcohol testing after his accident. *Id.* Mr. Blough recalled receiving an e-mail from the Complainant stating that he was sending Mr. Shoop to get a post-accident drug and alcohol test. *Id.* at 368. Mr. Blough testified that he spoke to the Complainant shortly after receiving the e-mail "and informed him that [the incident] did not meet the criteria for a federal DOT post-accident drug test." *Id.* Mr. Blough stated,

It's our company policy to do a drug test, a post-accident drug test. Then I heard from [the Complainant] that he said, well, Mr. Shoop had had a couple accidents, I guess, and that he wanted to send a message to Mr. Shoop and to the other employees

My response to that was, that's an inappropriate way to send a message, we have had other drivers throughout the company who have had similar accidents and that this would be singling out that driver if we sent him specifically and that we don't send messages that way. I also said that I would send him the reg that showed when we do a post-accident drug and alcohol test on Monday—because that was on Saturday.

Id. at 368. Mr. Blough stated that he had never heard of the "tow-and-go policy" the Complainant mentioned in his testimony. *Id.* at 371. Mr. Blough explained that the Respondent's policy was to follow the DOT regulations, which did not require a drug test in Mr. Shoop's situation. *Id.* According to Mr. Blough, a copy of the policy was in the Complainant's office and it was discussed with him when they went over the safety manual. *Id.* at 373-74. Mr. Blough confirmed that the Complainant followed his instruction to halt Mr. Shoop's drug test. *Id.* at 372. He did not issue the Complainant a written or verbal warning, but instructed him not to do it again. *Id.* at 374.

Mr. Blough was also involved—via e-mail—in the situation between Mr. Murdock and the Complainant concerning getting employees' birth certificates and social security cards. *Id.* at 375. Mr. Blough stated that he e-mailed the Complainant and instructed him not to ask employees for this documentation. *Id.* Mr. Blough explained that DOT regulations did not require these documents. *Id.* at 376. While it may be a good idea to use these documents

to verify an employee's information, Mr. Blough stated, "That would be the job of the HR department. . . . the safety department has a protocol, per the driver qualification file, to get the documents that it asks for. But, as far as verifying who people are, that is not something our department would do." *Id.* Mr. Blough did not issue the Complainant a verbal or written warning or reprimand for the incident. *Id.* at 378-79. Mr. Blough stated that this was part of his reason for terminating the Complainant's employment, but, at the time, he was on vacation and did not have access to the necessary forms to write-up or terminate the Complainant. *Id.* at 379.

Mr. Blough confirmed that he was referring to 49 C.F.R. § 382.303 in regard to screening for drugs and alcohol after an accident. *Id.* at 381. Mr. Blough did not find any ambiguity in the regulations as to when a driver should be tested. *Id.* at 382. He stated,

Whether they're confusing or not, I don't have an opinion on it because they're not my regulations. But (b)(2) says that a person who receives a moving violation—and then (2)(i) and (2)(ii) are the two ways that it has to happen. And then the chart following that is another way to look at it.

Id. at 383.

Mr. Blough recognized the green gaskets with the arrows identified during the Complainant's testimony. *Id.* at 384. He confirmed telling the Complainant that the gaskets were a good idea and that he should present them to Mr. Murdock. *See id.* However, Mr. Blough could not recall whether the gaskets were actually installed on the trucks. *Id.*

Mr. Blough recalled being informed that Mr. Hallock was using drivers with little tipper experience to operate the Respondent's tipper. *Id.* at 385. Mr. Blough stated that upon being informed of this, he called Mr. Hallock and told him "that's not how our protocol calls for it and he needed to stop that." *Id.* Mr. Blough explained that Mr. Hallock was using personnel to operate the tippers who had previously been trained at other companies. *Id.* at 386. However, the company policy is to only use operators trained by the Respondent. *Id.*

Mr. Blough did not know whether Mr. Murdock allowed drivers to come on the Respondent's property without insurance. *Id.* at 388. However, he did remember the wire incident the Complainant referred to in his testimony. *Id.* He could not recall whether he investigated the matter. *Id.* at 389. The only thing he could remember was "that a vehicle had taken down some power—or, some electrical lines that ran to the offices, but [he did not] remember a lot about it otherwise." *Id.* at 390. Mr. Blough confirmed that it would be a violation of company policy to allow someone on site without valid insurance. *Id.*

Mr. Blough refuted the Complainant's testimony that Mr. Murdock refused to terminate a driver he recommended for termination. *Id.* at 391. Mr. Blough stated that he would never demand an employee be terminated. *Id.* at 391-92. He stated,

I'd present a case—whether it be Mr. Murdock or anybody in operations as to why I believed we should take certain steps. On occasion, did Mr. Murdock and I disagree? I'm not going to—you know, absolutely, we did. But, I can give you a list of, you know, 10 other folks at IESI that, you know, that occasionally happened.

Id. at 392. Mr. Blough admitted that his disagreements with Mr. Murdock would sometimes get heated, but Mr. Murdock never spoke to him inappropriately. *Id.*

Further describing the Respondent's hierarchy, Mr. Blough testified that the drivers at the landfill reported to Mr. Key and Mr. Murdock. *Id.* at 395. Mr. Key and Mr. Murdock

conducted the initial interviews for new drivers. Once interested in a driver they found to be qualified, they would have the safety coordinator would go through the candidate's files and fill out the proper paperwork. *Id.* at 395. Pursuant to DOT regulations, the safety coordinator reviewed the candidate's motor vehicle records, driver's license, and physical cards to make sure they were eligible. *See id.*

Mr. Blough stated that according to company policy, the Respondent can accept a candidate's valid medical card upon hire. *Id.* at 396. However, as a matter of practice, the respondent sent candidates whose cards were close to expiring to get another physical examination. *Id.* at 397. Mr. Blough stated that the safety coordinator was responsible for ensuring that a candidate's medical card was valid. *See id.* at 398, 99. Mr. Blough did not know why or who made the determination to send Mr. Berkheimer to get another physical in February. *Id.* at 406.

Mr. Blough testified that he never saw Mr. Berkheimer's February 1, 2006 examination report *Id.*, EX 32. He also never saw Mr. Berkheimer's February 22, 2006 report. *Id.* at 411. Mr. Blough acknowledged that the February 22 medical report, which cleared Mr. Berkheimer to drive, was completed by another doctor. *Id.* at 412. However, he could not explain why the two medical reports, which resulted in different conclusions, were completed within twenty-one days of each other. *Id.*

Mr. Blough testified that he is aware that for certain medical conditions such as epilepsy, vision impairments, or insulin dependency, only the FMCSA can issue a waiver. *See id.* at 414-15. He believes that physicians should be aware of this rule before they certify a driver. *Id.* at 416. Additionally, Mr. Blough stated that the Respondent gives the physicians a copy of the "J.J. Keller packets," which inform them of the relevant regulations. *Id.* at 417. Mr. Blough agreed that it is the Respondent's responsibility to advise the medical examiners of the minimal medical requirements and stated that the Respondent fulfills this responsibility through the "J.J. Keller packets." *Id.* at 419-20.

Mr. Blough further testified that he was aware that Mr. Berkheimer required corrective lenses. *Id.* at 423. He found out about Mr. Berkheimer's vision impairment "a good time after" he was hired, but he was not fully aware of the extent of Mr. Berkheimer's partial blindness. *Id.* at 423, 426. Mr. Blough explained that he reviewed Mr. Berkheimer's file because of a pending Department of Transportation audit around November of 2006. *Id.* at 424, 425. He noticed that Mr. Berkheimer had a valid physical card, but he never saw that he had failed to pass a physical. *Id.* at 425. Mr. Blough claimed that he never saw the FMCSA's letter denying Mr. Berkheimer's exemption. *Id.*

Mr. Blough testified that he first learned of Mr. Berkheimer's accident after phone conversation with the Complainant in November of 2007. *Id.* at 430-31. Mr. Blough acknowledged that the Complainant informed him of his concern that Mr. Berkheimer may not be physically qualified to drive because of his vision. *Id.* at 431. Mr. Blough stated that he instructed the Complainant "to go to [Mr. Murdock] and [Mr. Key] to talk about suspension and termination . . . and that what [sic] he should do was go to his file and check to see that he had a valid physical card" *Id.* at 431-32. Mr. Blough stated that he instructed the Compliant not to do anything else regarding Mr. Berkheimer's physical qualification to drive as he would address those issues when he returned from vacation. *See id.* at 432.

Mr. Blough further testified that it is not uncommon for drivers to have accidents

similar to Mr. Berkheimer's November 2007 accident. *See id.* at 435. He explained that “[a]n accident where someone hits a corral with the forks of his truck is not that uncommon . . . [because] [t]hese are usually pretty tight spots, and these forks and these trucks are pretty big, so that wasn't uncommon.” *Id.* at 435-36.

After their first conversation about Mr. Berkheimer, Mr. Blough did not speak to the Complainant again until he came back from his vacation. *Id.* at 438. In the meantime, they exchanged e-mails and voice messages. *Id.* Mr. Blough stated that he left the Complainant a voice message reiterating his previous instructions and telling him to stop what he was doing until Mr. Blough returned from vacation. *Id.* at 438. Mr. Blough stated, “I was upset that he didn't follow my direction from Friday and that I had, you know, had to deal with this after him not following my direction from my vacation and in an area where, you know, again, it was hard to communicate.” *Id.* at 439.

Mr. Blough testified that he had no problem with the Complainant inquiring about the regulations or requesting information from the state police. *Id.* Mr. Blough stated that his problem with the Complainant was that he contacted Mr. Berkheimer's doctors. *Id.* He stated, “I had told him that—on Friday that we need to be careful when we start questioning people's physical capabilities, and I had known from . . . prior training . . . that you don't just do that, there could be some . . . EEOC and HIPPA [issues].” *Id.* at 440.

Mr. Blough testified that Ms. Stock, the Respondent's Director of Human Resources, contacted him while he was on vacation and informed him that Mr. Berkheimer was upset about the Complainant contacting his physicians. *See id.* at 441-42. Asked about his email to the Complainant on November 13, 2007, Mr. Blough acknowledged that he allowed the Complainant to pursue whether Mr. Berkheimer had a medical card. *Id.* at 457. However, he maintained that the Complainant was not supposed to pursue “DOT stuff.” *Id.* at 457.

Mr. Blough testified that there is no difference between interstate and intrastate under federal law for a driver's physical qualification. *Id.* at 463. Mr. Blough stated that he did not know what Mr. Murdock was referring to when he stated that Mr. Berkheimer was told to get an intrastate exemption. *Id.* at 465, EX 41. However, he did not mention his confusion at the time, because Mr. Murdock informed him that Mr. Berkheimer was suspended. *Id.* Mr. Blough assumed that he could sort everything out when he came back from vacation. *Id.*

Mr. Blough decided to terminate the Complainant based on his handling of the Berkheimer situation, particularly because the Complainant did not follow Mr. Blough's instruction on that Friday or on the following Monday when he left him a message. *Id.* at 470. Mr. Blough stated that he decided to terminate the Complainant while he was on vacation in Maine. *Id.* However, before terminating him, Mr. Blough decided to speak with Mr. Appuzzi and Mr. LoVerde to make them aware of his reasons. *Id.* at 471.

Mr. Blough clarified that he decided to terminate the Complainant's employment due to a compilation of factors, which included “the altercation with the landfill manager, his actions with Stan Shoop, as well as his actions where he basically told [Mr. Blough] that he didn't care about other regs.” *Id.* Mr. Blough stated that he believes it was reckless for the Complainant to express that he did not care about any non-DOT regulations. *Id.* Further expounding on his reasons for terminating the Complainant's employment, Mr. Blough stated,

I never -- I would never have terminated Mr. Jordan's employment because he found out that our driver should not have been driving. I have no problem that that was found out. I had a problem with the way he went about

finding that out. I feel that there would have been a much better way that would not have put the company in harm's way legally, that if he would have listened to my direct request twice, that that wouldn't have happened.

So at the end of the day -- and it sounds to me to be clear that Mr. Berkheimer is not able to drive, you know, it's good that he's not driving, if that's the case. And it sounds like that's the case. But that's not the reason for termination, and I explained that to Mr. Jordan when I terminated him.

Id. at 472. Mr. Blough stated that he wanted to proceed with the matter in a way that did not put the company "in harm's way" with other agencies or regulations, but the Complainant was not cooperative. *Id.*

Mr. Blough confirmed that he prepared the Complainant's termination form. *Id.* at 476, EX 6. He could not identify the writing at the top of the form, but confirmed that the rest of it was his handwriting. *Id.* at 477. Mr. Blough confirmed that he marked on the form that the Complainant's performance was unacceptable. *Id.* at 478. Asked if he ever wrote the Complainant up or had a meeting about his performance being unacceptable, Mr. Blough responded that he spoke to the Complainant about it. *Id.* at 478. Mr. Blough also confirmed that he marked that the Complainant was insubordinate, even though he never wrote him up for insubordination. *Id.* at 478. Finally, Mr. Blough acknowledged that he marked that the Complainant violated company rules. *Id.* Mr. Blough explained that the Complainant violated company rules by going to Mr. Berkheimer's doctor without assistance from human resources. *Id.* However, Mr. Blough acknowledged that the company handbook does not specially state that the Complainant was required to consult with human resources prior to visiting a driver's physician. *Id.*

On cross-examination, Mr. Blough confirmed that it was not possible for him to have mentioned Mr. Berkheimer's partial blindness during the Complainant's interview in August of 2007, because he did not learn of the precise nature of Mr. Berkheimer's medical condition until November of 2007. *Id.* at 487. Regardless, Mr. Blough stated that he would not have mentioned Mr. Berkheimer's medical condition in an interview because it would be inappropriate. *Id.* at 487-88.

Mr. Blough explained that the Complaint was hired to fill a specially designed position that was created as a condition of the Respondent's renewal permit at the landfill. *Id.* The renewal permit required that the Respondent take measures to ensure that traffic around the landfill was under control. *Id.* The Respondent, therefore, hired the Complainant to be the traffic and safety coordinator to "help monitor the roadway from Interstate 81 to the landfill entrance." *Id.* at 489. Mr. Blough explained that the Complainant's primary responsibility was "to monitor traffic coming in off the landfill, to ensure that they were following the speed limits, they stopped at the stop signs, they used their turn signals, those type things." *Id.* at 491. According to Mr. Blough, the Complainant did not have any supervisory authority. *Id.* at 492. Mr. Blough further stated that he wanted the Complainant to report problems to him, because he was still new and did not know a lot of the policies and procedures. *Id.* at 493.

Mr. Blough further stated that he expected his employees to contact him about whether a specific DOT regulation applies to a situation. *Id.* at 503. Mr. Blough stated that the Complainant did not call him before sending a driver, Mr. Shoop, to have a drug and alcohol screening. *Id.* Mr. Blough confirmed that there is a separate IESI policy regarding

drug and alcohol screening, but stated that it does not require being tested simply because a truck is towed. *Id.* Mr. Blough stated that the Respondent follows the federal guidelines concerning sending drivers for drug and alcohol screenings. *Id.* Mr. Blough never heard of a “tow-and-go” policy. *Id.* at 504. He stated,

I told [the Complainant] that we could not do a drug test on Mr. Shoop, that it didn't meet the DOT requirements and that's what we followed, and that him sending a message by testing a driver is not appropriate, it wouldn't be fair to Mr. Shoop to be tested when we had other drivers in the company that had, I'm sure, similar incidents, non-DOT post-accident required accidents, to send Mr. Shoop and not others.

Id. at 505.

Upon further questioning, Mr. Blough stated that he was first informed about the incident involving Mr. Berkheimer on that Friday when he spoke to the Complainant on the phone. *See id.* at 507-08 At the time, he had already given notice to Mr. Appuzzi that he was leaving the Respondent. *Id.* at 507. Mr. Blough explained that the Complainant told him about Mr. Berkheimer but did not mention that he was going to visit his doctors. *Id.* at 508. Mr. Blough stated,

He told me that he had some questions about his physical capabilities and that, you know, he had had some accidents. And, you know, that's when I replied, you know, talk to [Mr. Murdock] again about the discipline/suspension/ termination.

I wasn't—I didn't have Mr. Berkheimer's file, so I don't know what was chargeable, how many he had. And, again, I don't remember if he said a few or three, but he did say something to that effect. But at this point in time I was a little nervous that—on how [the Complainant] would react.

A couple of times before he had overstepped his bounds and had done some things that I thought were, you know, reckless or definitely beyond what he should be doing. So, because I was leaving for the week, I made it clear that you need—before you take up any issue on that end I want to be involved in that, you know, HR needs to be involved, it's not an easy process. So I knew that, and I had that already bad feeling that, you know, he may take things sometimes too far, from these previous two incidents, that I made that very clear.

Id.

Mr. Blough further stated that he did not find out that the Complainant visited Mr. Berkheimer's physician until the following Monday. He stated that he was angry that the Complainant did exactly what he was instructed not to do. *Id.* at 509. Upon finding out, Mr. Blough stated that he found a friend to drive him into town to call the Complainant. *Id.* He recalls leaving the Complainant a message instructing him to stop and not visit any doctors. *Id.* Mr. Blough stated,

I told him that he needed to stop doing that and that I was not happy. I don't remember my exact words, but I was angry, and I told him that I was angry, that I couldn't deal with this situation, you know, adequately from northern Maine and that I wanted him to stop this until I got back and then we could do this the right way, that HR needed to get involved, that, you know, this wasn't

just about only the DOT reg.

Id.

Mr. Blough stated that he was very angry to find out the Complainant disobeyed his instructions not to do anything after he was told on November 9th by voicemail and November 12 by e-mail. *Id.* at 518-19. Specifically asked how he felt at that moment, Mr. Blough stated,

Well, pretty angry. And at this point is probably when I decided that, you know, when I get back I think I'm going to -- you know, I'm going to terminate his employment. Again, as I mentioned earlier, I didn't want to just do that straight off. I needed, you know, to talk to some other people.

Id. at 519. Mr. Blough stated that he became concerned that he was leaving the Respondent and “without [him] being there and/or someone in [his] position to perhaps guide [the Complainant’s] actions with these sorts of things, that he could possibly put the company at risk with some of his actions.” *Id.*

Upon further questioning, Mr. Blough stated that he interprets 49 C.F.R. § 391.41 to mean that, as regional safety manager, he needs to verify that a physical was completed and that the Respondent had a copy of the driver’s medical card. *Id.* at 522.

Mr. Blough further stated that prior to terminating the Complainant he discussed the situation with his boss, Mr. Appuzzi, Mr. Murdock’s boss, Mr. LoVerde, and Ms. Stock, because he felt it would be unfair of him to terminate the Complainant without talking to them first since he was leaving the Respondent. *Id.* at 532. Mr. Blough stated that they all agreed that the Complainant’s employment should be terminated. *Id.*

Mr. Mark Berkheimer:

Mr. Berkheimer testified that he is currently involved in litigation against the Respondent through the Pennsylvania Human Relations Commission (“PHRC”). *Id.* at 560, 561-62. The nature of his claim is based on disability, invasion of privacy and Health Insurance Portability and Accountability Act (“HIPAA”) violations. *Id.* at 561. Mr. Berkheimer believes his privacy was violated when the Complainant went to his doctor and retrieved his medical information. *Id.* Mr. Berkheimer stated that the PHRC held a fact-finding hearing. *Id.* at 562-63. Mr. Murdock was present during the hearing on behalf of the Respondent, but he was without counsel. *Id.* at 562-63. Mr. Berkheimer described the hearing as basically a discussion between the parties, but he stated that Mr. Murdock did not admit any wrongdoing. *Id.* at 564.

Mr. Berkheimer further testified that he began working for the Respondent in January of 2006. *Id.* at 567. He continues to work for the Respondent and is currently an equipment manager. *Id.* at 565. He has been working in this capacity since February 8, 2008. *Id.* Prior to this position, he drove a toter box delivery truck. *Id.* Mr. Berkheimer stated that the box truck he drove was a 12,000 pound truck with IESI and DOT numbers written on its side. *Id.* at 566. Mr. Berkheimer was advised that he “did not need a commercial driver’s license or medical card to drive that truck.” *Id.* Mr. Berkheimer testified that he was placed in the toter box delivery truck on November 16, when Mr. Murdock and Mr. Key questioned the validity of his commercial driver’s license. *Id.* at 567.

Mr. Berkheimer stated that he had a valid class A commercial driver’s license when he was hired by the Respondent. *Id.* He stated that upon his hiring, he presented the Respondent

with his driver's license, medical card, resume, social security number, and all the typical material given to an employer at the start of work. *Id.* Mr. Berkheimer recalled going through orientation with Mr. Stevelach. *See id.* at 568, 569. During orientation,

[they] went through the safety issues with the truck, . . . on pre-tips, . . . and all of the things that go along with the blood-borne pathogens, the safe procedures on how to pick up bags, how to pick up and mover the toters . . . , the do's and dont's of driving, like not driving down the opposite side of the road because it's easier to pick up the cans instead of walking and dragging the cans across the road, landfill speed, . . . the fueling procedures, all of it.

Id. at 569.

Identifying his driver's license and medical card at EX 31, Mr. Berkheimer testified that according to the card, he can drive intrastate. *Id.* Mr. Berkheimer acknowledged that this is not indicated on the card and explained that he based his understanding of the regulations "on the information that was given to [him] from the Pennsylvania DOT when [he] applied for [his] commercial driver's license." *Id.* at 570. Mr. Berkheimer confirmed that Dr. Charlesworth, who had been his doctor for some time, issued his medical card. *Id.*

Mr. Berkheimer testified that the Respondent sent him to get a physical. *Id.* at 571. He stated, "I had been there a while, and then [Mr. Murdock] said that we need to send you for another medical. He says [sic] it just come down from safety or region. I says [sic], I have no problem with that." *Id.* Mr. Berkheimer further stated that the Respondent sent him to Occupational Health, where he was told he needed a federal waiver to be certified. *Id.* at 572. Mr. Berkheimer claims he went back to Mr. Murdock with this news and Mr. Murdock told him to go back to his family doctor, Dr. Charlesworth. *Id.* After talking with Mr. Murdock, Mr. Berkheimer "went back to the Pennsylvania driver's license facility where [he] took [his] CDL and talked to the supervisor . . ." *Id.* at 573. Mr. Berkheimer stated that the supervisor provided him with a medical exam form and signature card and told him, "Pennsylvania knows you can't drive out of state, but you are allowed to drive in the State of Pennsylvania." *Id.*

Explaining the subsequent events, Mr. Berkheimer stated,

When I applied for my commercial driver's license, I took my entire history to the Pennsylvania eye medical exam—or, medical history as far as my eyesight to the Chambersburg driver's license testing place, and it's off Loop Road in Chambersburg, south side of town off State Route 11.

I talked to Mr. Shenk, the supervisor there, and they sent the information on up to Harrisburg. I then received a letter from the medical board and Pennsylvania PENNDOT with the question and the statement that they understood I had had a recent eye issue, so we had to go back.

They sent back the form, they sent back the DL-102 form. It was sent to my eye doctor. It was filled out, it was sent back and faxed back to them. I got a second letter back stating that I was okay, that I was okay to drive. I made the call from my work—I was at Malvern, Pennsylvania at the time—and I talked to a LaShawn in the medical division.

And I specifically asked her, I says, okay, is this—she says, you are fine to go now. I says, now am I okay to take my CDL test? She says, yes, you are, because at that time there was a medical hold on my driving record. I

couldn't take any kind of test or renew anything.
Id. at 576-77.

Mr. Berkheimer testified that he took the DL-102 form to Dr. Charlesworth and told him that PENNDOT required that the form be completed before he could drive. *Id.* at 578. Mr. Berkheimer knew the form was not a waiver or an extension. *Id.*

Mr. Berkheimer acknowledged that his petition to the FMCSA for an exemption was denied. *Id.* at 578-79. He claimed that his petition was denied for lack of sufficient information regarding his driving history. *Id.* at 579. Mr. Berkheimer stated that he provided the Respondent with a copy of the denial. *Id.* He stated,

I gave it to Mr. Murdock. In fact, in my interview with Mr. Murdock I told him I am trying to work on a federal vision waiver so I can run interstate, at this time I am not allowed to drive out of state. He says, that's okay. He said, I don't need you to drive out of state, I have a single-man residential route in Adams County.

Id. Mr. Berkheimer testified that Mr. Murdock did not prevent him from driving after reviewing the denial from the FMCSA because he still had a valid CDL license through his medical card and driver's license. *Id.* at 580. Mr. Berkheimer further stated that the FMCSA determined that he could not drive interstate until he drove three years within the Commonwealth of Pennsylvania. *See id.* at 580-81.

Upon further questioning, Mr. Berkheimer stated that he had truck driving experience prior to working for the Respondent. *Id.* at 582. Mr. Berkheimer explained that he has been driving commercial vehicles since 1983. *Id.* He stated,

From 1983 to December of 1984, I worked for Communications Construction Group. That is—in October of that year is when I lost the—I had the corneal laceration. We had—we used Chevy—what they call the one-tons or the Ford one-tons, we were on roadsides pulling cable TV. I was in cable TV-telecommunications line construction.

When I had—after the corneal laceration, I went back to Texas, went back to college and become a licensed funeral director and embalmer, served my apprenticeship in Wills Point, Texas for LyBrand Funeral Homes, where I was involved with the first call of picking up the deceased remains.

I handled funerals. I also at that time did grave-digging for East Texas Grave Service, which was part of the funeral home complex. I was all over the country there. My driver's license at that time was what you'd be a class C here in Pennsylvania, which was up to 26,001 pounds or combination, but not to be over.

Id. at 583. In the three years prior to working for the Respondent, Mr. Berkheimer drove for Hoffman Transport and applied for a line haul position with Conway Transport. *Id.* at 584. He was denied the position with Conway, because their doctor only cleared him to drive interstate and the position required him to drive across state lines. *Id.*

Mr. Berkheimer denied being involved in the accident at Burger King. *Id.* at 586. Nevertheless, he acknowledged that he was suspended for three days and given a written warning for the incident. *Id.* at 592. Mr. Berkheimer also acknowledged that on several occasions he has dropped cans in the hopper of his truck. *Id.* at 595. He stated that this was a common thing that happens to many drivers. *See id.* Mr. Berkheimer confirmed another

incident at the Solar Shine Car Wash around February 20, 2007, when he “backed up over the parking light and the vacuum cleaner.” *Id.* at 598. Mr. Berkheimer explained that his backup camera was not working at the time. *Id.*

Upon further questioning, Mr. Berkheimer stated that he was also driving 80,000 pound tractor trailers for Hoffman Transport while working for the Respondent. *Id.* at 599. It was part-time work that involved shuttling trailers four miles to the terminal yard in preparation for them to go back out on the road. *Id.* at 600.

On cross-examination, Mr. Berkheimer did not recall the Respondent preventing him from driving when he first began work. *Id.* He stated, “My medical card was valid, and the third week there I was running the truck and Marcus Day was riding with me, and him and I were [sic] taking turns after the . . . fourth week.” *Id.* Mr. Berkheimer stated that he presented the Respondent with his medical card signed by Dr. Charlesworth when he was hired. *Id.* at 601. Mr. Berkheimer confirmed that he was neither working for nor knew Mr. Murdock, Mr. Blough, or Mr. Key when Dr. Charlesworth signed his medical card on October 23, 2004. *Id.* at 602-03.

Upon further questioning, Mr. Berkheimer explained that he is relying on 49 C.F.R. § 391.41 when he states that he is permitted to drive within the Commonwealth of Pennsylvania. *Id.* at 611. He stated,

I have never stated that the DL-102 form is a waiver. In fact, you can probably ask every driver at IESI hauling. They all know that I couldn't get—I had been denied my waiver and that I was driving for years in-state because I couldn't drive out of state, so that I could get the hours, the miles, so that I could get my interstate driver's license.

Id.

Mr. Berkheimer disclosed that Dr. Charlesworth informed him that the Complainant visited his office prior to the November 12, 2007 meeting with Mr. Murdock, Mr. Key, and the Complainant. *Id.* at 614. Mr. Berkheimer stated that he told Dr. Charlesworth not to release any information until he consults his attorney. *Id.* at 615. Mr. Berkheimer further stated that after the meeting he called Mr. Charlesworth's office and found out that the Complainant was there again. *Id.* at 617. He immediately hung up the phone and informed Mr. Murdock that the Complainant was back at his doctor's office. *Id.* After contacting Mr. Murdock, Mr. Berkheimer called Ms. Stock in human resources. *Id.* at 618.

Mr. Berkheimer further stated that after the meeting he contacted Representative Kauffman's aide, Mr. Christopher Lloyd, about the legality of his driving privileges within the Commonwealth of Pennsylvania. *Id.* at 618. Mr. Berkheimer confirmed that he has not driven a commercial motor vehicle for the Respondent since he was suspended on November 13, 2007. *Id.* at 623. Mr. Berkheimer denied having any information or anything else that he was using to blackmail or extort Mr. Murdock. *Id.* at 625.

Mr. Douglas Key:

Mr. Key testified that he has been working for the Respondent since August 7, 2006. He is currently an operations supervisor. *Id.* at 642. As an operations supervisor, he manages the Respondent's day-to-day operations, which includes “hiring, training, managing the day-to-day functions of the drivers, dealing with customers . . . [and] [a]nything that has to do with the operation” *Id.* Mr. Key reports directly to Mr. Murdock. *Id.* An operations

supervisor, as well as the Respondent's drivers and "helpers," including shop employees and mechanics all report to Mr. Key. *Id.* at 643. The Complainant and Mr. Key worked together "to accomplish better safety, to look at what drivers do, to make sure that they are implementing the safety procedures that are outlined to them . . . to make sure that they are obeying the local laws, as well as Greene Township regulations, and work together to investigate accidents, . . . [conduct] safety meetings, [and] . . . safety education with all the employees." *Id.* at 644.

In regard to determining whether an employee is qualified to drive a commercial motor vehicle, Mr. Key explained that the Respondent uses an outside company, Verifications, Inc., to complete background checks and determine whether an employee's license is valid. *Id.* They also examine the employee's past employment history and driving record. *Id.* According to Mr. Key, Verifications, Inc. also verifies whether the employee has a medical card. *Id.* at 645.

Mr. Key testified that he was not present when Mr. Berkheimer was hired. *Id.* However, pending the results of a background check, he does have full hiring and terminating authority for the Respondent. *Id.* at 646. Mr. Key stated that he did not need approval before terminating an employee, but he would typically get Mr. Murdock's approval. *Id.*

Describing the hiring process, Mr. Key explained that he would review employment applications, select candidates, interview the selected candidates, and then hire them. *Id.* Each new employee goes through a safety orientation. *Id.* at 646-47. Once a provisional offer of employment is made, the employee has to have a valid DOT physical on record. *Id.* at 647. Mr. Key testified that this requirement is satisfied if the driver brings a valid DOT physical card to work. *Id.*

Mr. Key testified that most employees who need a DOT physical or drug test are referred to Occupational Health. *Id.* at 648. Mr. Key explained that there is a list of DOT qualified physicians that employees may visit, but the Respondent mostly uses Occupational Health. *Id.* at 649. Mr. Key could not recall whether Dr. Charlesworth was on the list of approved providers. *Id.*

Mr. Key identified Sterling Robinson as an employee of the Respondents who Mr. Key hired to work as a front-load driver before the Complainant was hired. *Id.* at 653. Mr. Key confirmed that Mr. Robinson was involved in a work-related accident when the front wheel of his truck came off. *Id.* at 654. Mr. Key testified that he investigated the accident. *Id.* His investigation revealed that the tabs on Mr. Robinson's wheel had come loose because "the proper size impact wrench had not been used." *Id.*

Mr. Key further testified that Mr. Berkheimer, one of his drivers, was involved in a few accidents. *See id.* at 655-57. Mr. Key recalled Mr. Berkheimer's accident at the Burger King in November of 2007. *Id.* at 657. He stated that there were a couple accidents involving Mr. Berkheimer before that incident. *Id.* Specifically, he discussed an incident where Mr. Berkheimer dropped a garbage can in the back of his truck. *Id.* at 658. He confirmed that, as described in the e-mail to the Complainant, a sensor on Mr. Berkheimer's truck which prevents the arms of his truck from coming up when the blade is back was disabled. *Id.* Disabling the sensor contributed to the accident. *Id.* Mr. Key explained that company policy did not allow disabling a safety sensor; however, he did not consider the sensor which was disabled on Mr. Berkheimer's truck to be a safety-related sensor. *Id.* at 659. He stated that the sensor "prevents you from dumping trash behind the blade, which is a problem . . . [but,]

[t]here is no danger of anything other than that happening. *Id.* at 659-60. Mr. Key stated that Mr. Berkheimer's truck was sent for repairs after the incident. *Id.* at 660.

Regarding Mr. Berkheimer's accident at the Burger King, Mr. Key testified that he prepared an accident investigation report, which was filed in Mr. Berkheimer's safety and personnel file. *Id.* at 661. Recapping the event of that day, Mr. Key stated that he received a call from Burger King reporting "that there was damage to the wall in their dumpster enclosure and that they believed that it was caused by [one of the Respondent's] drivers." *Id.* Mr. Key told Burger King's manager that he would be there Friday morning to investigate the damage. *Id.* at 662. Mr. Key stated that he initially did not ask the Complainant to come to Burger King to join his investigation, because, at the time, he believed it was just a minor incident. *Id.* He explained that he would have involved the Complainant if it were an actual accident, off company property, involving another vehicle. *Id.* at 662. However, for minor incident's, Mr. Key explained that he usually conducts and investigations and decides whether to write-up the driver. *Id.*

Mr. Key testified that the Complainant called him on the morning of his investigation and informed him that he would be joining him at the Burger King. *Id.* at 663. Prior to that morning, Mr. Key stated that he spoke with Mr. Berkheimer and informed him that he received a call from Burger King and asked him if he knew anything about the situation. *Id.* at 664. Mr. Key stated that Mr. Berkheimer denied causing any damage at the Burger King. *Id.* at 665.

Mr. Key stated that Mr. Berkheimer was waiting for him at the Burger King when he arrived. *Id.* Prior to the Complainant arriving, Mr. Key asked Mr. Berkheimer "to pull into the dumpster enclosure to see what the clearances were on the sides of the truck." *Id.* at 666. While Mr. Berkheimer was pulling into the enclosure, Mr. Key observed that the truck's "knuckle where the forks actually tilt" barely cleared the damaged wall. *Id.* at 669-70. He also observed "chips out of the end of the wall that were at approximately the same height as the knuckle on [the truck's] forks." *Id.* at 671. Afterwards, Mr. Key was convinced Mr. Berkheimer had damaged the wall. *Id.* Mr. Berkheimer, however, continued to deny the incident. *Id.* Mr. Berkheimer told Mr. Key that if he did damage the wall he was not aware of it at the time. *Id.*

Mr. Key further testified that Mr. Berkheimer pulled into the enclosure a second time after the Complainant arrived on the scene. *Id.* at 673. Mr. Key stated that after witnessing Mr. Berkheimer pull into the enclosure, the Complainant agreed with him about the cause of the accident. *Id.* Afterwards, Mr. Berkheimer left and Mr. Key and the Complainant discussed the incident. *Id.* at 673, 676. Describing their discussion, Mr. Key stated, "we looked again at the marks on the wall, discussed the fact that the marks on the wall matched the part of the truck that would have been most likely to hit the wall . . . [and] decided that the facts indicated that [Mr. Berkheimer] hit the wall." *Id.* at 676. Mr. Key stated that he may have told the Complainant, "I know [Mr. Berkheimer] is lying." *Id.* Mr. Key stated that the Complainant then commented on Mr. Berkheimer's vision and the fact that he did not see the wall lean. *Id.* at 677. Paraphrasing the Complainant's comments, Mr. Key stated that the Complainant told him, "I know [Mr. Berkheimer] has a vision waver, I was made aware of that when I was hired, I don't think such a thing exists and I'm going to look into it." *Id.* at 677-78.

Mr. Key testified that Mr. Berkheimer had two "write-ups" prior to the Burger King

incident; once when he backed into a vacuum at a car wash and a second time when his truck slid on a snowy hill. *Id.* at 674-75. Mr. Key testified that both accidents were preventable. *Id.* at 676.

Upon further questioning, Mr. Key stated that it is apparent from looking at Mr. Berkheimer that there may be something wrong with his eye. *Id.* at 678. Mr. Key stated that he was aware that Mr. Berkheimer had an eye impairment. *Id.* at 679. Mr. Key explained that in his first week of work with the Respondent, Mr. Berkheimer informed him that his goal was to drive “big rigs” and that the only thing holding him back was that he was working on a vision waiver that only allowed him to drive within Pennsylvania. *Id.* at 679-80. Mr. Key further stated that Mr. Berkheimer told him that he would receive a vision waiver granting interstate driving privileges after demonstrating three years of safe driving. *Id.* at 680. Mr. Key did not look into Mr. Berkheimer’s vision waiver status after this conversation, because he “assumed that all those things had been addressed when [Mr. Berkheimer] was hired.” *Id.* Mr. Key explained that Mr. Berkheimer had already been driving for the Respondent for six months prior to his hiring. *Id.* at 681.

Mr. Key identified EX 37 as his statement of the events which occurred at the Burger King. *Id.* at 684. Mr. Key stated that he drafted the statement at the request of his manager, Mr. Murdock, on November 20, to document conversations and events that took place prior to the Complainant’s termination. *Id.* After reviewing his statement, Mr. Key confirmed that later that day, after investigating the incident at Burger King, the Complainant approached him with a copy of the regulations. *Id.* at 689. Mr. Key explained that they then discussed “[t]hat there in essence was no waiver for vision in one eye, that you had to meet certain criteria, but that was only for vision in both eyes, and at that point [the Complainant] brought up the possibility that [Mr. Berkheimer] forged his DOT physical card.” *Id.* Mr. Key stated that he had questions about the situation, but was still confident that all the due diligence was handled by Verifications, Inc. and the previous safety coordinator when Mr. Berkheimer was hired. *Id.* at 690.

Mr. Key stated that he told the Complainant that he does not “see how three companies could have missed this, that there was something that was not right . . .” *Id.* At which point, the Complainant told Mr. Key he was going to find out if the doctor who signed the waiver existed and make him aware of the regulations. *Id.* at 692. Mr. Key did not advise the Complainant against visiting the doctor. *Id.*

The Complainant and Mr. Key spoke again that afternoon. *Id.* at 694. The Complainant told Mr. Key that “he had checked with DOT and he had also checked with the state police and there is no vision waiver.” *Id.* at 694. Mr. Key responded by telling the Complainant that he is beginning to think there is something to the Berkheimer situation. *Id.* However, Mr. Key let the Complainant handle it because he believed it was beyond his duties and he “had a lot more to do than worry about that.” *Id.*

Mr. Key stated that he discussed the Burger King situation with Mr. Murdock that following Monday. *Id.* He recalls telling Mr. Murdock that the Complainant was investigating the matter and that he had communicated with DOT and Mr. Berkheimer’s doctors. *Id.* at 695.

Mr. Key recalled having several meetings with the Complainant, Mr. Berkheimer, and Mr. Murdock about the incident. *Id.* at 695. He stated that he believes the next day, on Tuesday morning, Mr. Murdock asked the Complainant to bring proof. *Id.* at 695-96.

According to Mr. Key, the Complainant presented Mr. Murdock with a copy of the regulations highlighting that drivers must have 20/40 in both eyes. *Id.*

Mr. Key also recalled being in the meeting with Mr. Murdock and the Complainant when the Complainant called Trooper Mecklin. *Id.* at 696. He stated,

My recollection is that he brought this information to Ken and said that he had spoken to the state police. And I believe at that time he called. Ken asked him to call the state police, and he called. He spoke to the officer for a second or two, and then he turned the phone over to Ken.

Id. Mr. Key could not recall much more of that meeting. *See id.* at 697. He just recalled that the Complainant left the room and Mr. Murdock asked him to call Mr. Berkheimer to schedule a meeting. *Id.*

Mr. Key stated that “there were several heated exchanges” at the meeting with Mr. Berkheimer that next day. *Id.* at 698. Mr. Key stated,

The meeting started, Ken talked—or, addressed Mark and said, Mark, we’re here because there is some doubt as to your ability—I’m paraphrasing— . . . and there’s some doubt as to your qualifications to drive, and we are looking into these things. And I don’t remember if it was at that point or later in the meeting where he told Mark, Mark, if it comes out that you are not qualified you will be terminated, if it is determined that you are qualified to drive that you will be made whole but we are going to suspend you pending an investigation.

Id. at 698. Mr. Key further explained that Mr. Murdock then turned the meeting over to the Complainant. *Id.* at 699. According to Mr. Key,

[The Complainant] said that he had contacted state police officers, he had looked at DOT regulations, and I believe at that point he made a comment that he had checked with Mark’s doctors. At that point, Mark stood up and said, this meeting is over, you went to my doctors, you went to my doctors without my permission, you violated my HIPAA rights, this meeting is over.

Id. After Mr. Berkheimer calmed down, the Complainant asked him if he had his exemption with him. *Id.* Mr. Key recalled the Complainant specifically asking Mr. Berkheimer if he was considering his DL-102 vision form to be the waiver, to which he responded affirmatively. *Id.* at 700.

Mr. Key testified that he is not sure if the Complainant jumped up and down during that meeting, but he did raise his voice. *Id.* Mr. Key stated that Mr. Murdock then yelled at the Complainant and said “something to the effect that, if you don’t sit down and be quiet or if you don’t lower your voice you can leave and not come back. *Id.* at 701. Mr. Key stated that Mr. Murdock appeared to be reacting to the Complainant “baiting” Mr. Berkheimer by making statements that continued to anger him. *See id.* Mr. Key could not recall whether Mr. Berkheimer ever told Mr. Murdock, “you knew about [the vision waiver], you sent me to another doctor.” *Id.* at 701-02.

Mr. Key testified that later that day Mr. Berkheimer called him and told him that he spoke with Christopher Lloyd from Representative Kaufmann’s office. *See id.* at 704. Mr. Key called Mr. Lloyd to tell him that he needed to speak to Mr. Murdock. *Id.* Soon after, Mr. Key recalled an e-mail being sent out stating that Mr. Berkheimer would be reinstated to a non-CDL position until documents verifying his qualification were received from Representative Kauffman’s office. *See id.* at 705-06. Mr. Key stated that he then got an e-

mail from the Complainant forwarding a string of other e-mails, including one from Mr. Lloyd stating that “he had checked with Pennsylvania DOT and that [Mr. Berkheimer], in fact, was not qualified to drive.” *Id.* at 706.

On cross-examination, Mr. Key stated that ALJ 4 only refers to work-related injuries. *Id.* at 718. He stated that the Respondent never tells its drivers who they must see to get a DOT physical. *Id.* at 719. He further stated that he has had drivers that have had a medical card filled out by doctors who do not live in Chambersburg. *Id.*

Mr. Key also stated that he never told anyone that Mr. Berkheimer had some sort of evidence or influence over Mr. Murdock. *Id.* at 720. Mr. Key stated that Mr. Berkheimer’s last day driving a commercial motor vehicle for the Respondent was the Friday they investigated the Burger King incident. *Id.* at 722-23. According to Mr. Key, Mr. Berkheimer was written up for the incident and given a three day suspension. *Id.* at 729. However, he and Mr. Murdock decided to allow him to drive a toter truck, which does not require a commercial license, because, other than the accident and his vision, they considered Mr. Berkheimer to be a good employee and an asset to the company. *See id.* at 728-29.

Mr. Key stated that he recalled the Complainant asking him why Mr. Berkheimer was not being terminated. *Id.* He told the Complainant that “[Mr. Berkheimer] was a good employee . . . he had shown up for work every day, he gave [the Respondent] a hundred percent he’s at work and that [they] felt like he deserved that.” *Id.* at 730. According to Mr. Key, the Complainant responded by stating, “well, I have done everything I can do, I have given you everything you need to do, I give you every reason to fire him, and if anything happens in the future it’s on you, I’m done.” *Id.*

Mr. Ken Murdock:

Mr. Murdock testified to being the Respondent’s district market manager, which means he “run[s] the hauling company at the Blue Ridge Landfill.” *Id.* at 738-39. He has no affiliation with operating the landfill. *Id.* at 739. However, part of his duties involves supervising sales, marketing, operations, and maintenance. *Id.* at 740. Mr. Murdock confirmed that, among other people, Mr. Key reports to him. *Id.* Mr. Murdock reports to Mr. LoVerde, the senior area manager. *Id.* Asked to explain the relationship between his duties and the Complainant’s job, Mr. Murdock stated, “[the Complainant] was the traffic coordinator for the Blue Ridge landfill and the Bethlehem landfill, and he did some safety issues for all three companies, including mine.” *Id.* Mr. Murdock explained that the Complainant “would go out and do driver observations and, when available, he would do accident and incident investigations.” *Id.* at 741. Neither Mr. Murdock nor the Complainant had any authority over the other. *Id.*

Mr. Murdock further testified that it is ultimately his responsibility to hire the drivers for the Respondent. *Id.* However, he explained that in actuality Mr. Key does most of the hiring and he assists. *Id.* Mr. Murdock confirmed that he interviewed and hired Mr. Berkheimer. *Id.* at 742. He testified that the Respondent’s background screening was done through an outside company. *Id.* at 743. However, he stated that the outside company does not verify whether an employee has a medical card. *Id.* Mr. Murdock stated that Mr. Berkheimer was sent to Occupational Health Associates for his drug and alcohol screening. *Id.* He explained that Occupational Health Associates are a group of doctors the Respondent has used for a number of years for pre-employment drug and alcohol screening, random drug

testing, and any other medical needs. *Id.* He confirmed that they are on a preferred provider list in Pennsylvania for workers' compensation cases. *Id.* at 743-44. Mr. Murdock stated that the drivers were free to use Occupational Health Associates for their medical cards as well. *Id.* at 744.

Mr. Murdock testified that after being hired, Mr. Berkheimer showed up for work without a medical card. *See id.* at 745. Mr. Murdock told Mr. Berkheimer that his previous Respondent kept his medical card. *Id.* at 745-46. Mr. Murdock explained that Mr. Berkheimer wanted to be a driver, so he went to Occupational Health Associates to renew his medical card. *Id.* at 745-46. In the meantime, Mr. Murdock assigned Mr. Berkheimer to work as a laborer. *Id.* at 747. Mr. Murdock does not know specifically what happened with Mr. Berkheimer's physical, but he testified that Mr. Berkheimer did not come back with a medical card. *Id.* at 746. Mr. Murdock could not recall if Mr. Berkheimer told him that the doctor at Occupational Health would not pass him. *Id.* at 746-47. He denied ever calling Dr. Sophash regarding Mr. Berkheimer's failure to secure a medical card. *Id.* at 748. He also denied ever seeing "a failed medical card." *Id.* at 748-49. Additionally, Mr. Murdock denied instructing Mr. Berkheimer to go back to the doctor who gave him his original medical card. *Id.* at 749.

Without a medical card, Mr. Murdock continued employing Mr. Berkheimer as a laborer. *See id.* at 747. Mr. Murdock identified EX 33 as Mr. Berkheimer's long form for driver fitness. *Id.* at 750-51. He could not confirm whether this was made part of Mr. Berkheimer's records, but stated that if it were sent to the safety division, the coordinator, who at the time was Mr. Jared Stevelach, would have received it. *Id.* at 752. Mr. Murdock stated that Mr. Stevelach never mentioned this form or Mr. Berkheimer's denial to him. *Id.* However, he noted that it would not have been necessary to inform him of the form because, at the time, Mr. Berkheimer was a laborer and was not driving. *Id.* at 752.

Upon further questioning, Mr. Murdock identified his handwriting on EX 32, Mr. Berkheimer's denial form. *Id.* at 753. The writing stated, "needs intrastate PA license all tonnages." *Id.* Mr. Murdock explained that he may have added this notation because Mr. Berkheimer told him that "his medical card was qualified as intrastate." *Id.* at 754. Specifically, "he told [him] that he could only drive in the State of Pennsylvania because of his limited visibility and that he was working towards—he had to drive three years to get the interstate certification." *Id.* Mr. Murdock stated that, at the time, he believed that there were two different medical certifications for interstate and intrastate driving. *See id.* However, Mr. Murdock realized that there is no difference between the certifications after talking to Trooper Mecklin on November 12, 2007. *Id.* at 757.

Mr. Murdock testified that he changed Mr. Berkheimer's status as a laborer to a driver once he gave him a medical card. *Id.* at 756. Mr. Murdock stated that Mr. Berkheimer personally gave him the short form medical card around mid-February. *Id.* at 756, 759-60. Mr. Murdock stated that the card he was given was signed by Dr. Charlesworth. *Id.* at 762. According to Mr. Murdock, the card did not differentiate between interstate and intrastate, but this was of no concern for him, because he needed a driver for Adams County. *Id.* Mr. Murdock felt no reason to further investigate the medical card. *See id.* at 763.

Mr. Murdock testified that he was first made aware of Mr. Berkheimer's accident at the Burger King by Mr. Key. *Id.* at 764. He asked Mr. Key to investigate the incident. *Id.* Mr. Murdock testified that the Complainant also became involved in the investigation. *Id.* at

765. Mr. Murdock recalled the Complainant coming to his office the following Monday and telling him that he had gone to see Mr. Berkheimer's doctor and that he does not think Mr. Berkheimer is qualified to drive. *Id.* Mr. Murdock stated that the Complainant told him that he was investigating Mr. Berkheimer's qualifications. *Id.* at 767. In response, Mr. Murdock told him to get proof that Mr. Berkheimer was not qualified. *Id.* Mr. Murdock stated that he was looking for expert proof; "[s]omething that would convince [him] that [his] initial judgment [of Mr. Berkheimer] was incorrect." *Id.* The Complainant told Mr. Murdock that he could get a letter from Mr. Berkheimer's doctor proving that Mr. Berkheimer was not eligible to drive. *See id.* at 767-68, 770. Mr. Murdock asked the Complainant to get him the doctor's note. *Id.* at 770. In instructing the Complainant to get more proof, Mr. Murdock explained that he did not instruct the Complainant to stay away from Mr. Berkheimer's doctor until the following day. *Id.* at 768.

Mr. Murdock further testified that the Complainant came back to his office that Monday and had him talk to Trooper Mecklin. *Id.* at 768-69. Mr. Murdock confirmed that the notes at EX 48 are handwritten notes of his conversation with Trooper Mecklin. *Id.* at 769. Mr. Murdock stated that after talking with Trooper Mecklin, he knew that Mr. Berkheimer had to pass his interstate physical. *Id.* At that point, Mr. Murdock arranged to have a meeting with Mr. Berkheimer, the Complainant, and Mr. Key. *Id.* at 770.

Mr. Murdock testified that he had a copy of Mr. Berkheimer's file with him prior to the meeting that following Tuesday. *See id.* at 772. He stated that the file would have contained Mr. Berkheimer's medical card, a copy of his driver's license, the long medical form for the physical exam he passed, and a letter from the FMCSA. *Id.* at 772-73. Mr. Murdock could not recall whether the "failed physical" was part of the file. *Id.* at 772. Mr. Murdock explained that the FMCSA letter "was a long, complicated letter that [he] believes said [Mr. Berkheimer] could not drive interstate." *Id.* at 773. Mr. Murdock confirmed that he sent an e-mail to the Complainant prior to the meeting stating, "I have the faxes from DOT and the optometrist. I am now more confused than before." *Id.* at 775. However, he could not recall specifically what these documents were. *Id.* at 776.

At the meeting, Mr. Murdock informed Mr. Berkheimer that "there was an allegation against his driver's license and [they] were investigat[ing] whether or not he had a valid driver's license." *Id.* at 778. At which point, Mr. Berkheimer stated that he had a valid driver's license. *Id.* at 779. According to Mr. Murdock, the Complainant then informed Mr. Berkheimer that he had visited Mr. Berkheimer's doctor. *Id.* This caused Mr. Berkheimer to become upset and jump up and down saying that his HIPPA rights were violated. *Id.* Mr. Murdock stated that "the meeting just went out of control." *Id.* He claims that he calmed everyone down and tried to resume the meeting, but the Complainant began telling Mr. Berkheimer that he was allowed to see his doctor, which angered Mr. Berkheimer again. *Id.* at 780. Mr. Murdock admits that at that point he crudely told the Complainant to be quiet or leave the meeting. *Id.* Mr. Murdock explained that he believed the Complainant was acting unprofessional and involving his emotions in the meeting. *See id.*

Mr. Murdock denied that Mr. Berkheimer turned to him during the meeting and said, "Ken, you knew about this, you told me to go to the other doctor." *Id.* at 782-83. Mr. Murdock stated that at the conclusion of the meeting he suspended Mr. Berkheimer pending an investigation into the allegations against his driver's license. *Id.* at 783. Mr. Murdock further stated that Mr. Berkheimer was found to have knocked down the wall at the Burger

King and given a three-day disciplinary suspension as a result. *Id.* at 783-84.

After the meeting, Mr. Murdock called Mr. Blough and informed him of the situation. *Id.* at 784. According to Mr. Murdock, “[Mr. Blough] told [him] that he was aware that [the Complainant] believed that [Mr. Berkheimer] was not eligible to drive and that he had—he, [Mr. Blough]—had told [the Complainant] not to investigate that until he came back because there were a lot of other issues involved.” *Id.* at 785. However, Mr. Murdock acknowledged that by that time he had all the information—the DOT regulations, phone call to Trooper Mecklin, and doctor notes—he needed. *Id.* at 787.

The next morning, on Tuesday, Mr. Murdock received a phone call from Mr. Lloyd, an aide to Representative Rob Kauffman. *Id.* at 788. Mr. Murdock stated, “Mr. Lloyd told [him] that he had been contacted by [Mr. Berkheimer] and that Mr. Berkheimer had asked him to intercede on his behalf and that Mr. Berkheimer made several phone calls to Pennsylvania DOT and that he was cleared to drive.” *Id.* Mr. Murdock stated that he asked Mr. Lloyd to provide him with written proof, which Mr. Lloyd agreed to acquire. *Id.* Mr. Murdock testified that he had no intention at that point to allow Mr. Berkheimer to return to driving. *Id.* at 789. He explained that he only planned to consider allowing Mr. Berkheimer to drive if he received the paperwork. *Id.* However, Mr. Murdock testified that he later received an e-mail from Mr. Lloyd reversing his position on Mr. Berkheimer’s driving qualifications. *Id.* at 790. The e-mail was forwarded to Mr. Murdock by the Complainant. *Id.*

Subsequently, Mr. Murdock also received an e-mail from the FMCSA, EX 42, stating that Mr. Berkheimer could not drive without a physical. *Id.* at 790. Mr. Murdock explained that the e-mail clarified the distinction between interstate and intrastate. *Id.* at 791. He confirmed that Trooper Macklin’s advice was consistent with the Complainant’s and Mr. Lloyd’s advice. *Id.*

Mr. Murdock testified that the Complainant was not supposed to do anything after the meeting on Tuesday. *Id.* He stated that he did not advise the Complainant to go back and get the doctor’s original letter. *Id.* Mr. Murdock recalled seeing the fax from Dr. Charlesworth, but could not recall if he received it in his office. *Id.* at 792-93, EX 34. Mr. Murdock stated that on Tuesday morning, he told the Complainant “not to go to the doctors because it created such a hubbub and [Mr. Berkheimer] was screaming that his rights were violated . . .” *Id.* at 797.

On cross-examination, Mr. Murdock explained that the Complainant did not report to him, so it was Mr. Blough’s decision to terminate his employment. *Id.* at 800. However, Mr. Murdock acknowledged talking to Mr. Blough about the situation. *Id.*

Mr. Murdock clarified that on that Monday, he did not stop the Complainant when he told him that he was going to visit Mr. Berkheimer’s doctors. *Id.* at 800-01. But, he did call Mr. Blough and told him that the Complainant visited Mr. Berkheimer’s doctor. *Id.* at 801. Mr. Murdock recalls Mr. Blough being upset. *Id.*

Upon further questioning, Mr. Murdock explained that when approached about Mr. Berkheimer, he initially did not accept the Complainant’s judgment and requested more proof because he considered the Complainant to be a “rookie.” *Id.* at 806. Moreover, he stated that he questioned the Complainant’s knowledge because in his very first important decision he was wrong to send a driver to get drug screened after an accident on private property with no citation. *See id.* at 805-06.

Further, Mr. Murdock testified that he was present during the meeting when the Complainant was hired, but stated that neither he nor Mr. Blough told him that “IESI employs a driver who is blind in one eye.” *Id.* He stated that such a comment would have been inappropriate. *Id.* at 807.

On re-direct, Mr. Murdock stated that the Complainant never told him to terminate Mr. Berkheimer’s employment. *Id.* at 821. Mr. Murdock confirmed that it was his determination to terminate Mr. Berkheimer if he found him to be unqualified. *Id.*

In the interest of justice, I also asked Mr. Murdock some questions. *See id.* at 822. In response to my questions, Mr. Murdock stated that he did not contact HR prior to the Tuesday morning meeting. *Id.* at 821-22. However, during that day he did speak to Mr. Stock, the Respondent’s director of human resources. *Id.* at 822.

Ms. Joyce Stock:

Ms. Stock testified to being the Respondent’s director of human resources for eight years. *Id.* at 824. In this capacity, she is responsible for “employee policies, procedures, benefits plans, [and] labor relations.” *Id.* at 824-25. She generally only gets involved in hiring personnel that report to her, but she does get involved in the terminations of employees with issues with their terminations *Id.* at 825. Ms. Stock confirmed that she was the director of human resources on August 6, 2007. *Id.* However, she did not assist in creating the job description for the safety and traffic coordinator position. *Id.*

Ms. Stock further confirmed that she was contacted by Mr. Berkheimer on November 13, 2007. *Id.* She stated,

Mr. Berkheimer called me. He was very upset. He had a meeting that morning at the Chambersburg hauling company, and there was some question about his driving capabilities and [the Complainant] had been visiting his doctors, and Mr. Berkheimer was very upset that somebody with IESI was visiting his doctors, they shouldn’t be visiting his doctors, and it was a violation of his HIPPA rights.

Id. at 825-26. Ms. Stock stated that the Complainant never contacted her regarding visiting Mr. Berkheimer’s doctors. *Id.* She claims that she would have told him not to contact the doctor until they look into the proper procedure. *Id.* at 826. Ms. Stock believes it is inappropriate for an employee to visit another employee’s physician without speaking to her first. *Id.* Ms. Stock stated that it is not appropriate to approach an employee’s physician without first either getting that employee’s permission or contacting her to determine the appropriate legal procedure. *Id.* at 827. She was not happy when she heard the Complainant had contacted Mr. Berkheimer’s physicians. *Id.*

Ms. Stock stated that she told Mr. Berkheimer that she would look into the situation and be in contact with him. *Id.* Afterwards, she attempted to call Mr. Blough. *Id.* Ms. Stock confirmed that she tried to contact Mr. Blough by e-mail. *See id.* at 828. She stated,

Mr. Murdock told me that, yes, there had been a meeting that morning that had gotten out of hand, that Mr. Berkheimer was very upset, that [the Complainant] had told him that he had been to his doctors. I believe by that point in time Mr. Murdock also had received a call from Mr. Berkheimer that [the Complainant] was back at his doctor’s. And Mr. Murdock told me that he had told [the Complainant] to stop going to the doctors.

Id. at 829. After this conversation, Mr. Stock sent Mr. Blough another e-mail stating that she “had learned that he was on vacation from [Mr. Murdock], that [she] learned that [Mr. Murdock] had talked with [Mr. Blough] briefly and that [she] would like to talk to [Mr. Blough] when he got back from vacation.” *Id.*

Ms. Stock confirmed that Mr. Murdock informed her of the allegations against Mr. Berkheimer not being qualified to drive and that he placed him out of service. *Id.* at 830. Asked what, if anything, she did when she heard of the allegations against Mr. Berkheimer, Ms. Stock stated,

[I]nitially on that Tuesday when I found that [Mr. Blough] was on vacation and that [Mr. Murdock] had placed him out of services so there was no longer a DOT issue with him driving a commercial motor vehicle if he wasn't able to, my original intent was to wait until [Mr. Blough] returned from vacation the several issues that Mr. Berkheimer had brought up and [Mr. Murdock] had told me about, as well, as far as waivers and forms and this doctor and that doctor. So I wasn't clear at that time what the situation was, but, since I am not the DOT expert, I thought it was best to wait until [Mr. Blough] got back from vacation.

Id. at 830-31. However, prior to Mr. Blough coming back from vacation, Ms. Stock was approached by Mr. Murdock who told her he was very confused because a state representative's office called him and told him that Mr. Berkheimer could drive. *Id.* at 831. Ms. Stock stated that, after talking to Mr. Murdock, she contacted the Respondent's outside labor counsel to start reviewing the issue of interstate and intrastate driving requirements and medical qualifications, as well as issues outside the DOT regulations. *Id.*

Ms. Stock stated that on Monday she spoke to Mr. Blough who told her that “he had expressly told [the Complainant] not to do anything with the medical portion of this until he returned.” *Id.* at 833. Ms. Stock stated that Mr. Blough forwarded her the e-mail he sent the Complainant following up and telling him not to do anything without human resource's involvement. *Id.* Ms. Stock confirmed that she is referring to the e-mail at EX 23. *Id.* Ms. Stock stated that Mr. Blough also informed her that he left the Complainant a voice mail message expressing that he was very upset that the Complainant disobeyed his instruction. *Id.* He also forwarded her the e-mail at EX 18. *Id.* at 834. Ms. Stock stated that after reviewing this e-mail, and the Complainant's statement that safety and the DOT regulations were the only things he cared about, she recommended that the Complainant be terminated. *See id.* at 835. Mr. Blough agreed. *Id.* Ms. Stock stated that she would have recommended terminating the Complainant's employment regardless of whether Mr. Blough mentioned it. *Id.* Asked whether Mr. Blough discussed why he wanted to terminate the Complainant's employment, Ms. Stock stated,

Yes. At that time, he had told me about the [sic] couple other incidents where he and Don Hallock had gotten into an argument at the landfill and then the issue about the drug testing where [the Complainant] had sent somebody to be drug tested when, in fact, they did not.

Id. at 836.

Ms. Stock testified that she had no issues with the Complainant reporting a potential safety violation or contacting the Pennsylvania State Police, the Department of Transportation or PENNDOT regarding the potential violation. *Id.* at 836-37. She also had no issue with

him contacting the state representative's office. *Id.* at 837.

Ms. Stock further testified that she was also upset by the fact that the Complainant was asking drivers for their social security cards and birth certificates. *Id.* at 832. She explained that "[t]hose documents might be requested during the initial hire in filling out an I-9 form if a supervisor is filling it out, but that was not what [the Complainant] was doing." *Id.* Ms. Stock felt that the Complainant had no reason to ask employees for this type of documentation. *Id.*

On cross-examination, Ms. Stock acknowledged that she is not an expert on DOT regulations. *Id.* at 840-41. She further acknowledged that she does not know whether a motor carrier is entitled to ask for medical qualifications under the regulations. *Id.* at 841. She knows that it is the carrier's responsibility to ensure its drivers are medically qualified to drive interstate, but she believes this requirement is satisfied by receiving a valid medical card. *See id.* Ms. Stock did not know if the carrier is responsible for ensuring that medical examiners are informed of the minimum medical requirements and the character of the work to be performed. *Id.* at 841-42.

Asked if she knew if there are instances under HIPPA when private information may be requested with authorization of the person involved, Ms. Stock stated,

Again, HIPPA is one of those regulations that I don't deal with on a day-in/day-out basis, so, if there was some reason to get medical information, I would contact our outside employment counsel to determine if there was an exception that we could get that information.

Id. at 842. However, Ms. Stock stated that "it is not up to an employee to take it upon themselves to go to a doctor's office. There is conflicting regulations from several different agencies . . . [a]nd that's not up to somebody in [the Complainant's] position to determine which one of those regulations takes precedence." *Id.* at 842.

Upon further questioning, Ms. Stock stated that she spoke with Mr. Blough, Mr. Berkheimer, and Mr. Murdock when investigating whether the Complainant's employment should be terminated. *See id.* at 843-45. She did not contact the Complainant or speak with him regarding his employment until after he was terminated. *Id.* at 845. However, Ms. Stock explained that Mr. Blough spoke with all the parties involved in the termination, including the Complainant, and it was ultimately his decision to terminate the Complainant. *See id.* at 845-47.

APPLICABLE LAW

The employee protection provisions of the Surface Transportation Assistance Act provide in relevant part:

(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, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;
 - (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 or health; or
(ii) The employee [or prospective employee] has a reasonable apprehension of serious injury to the employee [or prospective employee] or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a).

Under the Statute:

'employee' means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an Respondent, who--

(A) directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier; and

(B) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.

'Respondent'--

(A) means a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce; but

(B) does not include the Government, a State, or a political subdivision of a State.

49 USC § 31101 (2) and (3).

Protected Activity

Under 49 U.S.C. § 31105 (a)(1)(A), an employee has engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992); *see also Lajoie v. Environmental Management Systems, Inc.*, 1990-STA- 00031 (Sec'y Oct. 27, 1992). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. *Nix v. Nehi-R.C. Bottling Co.*, 1984-STA-00001, slip op. at 8-9 (Sec'y July 4, 1984). An employee's threats to notify officials of agencies such as the Department of Transportation or the Federal Motor Carrier Safety Administration may also be protected under the STAA. *William v. Carretta Trucking, Inc.*, 1994-STA-00007 (Sec'y Feb. 15, 1995).

Such complaints may be oral rather than written. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors). If the internal communications are oral, however, they must be sufficient to give notice that a complaint is being filed. *See Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (holding that the complainant's oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance).

An employee can also engage in protected activity by refusing to operate a vehicle because “the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health” or because “the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.” 49 U.S.C.A. §§ 31105(a)(1)(B)(i)-(ii). These two types of refusal to drive are commonly known as the “actual violation” and “reasonable apprehension” subsections. *Eash v. Roadway Express, Inc.*, ARB No. 04-036, slip op. at 6 (Sept. 30, 2005) (citing *Leach v. Basin Western, Inc.*, ARB No. 02-089, slip op. at 3 (July 31, 2003)).

Prima Facie Case

Claims under the STAA are adjudicated pursuant to the standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, the Complainant can prove discrimination with either direct or indirect evidence.

To prove a claim using direct evidence, the Complaint must prove, by a preponderance of evidence, that the Respondent took adverse action against him for engaging in protected activity. Evidence may constitute direct evidence if I am persuaded that it proves a particular fact in question without any inference or presumption. *Randle v. LaSalle*, 876 F.2d 563, 569 (7th Cir. 1989). If the Complainant presents direct evidence of discrimination, the burden will shift to the Respondent to demonstrate that the Complainant would have been disciplined regardless of his protected activity. *Pogue v. U.S. Dept. of Labor*, 940 F.2d 1297, 1298-90 (9th Cir. 1991).

Under the inferential method, the Complainant must establish a *prima facie* case of retaliatory discharge, which raises an inference that the protected activity was the likely reason for the adverse action. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987); see also *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To establish a *prima facie* case, the Complainant must prove: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of an adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of the Respondent. *Moon, supra*.

Adverse Employment Action

The employee protection provisions of the Surface Transportation Assistance Act provide that “[a] person may not discharge an employee” for engaging in protected activity under the Act. 49 U.S.C. § 31105(a). The Complainant has not been returned to status and I accept that he suffered adverse employment action within the meaning of the Act in this case.

Causal Connection

A causal connection between the protected activity and the adverse employment action may be circumstantially established by showing that the Respondent was aware of the protected activity and that adverse action followed closely thereafter. See *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). Thus, close proximity in time can be considered evidence of causation. *White v. The Osage Tribal Council*, ARB No. 99- 120, slip op. at 4 (Aug. 8, 1997). While temporal proximity may be used to establish the causal inference, it is not necessarily dispositive. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6 (Apr.

28, 2006). When other, contradictory evidence is present, inferring a causal relationship solely from temporal proximity may be illogical. *Id.* Such contradictory evidence could include evidence of intervening events or of legitimate, nondiscriminatory reasons for the adverse action. *Id.*

Rebutting the Complainant's *Prima Facie* Case

If the Complainant can carry his burden of establishing a *prima facie* case, the burden shifts to the Respondent to rebut that *prima facie* case by articulating a legitimate, nondiscriminatory reason for its employment decision. The Respondent “need not persuade the court that it was actually motivated by the proffered reasons,” but the evidence must be sufficient to raise a genuine issue of fact as to whether the Respondent discriminated against the employee. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). “The explanation provided must be legally sufficient to justify a judgment for the [Respondent].” *Id.* If the Respondent is successful, the *prima facie* case is rebutted, and the complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the Respondent is a mere pretext for discrimination. *Id.* at 255-256.

FINDINGS OF FACT & CONCLUSIONS OF LAW

In January of 2006, the Respondent hired Mr. Berkheimer, a driver with monocular vision. TR at 567, 742. Mr. Berkheimer testified that he had a valid class A commercial driver’s license when he was hired, which he provided to the Respondent, along with his medical card, resume, social security number, and all other necessary information. *Id.* Mr. Murdock testified that Mr. Berkheimer did not present a medical card upon being hired as he told the Respondent that his medical card was being held by his previous employer. *Id.* at 745-47. Mr. Berkheimer claims that he began driving for the Respondent by his fourth week on the job. *Id.* at 600. However, according to Mr. Murdock, Mr. Berkheimer was hired as a day laborer and was responsible for loading the truck on the Adams County route. *See id.* at 747-48. Mr. Murdock testified that he told Mr. Berkheimer that he would not be able to drive a truck until he produced a proper medical card. *Id.* at 746.

Mr. Berkheimer testified that his driver’s license and medical card signed by Dr. Charlesworth were both valid and allowed him to drive intrastate. *See id.* at 569, 601. Mr. Berkheimer claimed that the Pennsylvania Department of Transportation (“PENNDOT”) advised him that these credential’s permitted him to drive intrastate. *See id.* at 570, 573. Mr. Berkheimer stated that during his interview, he explained to Mr. Murdock that his federal waiver was denied, but that he could still drive within Pennsylvania. *See id.* at 579. He stated, “I told [Mr. Murdock] I [was] trying to work on a federal vision waiver so I can [drive] interstate . . . [.]” because at the time he was not permitted to drive out of state. *Id.* According to Mr. Berkheimer, Mr. Murdock told him he did not need him to drive out of state, because he had a “single-man residential route in Adam County” he needed filled. *Id.*

Mr. Berkheimer further testified that Mr. Murdock told him that the safety division required him to get another medical evaluation. *Id.* at 571. On February 1, 2006, Mr. Berkheimer went to Occupational Health for his evaluation. *See EX 27, 32.* After his examination, Mr. Berkheimer was told by the doctor that he needed a federal waiver for his vision in order to receive certification. TR at 572. Mr. Berkheimer claims that he told Mr. Murdock that Occupational Health would not certify him without a waiver and that Mr.

Murdock advised him to go back to the previous physician who certified him, Dr. Charlesworth. *Id.* Mr. Murdock denies this allegation. *See id.* at 749.

After speaking with Mr. Murdock, Mr. Berkheimer claims he went to the facility that originally issued his commercial driver's license. *Id.* at 573. Mr. Berkheimer explained that he was later given a DL-102 form, which was sent to his optometrist. *Id.* at 576-77. After his optometrist signed it, Mr. Berkheimer took the DL-102 form to Dr. Charlesworth and told him that PENNDOT would not let him drive unless it was completed. *Id.* At the end of his examination, Dr. Charlesworth signed Mr. Berkheimer's medical card. *See* EX 36. Mr. Murdock claims that Mr. Berkheimer personally handed him his new medical card. TR at 756. Mr. Murdock reassigned Mr. Berkheimer to a driving position as soon as he received the new medical card. *See id.*

Meanwhile, on August 6, 2007, the Respondent hired the Complainant to work as a "Safety and Traffic Coordinator." EX 1. The Complainant's official offer of employment stated that he was to report to "Chuck Blough, Region Safety and Compliance Manager with additional direct reporting to [the] Division Manager(s) as well." *Id.* However, the job descriptions provided at EX 2 & 3 indicate that the Complainant was to report only to Mr. Blough. *See* EX 2 & 3. According to the job description, the Complainant's principal responsibilities included:

- Monitor truck traffic on landfill and local access roads for speeding, stopping, school buses, and ACT 90 compliance.
- Complete monthly employee observations and driver ride along evaluations
- Conduct site inspections and evaluations at multiple sites
- Update/revise site safety procedures and programs
- Maintain and update all OSHA and DOT required records
- Oversee drug and alcohol testing program
- Manage background investigation for all new hires
- Maintain Driver Qualification Files for CDL drivers
- Oversee radiation monitoring program per PADEP guidelines to include inspecting trucks, equipment calibration and training
- Update/revise/report annual PPC and Tier II reports to DEP
- Take a lead role in accident investigation to determine the factors that caused the accident and address ways to prevent future accidents. Coordinator should make recommendations for future education, and/or disciplinary action based on findings from the investigations.
- Lead monthly Safety meetings—Schedule meetings. Present useful information on topics that are relevant to the daily tasks the employees perform. Provide opportunities for education in such areas as: Safe work methods, personal protective equipment, accident/injury prevention, DOT regulations, Hours Service regulations, etc.
- Lead efforts of Safety Committee-Schedule meetings, present relevant information, and provide timely feedback.
- Assist in managing external regulatory compliance (OSHA, NFPA, DOT)

- Interact with state and local agency's to ensure familiarity and good working relationships

Id.

Soon after being hired, the Complainant had a heated argument with one of the Respondent's managers, Mr. Don Hallock. According to the Complainant, Mr. Hallock agreed to oversee the traffic on the morning of October 30, 2007, because he had to travel to watch his son's football game. TR at 167-68. However, on that morning, the Complainant received a phone call from one of the Respondent's drivers informing him that the traffic was a mess and that it was a safety concern. *See id.* The Complainant confronted Mr. Hallock and a heated argument ensued about who was responsible for the traffic. *See TR* at 167-68, 363-67. Both the Complainant and Mr. Hallock spoke to Mr. Blough about the incident. *See id.* at 363. Mr. Blough asked both of them to calm down and he told the Complainant that the amount of time the trucks wait in traffic was Mr. Hallock's responsibility. *See id.* at 363-64. Mr. Blough further testified that he was later told by Ms. Connie Freidinger that the Complainant was bragging about "putting Mr. Hallock in his place." *See id.* at 364. Mr. Blough stated that he called the Complainant and told him that it was unacceptable for him to make such remarks. *Id.* at 364. The Complainant denies ever making these statements or that Mr. Blough had a conversation with him in this regard. *See id.* at 169-70.

On November 3, 2007, the Complainant e-mailed Mr. Blough and informed him that one of the drivers, Mr. Stan Shoop, had been in an accident that morning. EX 4. The Complainant explained to Mr. Blough that nobody was hurt, but that the truck needed to be towed, and as a result he sent Mr. Shoop to be screened for drugs and alcohol. *Id.* In the e-mail, the Complainant also stated, "Keep in mind this is the same drive [sic] who hit the scale hours not that long ago. This is the guy who is always on his phone while his is driving and I would bet anything this is the case with this." *Id.*

Mr. Blough responded to the Complainant's e-mail that same day stating, "[Mr. Shoop] does not need to be drug screened." *Id.* Responding a couple hours later, the Complainant informed Mr. Blough that he halted Mr. Shoop's lab results and had the tests thrown out. *See id.* The Complainant then asked Mr. Blough to, if possible, keep this between them, so that other "drivers will think about that before they do something careless." *Id.*

On November 9, 2007, the Complainant and Mr. Doug Key investigated an accident that occurred the prior week involving a dumpster at a local Burger King on Mr. Berkheimer's route. *See id.* at 45-46, 586-91, 662-94. The investigation was initiated as a result of Mr. Key receiving a call from the Burger King. *Id.* at 661. Mr. Key stated that the Burger King representative told him that they believe one of the Respondent's driver's damaged a wall surrounding their dumpster enclosure. *Id.* at 661. Mr. Key and the Complainant had Mr. Berkheimer reenact pulling into the dumpster to determine if he could have been responsible for the damage. *See id.* at 53, 670. After watching Mr. Berkheimer pull into the enclosure, both Mr. Key and the Complainant determined that he was responsible for the accident. *Id.* at 53, 670-71, 76. They explained their findings to Mr. Berkheimer, but he continued to deny any responsibility. *Id.* at 672. Mr. Berkheimer continues to deny having any involvement in the Burger King accident. *Id.* at 586.

Mr. Berkheimer was eventually dismissed to finish driving his route. *See id.* at 673-74. After Mr. Berkheimer left, Mr. Key and the Complainant continued discussing the

accident. During their conversation, the Complainant expressed concern that Mr. Berkheimer could not see the wall while driving. *Id.* at 677. Mr. Key agreed that this was a concern. *Id.* The Complainant then began questioning the validity of Mr. Berkheimer's "vision waiver." *See id.* at 677-78. Mr. Key explained that it was his understanding at the time that Mr. Berkheimer had a waiver or exemption for his vision that allowed him to drive within the Commonwealth of Pennsylvania. *Id.* at 677-80. Mr. Key had never heard of such a waiver, but he assumed that all these matters were resolved when Mr. Berkheimer was hired. *Id.* at 680.

The Complainant began investigating the matter by returning to his office and pulling Mr. Berkheimer's file. *See id.* at 55. After failing to find an exemption, the Complainant went to the hauling company to see Ms. Connie Freidinger, the Respondent's office manager. *Id.* Reviewing Ms. Freidinger's files, the Complainant found a letter from the FMCSA denying Mr. Berkheimer's application for an exemption. *Id.* at 57.

After reviewing the files, the Complainant approached Mr. Key and Mr. Murdock and informed them that he was unable to find an exemption for Mr. Berkheimer. *Id.* at 64. He told them that he was only able to find paperwork indicating that Mr. Berkheimer's exemption was denied. *Id.* The Complainant stated that Mr. Murdock told him that he would need more information before he would take away Mr. Berkheimer's driving privileges. *Id.*

About ten minutes after this conversation, the Complainant received a phone call from Mr. Blough. *See id.* at 68, 431. Mr. Blough told the Complainant that he was going on vacation for a week and that he would have some limited phone and e-mail access while he was gone. *Id.* During the conversation, the Complainant informed Mr. Blough about the Burger King accident and that he questioned Mr. Berkheimer's physical qualifications to drive. *Id.* at 430. Mr. Blough claims that he told the Complainant "to go to [Mr. Murdock] and [Mr. Key] to talk about suspension and termination . . . and [that] he should go to [Mr. Berkheimer's] file and check to see that he had a valid physical card" *Id.* at 431-32. Mr. Blough further claims that he told the Complainant not to pursue anything regarding Mr. Berkheimer's physical. *Id.* at 432. If there was still questions on that issue, he wanted to address them separately when he returned from his vacation. *Id.* at 432. Mr. Blough stated, "When you're questioning somebody's capabilities, I knew at that point that HR or, you know, others would have to get involved." *Id.* The Complainant testified that he told Mr. Blough that he was going to check to see if Mr. Berkheimer's doctor existed. *Id.* at 69. The Complainant stated that Mr. Blough approved of his plan and told him that they would look into it when he returned from vacation. *Id.*

The Complainant stated that he then called Dr. Charlesworth's office and discovered that the doctor that signed Mr. Berkheimer's card did exist. *Id.* However, he believed that the regulations placed the onus on the Respondent to keep unqualified drivers off the road, so he asked Mr. Key to reassign Mr. Berkheimer to the mechanic's shop. *See id.* at 70-73. According to the Complainant, Mr. Key stated that Mr. Murdock would not allow Mr. Berkheimer to be reassigned. *See id.* at 73.

On his way home that Friday, the Complainant stopped by the Pennsylvania State Police Barracks and discussed the situation with Trooper Campbell. *Id.* at 73-74. Trooper Campbell printed out a copy of the regulations at CX 28 and told him to call if he had any problems. *Id.* at 75.

In contrast to the Complainant's testimony, Mr. Key testified that the Complainant approached him two more times that Friday. Once to show him the regulations and explain that there was no waiver for monocular vision. *See id.* at 689. Mr. Key claims that the Complainant also mentioned the possibility of Mr. Berkheimer forging his DOT physical card and that he was going to investigate whether Mr. Berkheimer's doctor existed and, if he did, he was going to make him aware of the regulations. *Id.* at 689, 692. During a second conversation, Mr. Key claims that the Complainant told him that both DOT and the state police believe there is no waiver for a driver's vision. *Id.*

The following Monday, on November 12, 2007, the Complainant approached Mr. Key to find out what was happening to Mr. Berkheimer. *Id.* at 76-77. The Complainant was informed that Mr. Berkheimer was not working on Monday, but was scheduled to drive on Tuesday. *Id.* at 77. At that point, the Complainant and Mr. Key went to discuss the situation with Mr. Murdock. *Id.* During their conversation, the Complainant presented Mr. Murdock and Mr. Key with a copy of the regulations provided by Trooper Campbell, letters written by Dr. Centar to the FMCSA, the Complainant's DL-102 form, and a letter from the FMSCA to Mr. Berkheimer denying his petition for an exemption. *See id.* at 77-79. According to the Complainant, Mr. Murdock alleged a distinction between interstate and intrastate driving. *Id.* at 78. The Complainant responded that there was no distinction for a driver's qualifications. *Id.*

At some point during the day, the Complainant also informed Mr. Murdock that he spoke with the doctor who signed Mr. Berkheimer's card. Mr. Murdock insisted that the Complainant present him with more proof. The Complainant stated that Mr. Murdock asked that he bring him written proof that there is no distinction between interstate and intrastate physical qualifications. *Id.* at 79. However, Mr. Murdock testified that he wanted "expert proof" that would convince him that his initial judgment of Mr. Berkheimer was incorrect. *Id.* at 767. When asked what he meant by "expert proof," Mr. Murdock stated, "[the Complainant] had told me that he was going to get this letter from the medical doctor that [Mr. Berkheimer] was not eligible to drive." *Id.* at 767-68. Mr. Murdock acknowledged that he did not tell the Complainant to avoid Mr. Berkheimer's doctors in getting more proof. *Id.* at 768.

At some point on that Monday, the Complainant visited Dr. Charlesworth's office with a copy of the regulations. *Id.* at 85. He explained to Dr. Charlesworth that the DL-102 form was not a waiver for qualifying intrastate drivers and that physicians do not have discretion to grant waivers or exemptions for impairments involving "hearing, insulin usage, diabetes, [or] vision." *Id.* at 85. As a result of this visit, Dr. Charlesworth wrote a note stating that he based his report on his examination and a copy of Mr. Berkheimer's DL-102 form. EX 34. Dr. Charlesworth further wrote that it was his understanding at the time that there was a distinction between interstate and intrastate requirements for a CDL license. *Id.*

A letter by Dr. Centar, Mr. Berkheimer's optometrist, dated November 12, 2007, stated that the DL-102 he is enclosing is not an exemption. EX 30. The letter explains that the form was faxed to Mr. Berkheimer in November of 2005, along with a letter requesting a medical exemption for Mr. Berkheimer's commercial driver's license. *Id.* The Complainant informed Mr. Murdock of both correspondences on that Monday. He gave Mr. Murdock a copy of Dr. Centar's letter on Tuesday morning before a meeting with Mr. Berkheimer. *Id.* at 94.

On Monday afternoon, the Complainant also revisited the state police to get written proof that there was no distinction between interstate and intrastate physical qualifications for drivers. *See id.* at 78-79. The Complainant was given a copy of PENN. CODE § 231.62, which he presented to Mr. Murdock. *Id.* at 81-84, 694-702, 765-771, CX 43. Thereafter, at about 5:00 p.m., the Complainant called Trooper Mecklin and had him talk to Mr. Murdock. TR at 89-90, 694-702, 765-771. While speaking to the Trooper, Mr. Murdock took the follow notes:

Sent by Trooper Mecklin—Driver must pass interstate physical—no exceptions. Dr. can limit driver to intrastate if there are medical concerns but must have passed interstate physical to be limited by Dr. to intrastate. Told to me by phone from Trooper Mecklin 5:00p.m. 11/12/07.

IESI 21. Mr. Murdock acknowledged that the Trooper told him that there was no difference between interstate and intrastate physical qualifications. TR at 758.

After speaking with Trooper Mecklin, Mr. Murdock decided to schedule a meeting with Mr. Berkheimer to explain the allegations against his driver's license and permit him an opportunity to respond. *See id.* at 90-92, 613, 697-98, 721. Mr. Key called Mr. Berkheimer and scheduled the meeting for the next day at 8:00 a.m. *Id.* at 721.

Later that evening, Mr. Murdock called Mr. Blough and informed him of the recent events regarding Mr. Berkheimer's qualifications. *Id.* at 512-14, 786-87, 800-01. He also told him that the Complainant was getting information from Mr. Berkheimer's doctors regarding his ability to drive. *Id.* Mr. Blough was angry because he felt that the Complainant did not follow his directions. *Id.* at 513. Mr. Blough called the Complainant and left him a message reiterating the instructions he gave him on Friday and that he needed to stop what he was doing until Mr. Blough returned from his vacation. *Id.* at 438-39.

The Complainant responded to Mr. Blough's message in an e-mail which stated that Mr. Blough should have spoken to him before jumping to conclusions. EX 23. The Complainant wrote, "I did exactly what we talked about. I spoke to [Mr. Murdock and Mr. Key] concerning this issue. They are worried about getting sued no matter what we do." *Id.* The Complainant further stated that Mr. Blough told him "it was ok to check into the authenticity of DOT medical card." *Id.* He explained that in checking the card's authenticity, he discovered that was not in compliance with "DOT 391.41." *Id.* The Complainant informed Mr. Blough that he has a letter from the Department of Transportation denying Mr. Berkheimer's request for an exemption, and he will soon have a letter from Mr. Berkheimer's doctor stating that he was misled into believing the DL-102 form signed by Mr. Berkheimer's optometrist was an exemption. *Id.* Last, the Complainant stated, "By the way, I spoke to Ken about the option of terminating Mr. Berkheimer on the fact of his history of being suspended and written up for his past driving incidents. Ken told me that id we were going to do this he wanted to throw everything in." *Id.*

Prior to the Tuesday morning meeting, Mr. Berkheimer was informed by Dr. Charlesworth that the Complainant came to his office. *Id.* at 614. Mr. Berkheimer testified that he told Dr. Charlesworth not to release anymore information until he consulted his attorney. *Id.* at 615.

The meeting was held as scheduled on Tuesday morning. Mr. Murdock began the meeting by explaining to Mr. Berkheimer that an allegation had been made that he is not qualified to drive either interstate or intrastate. Mr. Murdock explained to Mr. Berkheimer

that he was being suspended until the validity of his license was resolved. He told Mr. Berkheimer that they would have to terminate him if it was determined that he was not qualified to drive, but he also promised to make Mr. Berkheimer “whole” if the allegations were meritless. Mr. Berkheimer asserted that his DL-102 form was a valid exemption. At this point, the Complainant interjected and told Mr. Berkheimer that neither the form nor his medical card qualified as a waiver. He told Mr. Berkheimer that he had visited his doctor, at which point Mr. Berkheimer became very upset and the two had a heated exchange about Mr. Berkheimer’s privacy rights. Mr. Berkheimer stated that his HIPPA rights had been violated.

After the meeting, Mr. Murdock sent an e-mail to Mr. Blough informing him that Mr. Berkheimer had been suspended pending further investigation and that he had been instructed to get a physical card with an intrastate exemption. EX 41. Meanwhile, the Complainant claims that he showed Mr. Murdock a fax sent to him by Dr. Charlesworth. *Id.* at 112-113, CX 22, EX 34. The fax was sent at 7:53 A.M. on November 13, 2007. *See* EX 34. The Complainant claims that Mr. Murdock told him that the fax was not readable and that he told Mr. Murdock that he would go back to Dr. Charlesworth’s office to get the original. *Id.* Mr. Murdock’s recollection of these events is not clear. *See id.* at 770-88.

Regardless of how it happened, the Complainant went back to Dr. Charlesworth’s office and had his staff transcribe the fax. *Id.* at 113. Mr. Berkheimer happened to call Dr. Charlesworth’s office while the Complainant was still there. *Id.* at 617. Upon hearing that the Complainant was at his doctor’s office, Mr. Berkheimer called and complained to Mr. Murdock and Ms. Stock. *Id.* at 618, 825. Mr. Berkheimer also contacted Mr. Christopher Lloyd, an aide for Representative Kauffman. *Id.* at 618. After talking to Mr. Berkheimer, Mr. Murdock e-mailed the Complainant and stated, “Are you at [Mr. Berkheimer’s] doctor? If you are I suggest you back off.” IESI 22, 50.

Later that day, at 2:03 P.M., Ms. Stock e-mailed Mr. Blough and told him that she needed to talk to him as soon as possible. EX 49. After finding out that Mr. Blough was on vacation, Ms. Stock sent another e-mail at 5:27 P.M., explaining that Mr. Murdock asked her to briefly speak to him about Mr. Berkheimer. *Id.* Ms. Stock stated that she would like to follow-up with Mr. Blough when he gets back from vacation, “particularly related to [the Complainant’s] inquiries into this employee’s medical records.” *Id.*

After receiving Mr. Murdock’s and Ms. Stock’s e-mails, Mr. Blough responded to the Complainant e-mail from the pervious day. *See* EX 23. In his response he stated,

What I expressly said on Friday when we spoke was not to pursue anything with the DOT stuff until I get back. I told you to speak with Ken about possible termination because of accidents. There are reasons I said this, namely I need to check with HR because of legal concerns I had because of who were dealing with. I mentioned this during the call, I am sure of what I said. I know the DOT regs joel [sic], but what you fail to realize is that the DOT is not the only thing we need to comply with.

Id.

It was around this time, while he was still on vacation in Maine, that Mr. Blough decided that he may have to terminate the Complainant’s employment. TR at 519. Mr. Blough explained that he was “pretty angry” to find out that the Complainant contacted Mr. Berkheimer’s doctor despite his previous instructions. *Id.* at 518-19. As a result, Mr. Blough decided to approach his supervisors, Mr. LoVerde and Mr. Appuzzi, about terminating the

Complainant when he returned from vacation. *Id.* at 470.

On November 14, 2007, during a safety meeting, the Complainant asked the Respondent's drivers to provide him with copies of their birth certificates and social security cards. *Id.* at 171-85, 523-28, 724-25, 815-16. After hearing about the meeting, Mr. Murdock e-mailed the Complainant and stated, "You do not have a need for [social security] cards or birth certificates. Do not ask for them." EX 17.

On November 16, 2007, the Complainant replied to Mr. Murdock's e-mail and carbon copied Mr. Key and Mr. Blough. *Id.* In his reply, the Complainant stated that he needed the social security cards and birth certificates pursuant to "DOT 391.21." *Id.* The Complainant stated, "By having copies of Social Security Cards [sic] & Birth Certificates shows [sic] that we (The Motor Carrier) have done out Due Diligence [sic] in keeping & maintaining accurate files pertaining to DOT 391.21 (Background and Character) & DOT 391.51 (Files and Records)." *Id.* A couple hours later, Mr. Murdock replied, "I repeat, you will not ask or gather these documents." EX 16. Soon after, Mr. Blough responded to the Complainant's e-mail stating that the documents were not necessary and that the Complainant needs to get both his and Mr. Murdock's approval before doing anything that goes beyond the regulation's requirements. EX 17. Mr. Blough further stated, "You can't just look at DOT regs, we also have to comply with other regulatory agencies and employee rights. *Id.*

At 8:23 P.M. that same day, the Complainant responded to Mr. Blough in a somewhat lengthy e-mail. *See* EX 18. In the e-mail, the Complainant expressed his frustration and stated that he has twice been told that the DOT regulations are not the only things that must be considered. *Id.* The Complainant stated that the DOT regulations apply "first and foremost" and that he can ask for anything that falls under the regulations. *Id.* The Complainant further wrote, "To do this job correctly you can't let the threat of a law suit cloud your judgment if you allow that you are in the wrong line of work." *Id.* Mr. Blough responded about thirty minutes later stating that he and the Complainant would speak when he returned from vacation. *Id.*

At 1:19 P.M. on November 15, 2007, the Complainant sent an e-mail to the FMCSA stating that he was having a hard time convincing one of his managers that Pennsylvania has adopted the federal statute concerning medical exams and physical qualifications. EX 43. The Complainant stated that his manager "does not want to accept the fact that there is no difference between an intrastate [and] interstate physical." *Id.* The Complainant further stated,

A driver who has permanent loss of vision in one eye convinced this manager that he is allowed to operate a CMV as long as he stays in the state of PA— intrastate. Can some [sic] please provide me the information that I need to keep an unsafe driver out of a CMB. I would prefer an interpretation of this question. I have tried showing and explaining the regulations to the manager but he does not have the vocabulary. I have done everything short of drawing pictures for him. Please Help!!!

Id.

On that same day, at 1:32 P.M., Mr. Murdock sent an e-mail to Mr. Blough, Mr. LoVerde, Mr. Key, and the Complainant, stating that he just received a call from Representative Kauffman's office and was told that according to PENNDOT Mr. Berkheimer was cleared to drive. EX 19. Mr. Murdock stated that they were faxing him the paperwork

and that he “put [Mr. Berkheimer] in the toter delivery truck (non-CDL) for tomorrow to limit [their] liability.” *Id.*

Upon receiving Mr. Murdock’s e-mail, the Complainant contacted Mr. Lloyd to give him all the facts regarding Mr. Berkheimer situation. *Id.* at 121. Later that day, at 3:21 P.M., Mr. Lloyd e-mailed the Complainant and thanked him for helping sort out “the Mark Berkheimer situation.” EX 20, 40, 46. Mr. Lloyd stated that he contacted the Pennsylvania State Police and they informed him that Mr. Berkheimer was not eligible for a CDL license in Pennsylvania because of his medical condition. *Id.* Mr. Lloyd further stated that Mr. Berkheimer and Mr. Murdock are now fully aware of the situation. *Id.* Mr. Jordan forwarded this e-mail to Mr. Murdock, Mr. Blough, and Mr. Key.

On November 16, 2007, at 10:59 A.M., the Complainant e-mailed Mr. Kevin Stewart of the Pennsylvania State Police and asked if he could clear up an issue concerning vision disqualification. EX 25. The Complainant stated that management believes that the state regulations supersede the federal regulations for granting a waiver or exemption for a driver’s vision. *Id.*

At 3:15 P.M., Mr. Murdock sent an e-mail to Mr. LoVerde, Mr. Blough, Mr. Key, and the Complainant, which stated,

Effective immediately, I have reinstated Mark Berkheimer to a non-CDL position delivering residential toters. He will be driving toters Saturday to help us catch up. I have converted his time off to a 3 day suspension for the Berger [sic] King accident. I will pay him 1 day that he did not work.

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Mr. Stewart responded to the Complainant’s e-mail the following Monday, November 19, 2007. *Id.* In his e-mail, Mr. Stewart stated that Pennsylvania has adopted the Federal Motor Carrier Regulations for qualifying drivers. *Id.* He further explained that drivers with monocular vision of less than 20/40 in one eye do not meet the qualification standards. *Id.* Mr. Stewart explained that there are no waivers for this vision requirement, but an exemption may be granted by the FMCSA. *Id.*

The Complainant forwarded Mr. Stewart’s e-mail to Mr. Murdock, Mr. Blough, Mr. LoVerde, and Mr. Key. *See id.* at 42. On this same day, Mr. Blough called the Complainant and told him that his actions put the Respondent at risk and that he wanted to see him the next morning. *Id.* at 129-31, 529. Following their conversation, the Complainant forwarded Mr. Blough another copy of Mr. Stewart’s e-mail, with the following statement:

And you are telling me that I put this company at risk!! And than you put a sickening feeling in my stomach regarding my job security for doing the right thing. Take a look at this and tell me who put this company at risk. I was not here when Berkheimer was hired!! . . . Remind me again, how long have you been here? I will be damned if you think I am going to allow you to use me as your scapegoat!!! . . . Damn it Check think about what you are doing and who you can trust. This email and every other email have stayed between us, for now. I really hate this shit. Ken will try to put this on you. There is a saying where I come from “Never get in bed with the Devil if you are not prepared to get burned.” Ken is going to try to burn you.

EX 25.

Mr. Blough testified that he was upset when he received the Complainant's e-mail. TR at 531. He could not recall whether it was before or after he received the e-mail, but at some point on November 19, he contacted Mr. Appuzzi, Mr. LoVerde, and Ms. Stock to discuss how he should handle the Complainant's situation. *Id.* Mr. Blough stated that they all agreed that the Complainant should be terminated. *Id.* at 532, 835.

The next morning, on November 20, 2007, Mr. Blough arrived at work around eight-thirty to nine in the morning. *Id.* at 533. He waited some time for the Complainant to arrive and then called him. *See id.* at 131-33, 533. Ultimately, Mr. Blough decided he could not wait any longer, so he called the Complainant a second time and terminated him over the phone. *Id.*

The Complainant eventually arrived at work and was greeted by Mr. Hallock. *Id.* at 134. After collecting his belongings and returning some company property, the Complainant was presented with a termination form filled out by Mr. Blough. *Id.* at 135-38. The Complainant refused to sign the form. *Id.* at 138-39. The termination form indicates that the Complainant was terminated for unacceptable performance, insubordination, and violation of company rules. EX 6. *Id.* Mr. Blough testified that he ultimately terminated the Complainant because he found his behavior during his altercation with the landfill manager, the Shoop incident, and during his correspondences when he stated that he did not care about non-DOT regulations to be reckless. *Id.* at 471.

Upon reviewing the evidence of record, I find that both the Complainant and the Respondent are covered under the Act. The Respondent is a covered employer because, in providing trash removal services, IESI is engaged in a business affecting commerce that assigns employees to operate commercial motor vehicles as defined by the Act. 49 U.S.C. § 31101. Complainant, in his capacity as a safety and traffic coordinator for the Respondent, is a covered employee because he was an individual who directly affected commercial motor vehicle safety in the course of his employment. *Id.* Respondent does not refute that the parties in this claim are covered. Respondent's Post-Hearing Brief ("RBr.") at 25.

Moreover, I find the Complainant's complaints to his supervisor, Mr. Blough, and Mr. Murdock and Mr. Key, as well as to the Pennsylvania State Police and the FMCSA, were related to commercial motor vehicle safety and, as a result, constitute protected activity under the Act. The Respondent's argument that the Complainant was not engaged in protected activity because he did not refuse to operate a vehicle is meritless. *See* RBr. At 29. Section 31105 of the Act states,

(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, 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 regulation, standard, or order, or has testified or will testify in such a proceeding; *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 or health; or
- (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105 (emphasis added). Refusing to operate a commercial motor vehicle because of a safety concern is one type of protected activity under the Act. *See id.* However, pursuant to § 31105(a)(1)(A), any employee that complains about a violation of commercial motor vehicle safety regulation or standard is protected, regardless of whether they refused to drive a commercial motor vehicle.

Nevertheless, a thorough review of the evidence reveals that the Complainant has not established any direct evidence of discriminatory retaliation by the Respondent for his protected activity. Therefore, the Complainant's only avenue of success in this proceeding is to establish a *prima facie* case by proving that (1) he engaged in protected activity under the STAA; (2) he was the subject of an adverse employment action; and (3) there was a causal link between his protected activity and the adverse action.

The Complainant does establish a *prima facie* case through the inferential method. As noted above, I find that the Complainant was engaged in protected activity when he complained to Mr. Blough and Mr. Murdock, as well as the Pennsylvania State Police and the FMCSA. I also find that the Complainant was subject to an adverse employment action by the Respondent. The Complainant's termination form and the testimony of the parties clearly establish that the Respondent terminated the Complainant's employment on November 20, 2007. *See* EX 6.

Additionally, I find that evidence supports that the Complainant's termination was in some way related to his protected activity, therefore establishing the necessary nexus for a *prima facie* case. The Complainant first engaged in protected activity on November 9, 2007, when he reported a potential safety violation regarding Mr. Berkheimer's driving qualifications to his supervisor, Mr. Blough, as well as two other of the Respondent's managers, Mr. Murdock and Mr. Key. *See* TR at 64, 69, 430-32. The Complainant continued investigating Mr. Berkheimer's qualifications in the following eleven days before he was terminated on November 20, 2007. The Respondent was clearly aware of the Complainant's protected activity prior to terminating him as the Complainant reported it to his supervisor and the Respondent's management staff. The temporal proximity of the Complainant's protected activity and his termination sufficiently establish the requisite causal link for a *prima facie* case. *See Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989) (temporal proximity is sufficient as a matter of law to establish the final element in a *prima facie* case of retaliatory discharge); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987). I do not find any intervening causes in the record worthy of destroying the inference established by the timing of the Complainant's termination.

Since the Complainant has established a *prima facie* case, the burden now shifts to the Respondent to articulate a legitimate, nondiscriminatory reason for its decision to terminate the Complainant's employment. The Respondent asserts that the Complainant "was discharged solely for his intemperate, volatile, insubordinate and antagonistic conduct, and not because of any safety complaint protected under the STAA." RBr. at 31. Respondent argues that that the Complainant was terminated "because he repeatedly failed and refused to follow his supervisor's express instructions and challenged his supervisor's authority, integrity, and credibility with inappropriate and insulting correspondence."

It is clear from EX 2 and 3, and the parties' testimony, that Mr. Blough was the Complainant's supervisor. Mr. Blough decided to terminate the Complainant's employment with the assistance of his supervisors, Mr. LoVerde and Mr. Appuzzi, as well as Ms. Stock,

the Respondent's director of human resources. See TR at 470, 532, 835. While Mr. Blough consulted with his superiors and human resources, it is evident that he made the ultimate decision to terminate the Complainant.

The termination form Mr. Blough completed indicates that the Complainant was discharged for unacceptable performance, insubordination, and violation of company rules. EX 6. Mr. Blough testified that he ultimately terminated the Complainant because he found his behavior during his altercation with the landfill manager, the Shoop incident, and during his correspondences when he stated that he did not care about non-DOT regulations to be reckless. *Id.* at 471. Mr. Blough was also troubled by the Complainant's repeated failure to follow instructions regarding contacting Mr. Berkheimer's doctor and his insistence to collect employee social security cards and birth certificates. *Id.* at 379, 440. Mr. Blough clarified that he had no problem with the Complainant inquiring about the regulations or contacting the state police. *Id.* at 440. He stated,

I would have never terminated [the Complainant's] employment because he found out that our driver should not have been driving. I have no problem that that was found out. I had a problem with the way he went about finding out. I feel that there would have been a much better way that would not have put the company in harm's way legally, that if he would have listened to my direct request twice, that that wouldn't have happened.

Id. at 472.

The Complainant argues that any orders from Mr. Blough to stop the DOT investigation or to refrain from contacting Mr. Berkheimer's doctor were contrary to the Respondent's responsibility under the law, and therefore, "clear attempts to deter whistle blowing activity." Complainant's Proposed Findings of Fact and Conclusions of Law ("CPF") at 20. The Complainant asserts that any frustration or impulsive behavior on his behalf that may be viewed as insubordination is protected by the leeway doctrine. *Id.* at 21. Further, the Complainant asserts that the Complainant could not have been lawfully discharged because "the Respondent's unlawful interference into the employee's protected activity provoke[d] some kind of indiscretion on the part of the employee." *Id.* at 22.

Upon reviewing the evidence, I find that the Respondent's explanation for terminating the Complainant for insubordination and failing to follow direction is well-supported. Even if he was right about Mr. Berkheimer's qualifications, the Complainant defiantly ignored his supervisor's instructions and carried out his duties on his own terms.

On November 9, 2007, at the beginning of the Complainant's investigation into Mr. Berkheimer's qualifications, the Complainant had a discussion with Mr. Blough, during which he was instructed to check Mr. Berkheimer's files and see if the doctor that signed his medical card actually existed. Mr. Blough told the Complainant not to pursue anything else regarding Mr. Berkheimer's physical until he returned from his vacation the following week.¹

¹ I find Mr. Blough's recollection of this conversation to be more credible, because it is more consistent with the statements made in the subsequent e-mails between him and the Complainant. In his November 12 e-mail to Mr. Blough, the Complainant stated that he did as Mr. Blough asked and looked into the authenticity of Mr. Berkheimer's medical card. EX 23. After determining that it was not incompliance, the Complainant decided it was the Respondent's responsibility to ensure that the medical examiner was properly informed of the regulations, which is why he continued his investigation. *Id.* The Complainant's e-mail suggests that he was instructed to limit his inquiry to the authenticity of Mr. Berkheimer's medical card until Mr. Blough returned from vacation and could be part of the process. Mr. Blough's subsequent e-mail to the Complainant, which

Id. at 432. Mr. Blough explained that he wanted to address Mr. Berkheimer's situation when he returned from vacation so he could involve the human resources office. *See id.* at 432. Despite Mr. Blough's instructions, the Complainant continued to investigate Mr. Berkheimer's qualifications, without any further consultation with Mr. Blough, by contacting his doctors.

Even assuming that Mr. Blough's instructions were not clear the first time, any ambiguity should have been clarified when Mr. Blough left the Complainant an angry message the following Monday. *Id.* 438-39. Mr. Blough again instructed the Complainant to stop proceeding with the investigation and wait until he returned from vacation. *Id.* Ignoring his superior's instructions, the Complainant returned to Dr. Charlesworth's office the following day. At this point there was no immediate safety concern as Mr. Berkheimer was suspended from driving. Even if Mr. Murdock told the Complainant that Dr. Charlesworth's letter was illegible, the Complainant could have easily respected his superior's instructions and waited until Mr. Blough returned from vacation to work on the case together. With no immediate safety concern, the Complainant's extra efforts were unnecessary and insubordinate.

It should also be noted that the fact that Mr. Murdock was at the very least complicit in contacting Mr. Berkheimer's doctor is of no consequence. Both the parties and the record clearly establish that Mr. Murdock held no authority over the Complainant. *See* EX 2 & 3. Mr. Blough, however, was the Complainant's direct supervisor, and his instructions should have been respected to the extent that they did not cause a safety concern. At the very least, the Complainant had a responsibility to keep Mr. Blough apprised of the situation and the urgency of keeping Mr. Berkheimer off the road. If the Complainant felt that Mr. Blough's instruction to wait caused an unsafe risk, he should have expressed his concern directly to Mr. Blough rather than unilaterally deciding to proceed with an investigation. The Complainant's arguments against the Respondent would have been much more substantial if he had consulted with his superior before taking action. Mr. Blough's unavailability while on vacation is no excuse as there is no evidence of the Complainant leaving Mr. Blough any messages or sending any e-mails between Friday evening and when he responded to Mr. Blough's message on Tuesday.

Moreover, I find that the Complainant's e-mails to Mr. Blough on November 16 and 19 were highly inappropriate. *See* EX 18 & 25. These e-mails reflect the defiant attitude the Complainant had towards his superior and his consistent failure to follow instructions when he felt he was right. *See* EX 18. While the e-mails and the incident with the Complainant collecting employee birth certificates and social security cards may have occurred after Mr. Blough decided to terminate him, they only reinforced his ultimate decision. Additionally, I find Mr. Blough's and Ms. Stock's concern with the Complainant's statement that the DOT regulations are the only thing that he and Mr. Blough should worry about, despite the fact that he had twice been instructed that this was not the case, is legitimate.

states, "What I expressly said on Friday when we spoke was not to pursue anything with the DOT stud until I get back," further supports Mr. Blough's recollection of the original conversation. *Id.* Additionally, Mr. Blough's recollection is supported by the Complainant own testimony. The Complainant testified that Mr. Blough told him to go ahead and check to see if Mr. Berkheimer fabricated his doctor and that they would look into the situation when he returned from vacation. TR at 69.

As the Complainant notes, the leeway doctrine affords employees some latitude in their insubordination when it concerns their protected activity. The doctrine originated in *Kenneway v. Matlock, Inc.*, 1988-STA-20 (Sec’y June 15, 1989). In *Kenneway*, the complainant refused to accept a driving assignment. Thereafter, a conversation ensued and the complainant was discharged. Respondent argued that the complainant was discharged for vulgar and abusive language. The Secretary agreed with the ALJ’s conclusion that the complainant’s language and conduct during the conversation did not remove him from protection afforded under the STAA. The *Kenneway* decision relied on the NLRB Fifth Circuit cases for the fact that courts have recognized the use of intemperate-language associated with some forms of statutorily protected activities due to the adversarial nature of these activities. The Secretary applied a balancing test to determine the appropriate application of the doctrine. The test balances the right to engage in statutorily-protected activity while permitting some leeway for impulsive behavior against the employer’s right to maintain order and respect in its business by correcting insubordinate acts. A key inquiry is whether the employee has upset the balance that must be maintained between the protected activity and shop discipline. *Kenneway*, 1988-STA-20.

I find that the leeway doctrine does not apply in this particular case. The Complainant’s insubordinate behavior and improper language was clearly not impulsive as it was memorialized in lengthy e-mails that permitted him time to reflect before actually sending them to his superior and colleagues. Moreover, the Complainant’s defiance towards his superior and pattern of doing things his way clearly have the potential to upset “shop discipline.” Mr. Blough’s concerns that the Complainant did not respect authority and could not follow direction seem legitimate.

Additionally, in *Harrison v. Roadway Express, Inc.*, 1999-STA-37 (ARB Dec. 31, 2002), *aff’d* 2nd Cir. Nov. 30, 2004, the Administrative Review Board determined that “[T]he ALJ inappropriately applied the labor relations standard cited in *Kenneway* to determine whether Harrison was entitled to the protection offered by § 31105(a)(1)(A). *Kenneway* arose under § 2305(b), which is now § 31105(a)(1)(B) As noted above, the Complainant engaged in protected activity under § 31105(a)(1)(A) as he did not establish a “refusal to drive.” Thus, following *Harrison*, the *Kenneway* decision does not apply to the current case.

In further analyzing whether the Respondent’s articulated reasons for discharge are credible, I find that there is sufficient evidence demonstrating that the Complainant was not a model employee. He disappointed Mr. Blough on several occasions before and after the Burger King investigation. Mr. Blough expressed frustration regarding the Complainant’s handling of the Hallock traffic incident, Shoop drug screening incident, and the collection of birth certificates and social security cards.

Based on the above determinations, I find no discriminatory intent in the Complainant’s termination. The evidence supports that the Complainant was terminated for legitimate, nondiscriminatory reasons, namely his insubordination and failure to follow instruction.

Nevertheless, it should be noted that when there are both legitimate and discriminatory reasons for an adverse action, the dual motive analysis applies. *Spearman v. Roadway Express*, 1992-STA-1 (Sec’y Jun 30, 1993), *Yellow Freight System v. Reich*, 27 F.3d 1133, 1140 (6th Cir.1994). Under the dual motive analysis, the burden shifts to the respondent to

show that it would have taken the same action against the complainant even in the absence of protected activities. *Asst. Sec. and Chapman v. T.O. Haas Tire Co.*, 1994-STA-2 (Sec’y Aug. 3, 1994), appeal dismissed, No. 94-3334 (8th Cir. Nov. 1, 1994).

Even if there was a discriminatory reason for the Complainant’s termination, I find that the Respondent would have taken the same action absent any protected activity. The complainant must prove by a preponderance of the evidence that the reasons offered by the respondent were not its true reasons but were a pretext for discrimination. *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002); *Ridgley v. C.J. Dannemiller Co.*, ARB No. 05-063, ALJ No. 2004-STA-53 (ARB, May 24, 2007). The ultimate burden of persuasion that the respondent intentionally discriminated because of the complainant's protected activity remains at all times with the complainant. *St. Mary's Honor Ctr.*, 509 U.S. at 502. Mr. Blough clearly explained that he terminated the Complainant because of his repeated disappointment with his decisions, failure to follow instructions, express statement that he would not consider anything but DOT regulations in fulfilling his job responsibilities, and most importantly, his insubordination. I accept that Respondent’s reasons for discharge are both legitimate and credible. Further, I find that the Complainant’s allegations of a conspiracy to keep Mr. Berkheimer on the road fall short of establishing pretext.

CONCLUSION

In summation, I find no evidence to indicate that any alleged adverse action taken by the Respondent was motivated by the Complainant having engaged in alleged protected activity. As the Complainant has failed to establish that the action against him was motivated by any prohibited reasons, his claims must be denied.

RECOMMENDED ORDER

It is hereby **ORDERED** that the claim is **DISMISSED**.

A

Daniel F. Solomon
Administrative Law Judge

NOTICE OF REVIEW: The Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary’s Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.