

**U.S. Department of Labor**

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**Issue Date: 22 July 2005**

**Case No.: 2005-STA-24**

**IN THE MATTER OF**

**LANCE JOHNSON,**  
Complainant

**vs.**

**ROCKET CITY DRYWALL,**  
Respondent

**APPEARANCES:**

**LANCE JOHNSON, Pro Se,**  
On Behalf of the Complainant

**CAROLYN ANN McCALISTER, ESQ.,**  
On Behalf of the Respondent

**BEFORE: PATRICK M. ROSENOW**  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

***BACKGROUND***

This matter involves a complaint under the Surface Transportation Assistance Act<sup>1</sup> brought by Lance Johnson (Complainant) against Rocket City Drywall (Respondent). On 1 Sep 04, Complainant filed by e-mail an administrative complaint. The Office of Occupational Safety and Health Administration conducted an administrative investigation and dismissed the complaint on 8 Feb 05.<sup>2</sup> On 19 Feb 05, Complainant filed a request for a hearing. On 11 Mar 05, I issued an order setting the hearing for 15 Apr 05. The parties subsequently agreed to continue the case to 11 May 05.

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<sup>1</sup> 49 U.S.C. § 2301 et seq. (2004).

<sup>2</sup> As this is a de novo review, the substantive aspects of the OSHA findings are not relevant.

Respondent was represented by counsel and Complainant appeared pro-se. On 11 May 05, a hearing was held at which the parties were allowed the opportunity to call witnesses, examine and cross examine those witnesses, offer exhibits, and make arguments. Both parties declined the invitation to submit post hearing briefs.

My decision is based upon the entire record, which consists of the following:<sup>3</sup>

Witness Testimony of:

COMPLAINANT  
JEWELL STANLEY  
CHARLES STANLEY  
KENNY BANNISTER  
MIKE BLACKMON  
JAMES ANDREWS

Exhibits:

Claimant's Exhibits (CX) 1-9, 12, 14-16  
Employer Exhibits (EX) 1-8

Stipulations<sup>4</sup>:

1. Complainant had a commercial driver's license (CDL) while he worked for Respondent.
2. Respondent discharged Complainant on 4 Jun 04.
3. Respondent paid Complainant \$13,099.80 in gross pay during 2004.

***POSITIONS OF THE PARTIES***

Complainant argues that he engaged in protected activity in a number of ways. First, he complained about not having any safety training and being asked to operate in a way contrary to the safety limitations of that equipment. Second, he complained about

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

<sup>4</sup> Tr. 9

another driver operating equipment without the required CDL. Third, he complained about various unsafe conditions of the trucks. He further argues that Respondent terminated him because of those activities.<sup>5</sup>

Respondent concedes that Complainant did engage in protected activity, but responds that it addressed his complaints. Respondent argues that it terminated Complainant not because of those complaints, but because he violated safety procedures and destroyed property. Specifically, he twice backed without a spotter. He received a warning the first time and was terminated the second.<sup>6</sup>

### *EVIDENCE*

Complainant testified that:

Prior to applying with Respondent, Complainant had experience in driving boom trucks and flatbed trucks. Complainant first started working for Respondent in 1998 and worked for Respondent intermittently. He quit for a while in 2001 because of safety concerns but returned after a few months. Respondent is in the drywall, roofing, and drywall material supply business. They deliver drywall to residential building sites. Complainant would drive the truck to the site, take the drywall off the truck with the boom and leave it at the construction site.

There was no formal training. Respondent assumed that Complainant knew what he was doing since he worked for them before. When he first went to work for Respondent, they didn't have boom trucks. They operated out of flat beds. He would watch someone else do the job and then be told to try it himself. When he started work for Respondent he never encountered any type of safety training or job training.

In December 2003, January 2004, March 2004, and May 2004, Complainant saw James Andrews, his supervisor at the time; drive a single vehicle with a 26,000 pounds gross vehicle weight rating and a vehicle in tow, without a commercial driver's license. By law that is a requirement. He asked Mr. Andrews several times if he had a CDL. Each time Mr. Andrews said no. He raised the CDL issue to Charlie Stanley, Jewell Stanley, and Matt Beavers.

There would be occasions when Complainant was told to take out windows in order to get drywall upstairs to the second floor, but there was no training. Complainant would be told that it is a part of the job and given a hammer and crowbar. He was supposed to lift the drywall up, put it against the house, come

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<sup>5</sup> Tr. 17

<sup>6</sup> Tr. 18-20

out of the window, and stand on it as it was hanging from the boom. There was five thousand pounds of drywall on the boom. Warnings not to do that were all over the boom.

In 2001, 2003 and 2004, Complainant raised these issues to Mr. Andrews, Mr. Stanley, and Mrs. Stanley and other employees. When he complained about taking the windows out, he was told to do it or find another job. He quit in 2001 because of the lack of safety, but went back because he needed the money.

The sticker on the crane that Complainant was operating said, "Danger. "Do not stand on, or under, ride on or swing during crane operation." The crane would be operated while he was standing on the drywall. Complainant has seen on a couple of occasions other people lift up drywall while somebody stood on it and took windows out. Matt Beavers did that one time.

Complainant complained about that to Charlie Stanley and James Andrews. Complainant is not aware that they made any improvements or changes. Charlie Stanley would answer that if Complainant didn't like it he could find another job. Jewell Stanley would say that it was a part of his job to take the windows out. Some employees suffered cuts, bruises, and scrapes from prying out windows. There were also some broken windows, but Complainant isn't aware of any falls. Respondent did get safety harnesses after Complainant complained in April 2004.

Toward the end of his employment with Respondent, Complainant wanted to find another job because of his concerns about safety. Respondent knew Complainant was trying to upgrade his license and become an over the road truck driver. The new employer actually called Respondent and asked if Complainant was still working there. Complainant told Respondent he would give two weeks notice. Respondent took Complainant off the truck and put him on hourly wage, which was a lot less money than actually going out on site and doing work.

Complainant had trouble getting the new job. After a while, Jewell Stanley asked Complainant whether he was going to quit or stay. He told her he would stay until he could find something else. Respondent let Complainant go back out on the truck to make a delivery that day. Complainant and two other employees, Kenny Bannister and Mike Blackmon, went out on the load. They drove a flat bed truck and he drove the boom truck.

That truck is shown in CX-2 and CX-4. It didn't have seat belts in it and was out of date. Complainant had raised safety issues on that truck, but Respondent didn't use it in their operations every day. It was a backup truck. It had a number of

problems. The crane wouldn't hold drywall in its place, so it was very hard to maneuver. Complainant complained about it. There were accidents with that truck and other people complained about it also. They were told to do the work or lose their job.

Complainant met Kenny Bannister and Mike Blackmon at the site. Since Complainant drove the boom truck out there and they went inside the house, Complainant assumed that they wanted him to operate the boom. He set up the truck and started to operate the boom to start moving the drywall. The boom was faulty and even if the load was on straight, it would rock back and forth, causing the weight to shift. The load was three to five thousand pounds. Two times a bunch of drywall fell out of the crane. Mike and Kenny knew what happened and told Mr. Stanley on the radio. Mr. Stanley told them to tell Complainant to get it back on the truck and bring it back to the warehouse. Once the rest of the drywall was distributed, Complainant drove back.

Upon arriving back at Rocket City, Complainant parked the truck. He had to back it into the warehouse due to limited space. Respondent has a two level warehouse with a ramp. As Complainant was backing in at an angle, the outside tire hit the edge of the ramp and blew out.

After Complainant parked the truck he went to see Mr. Stanley and they talked about what had happened with the drywall. Mr. Stanley seemed upset that Complainant hadn't picked up the load correctly. Complainant responded that the equipment didn't work right and that it was just an accident on the job. Mr. Stanley assumed it was Complainant's fault and fired him. It was then that Complainant told Mr. Stanley about the blown tire.

Complainant was never written up for a safety violation. Nothing Complainant did seemed to come out right. It seemed like everybody that worked there was against Complainant, perhaps because he made allegations about their drug use and gambling.

Complainant waited until August to report the alleged safety violations which occurred in April and earlier because he didn't know he could complain about them until he learned about it in truck driving school in June of 2004.

Jewell Stanley testified that:

Respondent sells and delivers roofing, drywall, and related supplies. As Respondent's vice president and office manager, she keeps the bookwork in order and more or less oversees everyone who works there.

Complainant was hired to be a driver and deliverer. When he first came to Respondent in 1998, it was through the state employment service. He represented himself as having experience operating a boom and being a forklift operator. He did not have his CDL license at that time.

In 1998, Complainant worked for Respondent from July until September and then quit. He came back December of 1998 and worked until March 1999 when he quit again. Then he came back in early 2000 and worked until early 2002. He quit at that time, stating that he wanted to go back to school and get some courses so that he could join the Navy. He was on a temporary part-time basis the week before Thanksgiving of 2003 to help move Respondent to a new location. He returned again on 1 December 2003 and was terminated 4 June 2004.

Complainant said that he was giving two-week notice. Near the end of the two weeks, he came forward, said he couldn't go to truck driving school at that time and asked if he could stay on with Respondent. She told him he would have to remain in the warehouse position because they had already put Kenny Bannister on the truck to be trained and it wouldn't be fair to take him off the truck just because Complainant wanted to stay a few weeks longer. Complainant agreed to that.

At various times Complainant did complain that it was unsafe to stand on the drywall to take out a window. He was told that if he did not feel it was safe, somebody else could take the window out for him or the drywall could be walked up the stairs. Complainant was never made to do anything that he did not feel was safe.

Later, Respondent did secure fall protection harnesses and lanyards, assembled the employees, and showed them the harnesses. Mr. Andrews demonstrated how to wear the harnesses. They were told to put them in their truck and use them when they were up on the drywall. The harnesses were to make them feel more secure and prevent falls.

The drywall that they're standing on is four feet by twelve feet and is a large platform. It lays flat as they stand on it. The boom is not in motion because it's locked in place and will remain up against the house.

Respondent does not have any written rules and procedures that are given to employees. They are verbally informed of the rules and procedures regarding safety. Every time that she would see a safety violation, she pointed it out to them. RX-4 is a list of the safety procedures and safety rules which Respondent requires employees to follow. They are the safety rules and procedures that employees

would be given when they're first employed and during meetings throughout the year. If some other safety complaint was brought up, it was addressed and then incorporated into the procedures.

Rule number one is to never back a boom truck without a spotter, because Respondent had had some problems with boom trucks backing over things. One of Respondent's drivers had backed into a light pole over in Decatur and put the lights out in a two block area. It was incorporated into the rules and Respondent made backing the boom truck without a spotter a "fireable" offense. If an accident occurs, the driver is subject to an immediate drug test. The spotter is someone that stands toward the rear of the truck and looks out for objects that might be in the way. Normally, it's the helper that's in the truck.

The operator of the boom has to make sure that the drywall is picked up level. If he picks it up at an angle he has to replace it on the truck.

RX-3 is Respondent's reply to the Alabama Department of Industrial Relations Employment Compensation Division concerning Complainant's application for unemployment compensation. It shows the reason for termination was unsatisfactory work. Complainant was discharged for violating safety rules and damaging company property.

On 4 June 2004, Complainant dropped two lifts of drywall, damaging 68 boards. Upon his return to the warehouse, instead of driving into the warehouse, he chose to back into the warehouse with no spotter. If Complainant didn't have anyone in the truck with him to spot, he shouldn't have backed the truck up. He hit the ramp with the right rear outside tire and blew it out. It was not the first time that he had backed without a spotter. On a previous occasion, he had been given a verbal warning by James Andrews.

Late on the Friday afternoon of 4 June 2004, Complainant came into the office after returning to the warehouse. She, Charlie Stanley, Mike Blackmon, and Kenny Bannister were all in the office. Charlie asked Complainant what happened. Complainant answered "Well, things happen, I dropped two lifts of drywall and that's that." Charlie told Complainant to go home. Everyone walked out of the office to the warehouse and Charlie and Kenny and Mike started toward the back to make sure everything was secured. Complainant was still standing there. She asked Complainant why he was still there. Complainant replied "Well, since you're already upset, I'll tell you. I'm a man. And I'll take responsibility. I backed the truck up and hit the ramp and blew out a tire." Charlie said, "Well, you're fired then."

There was another instance at the Church Street location before Complainant's last employment period when his spotter told him to go one way, but Complainant decided to ignore him and go another way. He hit a wire on a light pole and broke the wire down.

Another incident was also during a previous employment, although it did not involve backing. Complainant had been delivering drywall to a house. When he came up the driveway to get to the street, he ran over a brick mailbox. He said he could not see over the cab of the truck. She asked what if it had been a kid standing there and Complainant replied he would have hit the kid.

She has no written documentation of Complainant backing trucks and hitting light poles, but he was verbally warned. The damage to the light pole was very obvious. Complainant was written up once for insubordination.

Respondent has three boom trucks that are required to be driven by a driver who has a CDL. The piggy back truck with a mechanical forklift on the back does not meet the 26,000 pound requirement and a driver would not be required to have a CDL.

There was one time Mr. Andrews drove one of the boom trucks which would require a CDL license. That was in March of 2004. Complainant and his helper went out to a job about 7:45 in the morning. He put the boom truck in a place where he should not have tried to put it, and it was leaning precariously. The only thing that was holding it from flipping over was a large boulder against the gas tank. The home owner called the office and the wrecker driver suggested that someone get out there. They said Complainant either was refusing or unable to cooperate with them in getting the truck out. They felt that he might be impaired in his driving ability. Mr. Andrews and the office saleslady went out to the job, and assessed Complainant's actions. Mr. Andrews made the judgment call that Complainant should not drive the truck back. Complainant was put in the pickup with the saleslady. Mr. Andrews did drive the truck back to the warehouse. Complainant was sent for a drug screen for cause at that time. This is the only instance that she is aware of that of Mr. Andrews driving a CDL required vehicle without a CDL license. At the time, there wasn't anyone else who could have driven the truck back.

She doesn't know for sure if CDL is required for dual action trucks. Respondent does require a copy of a motor vehicle record for all its drivers. She has a copy of Complainant's, which he provided to her.

Respondent didn't have other employees with similar accident records. Respondent does have employees drug tested. Complainant was drug tested randomly as were the other employees. James Andrews has been tested twice, as have Kenny Bannister and Mike Blackmon.

Respondent terminated Complainant for his attitude and for the whole situation, including the expense that he caused by not properly operating forklifts on the drywall and backing without a spotter. This was the second time within a month. The first time that he was warned verbally was in May, and this was June. Just the drywall damage would have brought a reprimand. Complainant's normal response was to say that "things happen." That's how he explained dropping the load. He had a careless, nonchalant attitude that "it's not mine, why should I care what happens to it?"

She has no knowledge that Complainant ever raised an issue with the operation of that boom. It was an old, secondary backup truck. The new truck was out in Kansas having some warranty work done on it, so Respondent had to put that one into service. Mr. Blackmon and Mr. Bannister had been operating that truck safely.

Charles Stanley testified that:

He is Respondent's owner and president.

The single piggy back truck in question does not require a driver to have a CDL license. He double checked the sticker on the door. Any truck under 26,000 pounds doesn't require a CDL license. The sticker says it's 24,140 thousand pounds. The older truck described by Complainant does have seat belts. They are in the floor and will strap across the lap but not across the shoulder. The truck is an '89 Pace Star 5,000, International.

The boom Complainant described will clamp the drywall. If the drywall is picked up wrong, it will lean to one end. Mike Blackmon and Kenny Bannister told Complainant to set it back down, but Complainant said it will be all right and brought it over. The drywall fell on the ground. After another lift or two, Complainant picked up another load and did the same thing. Complainant was improperly positioning the board. It has to be picked up in the center where the board will be level and then clamped it so it won't come off the lift.

Since that incident, other drivers have used the same vehicle. The only problem with the drywall lift is when a new man picks it up improperly and lets a lift slide off. Experienced drivers don't have any problems with the crane. One crane operates just like the other cranes do. The crane has DOT inspection stickers on it, and is kept serviced. If anybody has any complaint about it, it is fixed.

Complainant has complained about not wanting to take a window out. Mr. Stanley told Complainant he didn't have to do that, but could walk the drywall up the stairs, instead. The guys that do the delivering get paid by the boards, not by the hour. They make real good money, but their job is to put the drywall in the house. They don't have to use the upstairs crane. They can walk it up the stairs, even though that takes longer and it cuts into their pay. When that stack of drywall pushes against the house, and the boom is locked, five or six men can get out there and it won't move. Even if the hose is cut, the boom is locked and won't move. That would not be a violation of what it says on the equipment, because it says while in operation. That crane is not in operation. It is parked.

Complainant talked about riding the crane, but that's incorrect. That's not the way to do it. The drywall is secured and they go up the stairs and step out on the drywall with a hammer. The window is tacked with little short nails. They remove the nails, pull the window out, and pass the drywall through the house. Our competition does it the same way.

Respondent also got some safety harnesses. They had a meeting to tell everyone that they can hook up and if they trip or fall, the harness will catch them before they get to the ground.

On the day Complainant was fired, Mr. Stanley had radioed out to the job to find out what was taking so long. Mike and Kenny said Complainant had dropped two lifts and they had to pick it up off the ground before they could bring it back. When Complainant came back in the office, he asked Complainant what happened. Complainant replied that things just happen and it was just an accident. Mr. Stanley's blood pressure was going up, so he told Complainant to go on and they would talk on Monday. Mr. Stanley went back with Kenny and Mike to make sure the back was secured. Complainant was still there and said he was a man. Then he said he blew a tire out back there when he was backing up.

Everybody else had been pulling in, but Complainant decided to back in, hit a ramp, and blew a tire out. That's when Mr. Stanley told Complainant, "You're fired. You can just go on home. That's it. I've had all I want of you. You're fired." If he was going to back in, he could have stopped at the office and asked Kenny or Mike to spot for him.

If the truck is pulled in it has to be backed out.

Kenny Bannister testified that:

He has been employed with Respondent since 5 March, 2004. His duties include driving a boom truck, delivering sheetrock, operating a fork lift, and helping around the warehouse. He was employed with Respondent when Complainant was employed with Respondent and worked on site with Complainant.

The day Complainant was fired they were at a jobsite and Complainant was attempting to pick up a lift of sheetrock. Complainant was told that he had it picked up wrong, but he disregarded the instructions and dropped it. That happened twice.

Then when Complainant got back to the warehouse, Complainant backed in without a spotter. The drivers have been told numerous occasions not to back without a spotter. Mr. Bannister takes safety seriously and knew Complainant was alone in the truck but did not volunteer to help Complainant back the truck because he did not see Complainant pull into the yard.

Complainant came in and Charlie asked him what had happened. Charlie knew Kenny and Mike had told Complainant to reset the load. Complainant had a nonchalant attitude. Charlie was frustrated and asked Complainant to leave and go home. Mrs. Stanley also asked Complainant to go home.

Complainant didn't go home. Everyone proceeded outside of the office and Complainant said that he had blown a tire out. That's when Charlie let go. He said, "Well, you're fired. I'm sorry."

All drivers are required to have a spotter when backing up and are reminded at least three times a week. Employees are subjected to random drug tests. They are also tested if they're involved in an accident or any type of situation that is questionable. Mr. Bannister does not remember Complainant being given a choice to take a drug test.

Mr Bannister is not a supervisor and not in authority to give instructions to another worker such as Complainant. He has backed without a spotter and got a verbal warning.

Kenny is not being compelled to testify and is not fearful of losing his job if he did not testify.

Mike Blackmon testified that:

He is currently employed with Respondent. He drives trucks to the jobsites. Once there he gets out to look around and see if any objects are in the way. Then he gets the drywall into the house. He stocks the drywall, operates the forklift, and does anything that needs to be done around the warehouse.

There is more than one option to get drywall into the house. The first option is through the windows. Complainant refused to take the training on how to take the strips out of the window without even having to stand on the boom. He didn't want to hear about taking windows out at all. The drywall is secured against the house and the workers can just go inside the house and step out on the drywall. If the valve is off, it stays there and won't move any more. The other option is to walk it up.

Mr. Blackmon was employed at Respondent at the same time Complainant was and worked on site with him.

On June 4<sup>th</sup>, Complainant had picked the sheetrock up and it had a lean to it. Mike and Kenny told Complainant to take it back. Complainant said, no, he had it. As soon as Complainant got it by the window, it destroyed the window. Kenny fixed the window. On the next lift, it did the same thing. Complainant caught it on the side and it just leaned down and fell on the ground.

Mr. Stanley called and asked what was taking so long on the jobsite. Mike and Kenney reported the problem to Mr. Stanley. Everyone got back to the warehouse. Normally, trucks stop up front when there is damaged drywall so Charlie can look it over and decide where to put it. But, Complainant went to the back. Everyone was in the office for three or four minutes before Complainant came up. That's when Charlie found out that Complainant had been told to set the loads back down. Charlie asked Complainant what happened. Complainant just said that he dropped the sheetrock. Charlie told Complainant to go home and they would talk about it Monday. Complainant stayed around and Mrs. Stanley also told him to go home. Everyone left the building and went back to see the sheetrock. Complainant said he might as well tell now that while he was backing in, he blew out the tire. Then Charlie said, "I tell you what, you're fired."

The drivers were told not to back the truck in. Two months before, Charlie had said to never back a truck in again without a spotter.

All employees were subject to random drug testing and Mike had been tested. Mike once damaged an unmarked septic tank with Kenny down in Abbeville. He wasn't drug tested after it. It was unmarked and underground.

Respondent doesn't give any extra pay for safety. Mr. Blackmon has never had an accident in any commercial vehicle. Respondent's policy is that workers are subject to random testing or testing any time that Respondent suspects a worker is impaired in any way while operating a vehicle on the job.

Mr. Blackmon was not getting paid by Respondent for his testimony. He wasn't compelled to testify or fearful of losing his job if he had not come and testified.

James Andrews testified that:

Mr. Andrews was Respondent's general manger from January 2001 to January 2005 and Complainant's supervisor. Complainant was there when he started in January of 2001. The first part of 2002, Complainant was gone and then he came back in December of 2003. Complainant came back two or three times during the year of 2003 asking if Respondent had any work for him.

Complainant was careless and violated safety regulations and procedures while he was with Respondent. Backing without a spotter a few times was the main thing. Mr. Andrews can recall specific four times.

Every time a driver backed without a spotter he was warned. If somebody did something that would mess something up, all the drivers were told to make sure that it didn't happen again.

Complainant also destroyed property through his carelessness at work.

One time, Complainant backed into a septic tank in one yard and then pulled forward into the next yard, driving into that septic tank, too.

About three weeks before Complainant was fired, during the two week notice time, he backed into one of the sheds Charlie had put up in the back. Complainant admitted that he was backing the truck without a spotter.

On an earlier occasion, Complainant had gone to Madison and called saying he was stuck. Then the homeowner called asking somebody to get there because Complainant was "on something." The homeowner said Complainant was walking around in the woods with his arms crossed, looking up in the trees, and talking to himself.

The saleslady and Mr. Andrews drove out to the job. When they got there, the tow truck driver was ready to leave. The tower wanted Complainant to help get the truck out, but Complainant wasn't cooperating and wouldn't answer. Complainant was walking around all by himself and standing in the edge of the trees looking up with a big smile on his face. It took about two hours to get the truck unstuck.

Complainant was acting real strange. Mr. Andrews told Complainant to get in the truck with the saleslady and that she would be driving him back. Mr. Andrews drove the boom truck straight from there back to the warehouse. He was fearful at that time that Complainant was possibly on some type of drugs because of the way he was acting and where the truck was. It was on a hill that was tough enough to walk down, much less to drive. Drivers aren't given specific directions on every job, but are supposed to use smart judgment. Complainant was drug tested later.

This was the only instance that Mr. Andrews has driven a vehicle that required the driver to have a CDL license. The other vehicle is the piggy back truck with the mechanic forklift on back and does not require a CDL license. He has driven that vehicle on several occasions. Mr. Andrews may have worked three Saturdays during the four years he was with Respondent. He didn't go joyriding in the boom trucks on the weekend. He does not have a CDL. Everyone at Respondent except the saleslady and Jewell has a forklift certification.

Complainant did complain about safety or any safety concerns he had in doing this work. He didn't like having to stand on the drywall to take the window out. Complainant was given a second option. There are actually three options because they can take the plastic strips around the inside of the glass on many windows out and take the top glass out too. Mr. Andrews tried to give training on how to take out the plastic strips on but Complainant didn't want to learn how to do it and wouldn't pay attention.

After Complainant complained about the safety of being up on the boom next to the window, the harnesses were purchased. Mr. Andrews showed them how to put them on and made sure that every employee had one. There were two for each truck. The drivers were told to use them any time they were off the ground, including when they were taking the second story windows out. Mr. Andrews never had any training on the harness, but any six year old could have figured it out.

It was real rare to drop two lifts on a job. Usually one drop was enough to make sure they started doing things right and wouldn't drop two. Charlie was already upset about that. Then Charlie found out Complainant backed in and violated that

policy. Backing without a spotter is a firing offense. It's something that was reviewed two or three times a week. However, there are no written logs and documents that might have each employee's signature that they sat through that training or signed off on it.

Mr. Andrews has been drug tested. He no longer works for Respondent and is testifying of his own free will. He was disappointed that he wasn't there to be the one to get to let Complainant go.

### *LAW*

“A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because... the employee ... has filed a complaint... related to a violation of a commercial motor vehicle safety regulation, standard, or order...”<sup>7</sup>

Internal complaints to an employer are protected. Protection is not dependent on actually proving a violation.<sup>8</sup>

A prima facie case of unlawful termination under the ACT requires a showing that the employee engaged in protected activity, that the employee was subjected to adverse employment action, and that there was a causal connection between the protected activity and the adverse action. Where a complainant has made out a prima facie case of retaliatory discharge, the employer may rebut that showing with evidence of a legitimate, non-retaliatory reason for the discharge. The burden then shifts back to the complainant to prove that the proffered reason is pretext for unlawful retaliation. Where evidence of a dual motive exists, the employer bears the burden of establishing by a preponderance of the evidence that it would have taken the adverse employment action in the absence of the employee's protected activity.<sup>9</sup>

However, in a case fully tried on the merits, ... “It is not particularly useful to analyze whether the complainant established a prima facie case. ... Rather, the relevant inquiry is whether [the complainant] established, by a preponderance of the evidence, that the reason for his discharge was his protected safety complaints.”<sup>10</sup>

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<sup>7</sup> 49 U.S.C. Sec. 31105 (a) (1).

<sup>8</sup> Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 356-357 (6th Cir. 1992).

<sup>9</sup> Clean Harbors Environmental Services, Inc., v. Herman, 146 F.3d 12 (1st Cir. 1998).

<sup>10</sup> Pike v. Public Storage Companies, Inc., 1998-STA-35 (ARB Aug. 10, 1999).

Therefore, a complainant must establish that the respondent took adverse employment action against him because he engaged in an activity protected under the Act. A complainant must show that it was likely that the adverse action was motivated by a protected activity. The respondent may rebut such a showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The complainant then must prove that the proffered reason was not the true reason for the adverse action.<sup>11</sup>

Close proximity between the protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action.<sup>12</sup>

### *ANALYSIS*

In this case, there is little question that Complainant engaged in protected activity that Respondent knew of the protected activity or that Complainant took an adverse action against Complainant by firing him. Complainant questioned whether Respondent was complying with CDL requirements. He complained that drivers were being asked to violate the posted safety limitation on the boom truck and that a truck had no seat belts and was out of date. He made allegations that other drivers were using drugs.<sup>13</sup>

There is a significant question as to whether there is a causal connection between the protected activity and the adverse action and whether Respondent fired Complainant because of those protected activities.

There is no direct evidence, save Complainant's opinion, that Respondent fired Complainant because of his various complaints. All of Respondent's witnesses were consistent that Complainant was fired because of his careless attitude, accident/incident history, and final precipitating mishaps with the drywall and blown tire on 4 June. Those witnesses' testimonies were cross corroborating and even corroborated by the vast majority of Complainant's testimony. I found those witnesses to be highly credible.<sup>14</sup>

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<sup>11</sup> Moyer v. Yellow Freight System, Inc., 89-STA-7 (Sec'y Oct. 21, 1993).

<sup>12</sup> Kovas v. Morin Transport, Inc., 92-STA-41 (Sec'y Oct. 1, 1993) (citing Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987)).

<sup>13</sup> At trial I sustained an objection to this matter on relevance grounds. However, insofar as a complaint about drug use could conceivably relate to driver safety, I have considered the allegation as a protected activity.

<sup>14</sup> Complainant testified that he was fired before he disclosed that he blew the tire. The other witnesses are consistent that it was the other way around. I find their version more credible, but in either event the decision would be the same.

Respondent's actions, however, speak as loudly as its words. A highly probative point is that the very day he broke the drywall and blew the tire; Respondent had just allowed Complainant to return to driving duty. He had been in the warehouse because he had given Respondent his notice in anticipation of taking another job. Yet, when he asked to return to full driving duties, Respondent allowed him to do so. Obviously, at that point Respondent was not considering firing Complainant. There was no protected activity in the interim. Complainant was fired because he violated Respondent's safety rules regarding backing, ignored the advice of co-workers, destroyed property, and manifested a careless attitude toward his work.

Complainant's complaints were viewed by Respondent with various degrees of concern. It addressed and tried to remedy some. It found other complaints to be groundless and simply ignored them. What it did not do is fire Complainant because of them.

I do not find that there is sufficient evidence of a temporal nexus between activity and adverse action to raise the inference of causation. However, even if there were, and Complainant had made out a prima facie case of retaliatory discharge, it is clear that the Respondent has rebutted that showing with evidence of a legitimate, non-retaliatory reason for the discharge.

I do not find Complainant has shown that Respondent's proffered reason for the adverse action is pretextual. Nor do I find that a dual motive exists. However if it did, Respondent has established by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of the employee's protected activity.

In short, even if all evidentiary burdens were on the Respondent, I find the evidence to clearly establish that it did not fire Complainant for any retaliatory reason related to any protected activity.

### **Recommended Decision and Order**

That the complaint be dismissed.

**So ORDERED.**

**A**

**PATRICK M. ROSENOW**  
Administrative Law Judge

**NOTICE:** This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).