



Issue Date: 15 August 2011

Case No. 2006-STA-31

In the Matter of:

HARRY SMITH,

Complainant,

v.

CRST INTERNATIONAL, INC.,

Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR
SUMMARY DECISION AND DISMISSING COMPLAINT¹ AND
ORDER CANCELLING HEARING**

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act ("STAA" or "Act") of 1982, as amended and re-codified, and its implementing regulations. 49 U.S.C. § 31105; 29 C.F.R. § 1978. The Act prohibits covered employers from discharging, disciplining, or discriminating against an employee in retaliation for the employee's engagement in certain protected activities.

PROCEDURAL HISTORY

On November 15, 2005, Complainant filed a single complaint with the Occupational Safety and Health Administration (OSHA) against Lake City Enterprises,

¹ The August 31, 2010, amendments to the STAA regulations changed the nature of Administrative Law Judges' decisions from "recommended" to "initial." See 75 Fed. Reg. 53550. Thus, effective August 31, 2010, STAA decisions are entitled "Decision and Order" rather than "Recommended Decision and Order." Moreover, the Notice of Appeal Rights has changed.

Inc. ("LCE") and CRST, invoking 49 U.S.C. § 31105 of the Act. (ALJ 1).² Complainant alleged that he was an employee of LCE, and that his work for LCE "was through an assignment or other arrangement with" CRST. *Id.* Complainant further alleged that LCE and CRST "discharged and discriminated" against him and refused to rehire him. *Id.* OSHA investigated the claim against each corporation separately and found no merit to either claim. *Id.* Complainant's attorney objected to the findings in both the LCE and CRST investigations and requested hearings before an administrative law judge. (ALJ 4). In the case against LCE, I found, and the Administrative Review Board ("Board") affirmed, that LCE had violated the STAA by firing Complainant. *Smith v. Lake City Enterprises, Inc.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-32, slip op. at 14 (ARB Sept. 28, 2010).

I dismissed the case against CRST for timeliness, and the Board affirmed. *Smith v. CRST Int'l, Inc.*, ARB No. 06-146, ALJ No. 2006-STA-31 (ARB June 30, 2008). Complainant appealed to the United States Court of Appeals for the Sixth Circuit, which held that the doctrine of equitable tolling applied and remanded the case for further proceedings. *Smith v. Solis*, 390 Fed. Appx. 450 (6th Cir. 2010). A hearing in this matter is scheduled for September 7, 2011. On May 9, 2011, Respondent filed a Motion for Summary Decision pursuant to 29 C.F.R. § 18.40. On July 5, 2011, Complainant filed a Memorandum in Opposition to Summary Decision and Cross-motion for Partial Summary Decision. On July 28, 2011, Respondent filed a reply to Complainant's opposition.

FACTUAL FINDINGS³

² As will be explained later in this Decision and Order, all of the exhibits and the transcript from *Smith v. Lake City Enterprises*, OALJ Case No. 2006-STA-32 have been admitted for consideration in this case on the issue of Summary Decision. Any reference to an ALJ Exhibit is from *Smith v. Lake City Enterprises*, OALJ Case No. 2006-STA-32.

³ In support of the request for Summary Judgment, Respondent submitted Respondent CRST International INC.'s Appendix in Support of its Motion for Summary Judgment (hereinafter "CRST Appendix"). The CRST Appendix includes the following evidence: 1) Excerpts from the deposition of Harry Smith taken on December 23, 2006; 2) CRST Statement of Lease and Appendix A to Independent Contractor Operating Agreement, Tractor; 3) Appendix A to Independent Contractor Operating Agreement, Trailer; 4) Harry Smith receipt for tractor, trailer, and other equipment assigned to him by LCE; 5) Excerpts from deposition of Craig Smith taken on March 15, 2011; 6) Notice of Personnel Action dated November 9, 2005; 7) Affidavit of Carl Rochford dated April 19, 2011; 8) U.S. Department of Labor, Occupational Safety and Health Administration, Letter to Harry Smith dated March 21, 2006; 9) LCE-CRST Exclusive Agency Agreement; 10) LCE-CRST Independent Contractor Operating Agreement; 11) Excerpts from the deposition of Harry Smith taken on February 21, 2011; and 12) LCE pay records for Harry Smith.

Complainant, Harry Smith, was hired by LCE on Labor Day in 2005. (CRST Appendix at 4). Complainant was hired to drive a tractor and trailer owned by LCE and leased to CRST. (CRST Appendix at 9-13). At the time Complainant was hired, LCE had an Exclusive Agent Agreement and an Independent Contractor Operating Agreement with CRST. (CRST Appendix at 24-45). The trucking division of CRST never hires drivers as employees; rather, the division solely operates through contracts with independent contractors, such as the one entered into with LCE. (Craig Smith Depo. at 7). LCE was considered both an agent and independent contractor, otherwise known as a fleet owner. *Id.* at 25. Fleet owners own trucks that are leased to CRST exclusively, and are required to find and hire drivers for their trucks. *Id.* at 25.

In the Exclusive Agent Agreement, the parties agreed that LCE (Agent) would solicit freight for CRST, and states that LCE “shall not have any authority to act on behalf of or bind CRST, except as specifically provided herein.” (CRST Appendix at 24, 29). The Agreement further provides:

Agent is now and during the term of this Agreement shall be an independent contractor. . . . If Agent deems it necessary to hire other employees to fulfill its duties and obligations under this Agreement, such employees shall be subject to the full control and direction of Agent at all times and at its own expense. . . . The Agent has, and shall retain, complete and sole responsibility, subject to any regulatory and/or legal requirement which may be placed on CRST by various governmental agencies, for maintaining an operation as is necessary to carry out the terms of this Agreement, including, but not limited to: hiring, setting

On July 5, 2011, Complainant’s counsel’s filed Complainant Harry Smith’s Memorandum in opposition to Summary Decision and Cross-Motion for Partial Summary Decision (hereinafter “Memorandum in Opposition”), which provides that the parties stipulated that the “exhibits and transcripts for the record of *Smith v. Lake City Enterprises*, OALJ Case No. 2006-STA-32, may be used in this matter in motions, in opposition to motions, and at hearing, without further need for authentication.” (Memorandum in Opposition at 1-2). Complainant refers to the following evidence from the record of *Smith v. Lake City Enterprises* in his Memorandum in Opposition: 1) Crystle Morgan’s Management Overview, marked as CX 1 in the *Harry Smith v. Lake City Enterprises* record; and 2) Excerpts from the transcript of the hearing, including the testimony of Michelle Smith, Jacob McNutt, Harry Smith, Lawrence Cassell, Kenneth Morrison, Robert Liuzzo, and Crystle Morgan. Complainant submitted the following additional evidence in support of his Memorandum in Opposition: 1) Deposition of Craig Smith taken on February 15, 2011; 2) Deposition of Jeff Loggins taken on May 23, 2011; 3) Deposition of Carl Rochford taken on May 24, 2011; 4) CRST Carrier Group Hiring Guidelines (hereinafter “CRST Guidelines”); 5) CRST 212, which includes a list of CRST drivers with a code 22; 6) CRST’s answers and objections to Complainant’s second set of interrogatories; and 7) CRST’s supplemental and amended answers to Complainant’s second set of interrogatories.

wages, hours and working conditions, adjusting any grievances, and supervising, training, disciplining, and firing all employees of the Agent . . .

(CRST Appendix at 25).

In the Independent Contractor Operating Agreement, LCE (Contractor) agreed to use its Equipment, together with drivers and all other necessary labor, which LCE shall furnish, to spot equipment, transport, load and unload freight on behalf CRST (Carrier). (CRST Appendix at 34). Regarding LCE's drivers, CRST required:

Contractor and his/her drivers shall submit to all physical examinations required by federal and state safety regulations. In addition, as required by 49 C.F.R. § 382.103, Contractor shall comply with Carrier's drug and alcohol policy, including participation in Carrier's random drug and alcohol testing program at Carrier's expense; and

Carrier shall have the right to disqualify any driver provided by Contractor in the event that the driver is found to be unsafe, unqualified or disqualified pursuant to federal or state law, in violation of Carrier's minimum qualification standards, or otherwise incompetent, in which case either Contractor shall, if he/she chooses, furnish another competent, reliable, and qualified driver who meets Carrier's minimum qualification standards or this Agreement shall terminate immediately.

(CRST Appendix at 36).

Furthermore, the Independent Contractor Operating Agreement provided that it shall be the sole responsibility of Contractor to determine the manner and means of performing all of its services, including:

Selecting, setting the compensation, hours, and working conditions, adjusting any grievances, and supervising, training, disciplining, and firing all drivers, drivers' helpers, and other workers necessary for the performance of Contractor's obligations under this Agreement, provided that Contractor shall ensure that all such drivers and workers comply with the terms of this Agreement, including the requirements of safe operations and compliance with Carrier's safety policies and procedures while operating the Equipment on Contractor's behalf. No person Contractor may engage shall be considered Carrier's employee.

Contractor alone shall pay any employment expenses for his/her workers, including but not limited to workers' compensation insurance, employment taxes, and all other benefits and pensions for the Contractor and his/her drivers

Controlling the activities of his/her drivers to ensure that dispatch instructions of Carrier are followed.

(CRST Appendix at 37).

Under these agreements, LCE was required to follow CRST policies. For instance, drivers first had to be screened and qualified by CRST before they could be hired by LCE. (Craig Smith Depo. at 17-18). CRST would run a record check on the driver, including his motor vehicle record and DAC report; review the driver's previous employment history and application; and conduct a drug test. *Id.* LCE was also required to send its drivers to a safety orientation provided by CRST. *Id.* at 16; (TR at 561). The safety orientation included watching safety videos, discussing log books, and training on how to secure loads. (TR at 571). The drivers were also given information on the Federal Motor Regulations and were provided the CRST manual, which included numbers on who to call in case of an accident. *Id.* CRST conducted random drug screens on drivers, and if a driver failed the test he or she would be immediately disqualified and could no longer drive one of CRST's leased trucks. (TR at 557). CRST further required LCE to have its equipment checked by approved facilities throughout the CRST system and had requirements as to the equipment that must be kept in the trucks, such as the number of chains, binders, and tarps that need to be in a trailer. (Craig Smith Depo at 16; TR at 569). Finally, all drivers were issued a driver number and were required to send daily log books to CRST electronically. (Craig Smith Depo. at 15, 57). If a driver failed to submit his driving logs, he would be put on "stop dispatch" until his log was completed. (TR at 575).

Complainant was pre-qualified by CRST prior to his hiring with LCE and attended CRST's safety orientation in Rockport, Indiana. (TR at 563; Craig Smith Depo. at 16-17). Complainant was issued a driver number and had his equipment inspected by A & H Trucking, an approved CRST facility. (Craig Smith Depo. at 15-17). Shortly thereafter, Complainant began his dispatches as directed by LCE. (CRST Appendix at 71).

On November 8, 2005, Complainant called Kenneth Morrison, LCE's terminal manager, complaining about an incident with his tractor and trailer. (TR at 331-332; Management Overview at 2). Complainant told Mr. Morrison to inform Crystle

Morgan to “either replace him [Complainant] or the equipment.” (TR at 483). Complainant also discussed the incident with Crystle Morgan, LCE’s President and sole shareholder. (TR at 334, 553; Management Overview at 2). After Crystle Morgan talked with Complainant on the phone, she called Milton Parks, who worked at the time in CRST’s recruiting department. (Management Overview at 2-3; Craig Smith Depo. at 32). She told Mr. Parks that LCE “needed to re-seat” the truck that Complainant drove as he gave LCE “an ultimatum and told us to find another driver for the truck because we had faulty equipment.” (Management Overview at 2). Mr. Parks then told Ms. Morgan that he had just received a call from Complainant, and Complainant had stated “that he was going to take our [LCE’s] trailer and have it DOT inspected.” *Id.* When Complainant returned to LCE’s office with the trailer and tractor, his employment with LCE was terminated by Crystle Morgan. (Management Overview at 3; CRST Appendix at 5-6).

About “a day or two” after Complainant was terminated by LCE, he sought to enter into an arrangement with his friend, Sean Dawsdy, in which Complainant would drive a truck owned by Mr. Dawsdy, and Mr. Dawsdy would enter into an independent contractor agreement with CRST. (CRST Appendix 7-8; TR at 251). Mr. Smith and Mr. Dawsdy then contacted a CRST recruiter about the arrangement. (Rochford Depo. at 10-11; TR at 251). On November 11, 2005, Ms. Morgan called Mr. Parks at CRST. (Management Overview at 4). Mr. Parks informed Ms. Morgan that Complainant had just bought his own truck and wanted to lease it to CRST. *Id.* Mr. Parks asked Ms. Morgan if she would have a problem with Mr. Parks being on CRST’s dispatch board, and she answered “no.” *Id.*

Sometime after Complainant’s termination with LCE, Ms. Morgan sent to CRST a “Notice of Personnel Action,” dated November 9, 2005. (CRST Appendix at 18, 19 paragraph 4). The Notice stated that Complainant had quit LCE, and that there was an unreported accident. *Id.* Under the comments section, Ms. Morgan further stated: “Driver quit. When driver turned in equipment he had damaged the trailer in an incident he had the day before and did not report that he had damaged equipment. Harry also defaced 4 of our tractor tires by painting them white and we could not locate one of our tarps.” *Id.*

In November 2005, it was CRST’s practice that a prospective driver would be disqualified if information was received from a credible source that the driver had an unreported accident. (CRST Appendix at 19 paragraph 5). This practice, however, is not found in CRST’s hiring standards that were effective as of June 2010, although the standards do provide that “[a]pplicants cannot display unsafe operating habits or behavior through overall review of safety records Employment history will be

judged according to standards of performance, stability and honesty.” (CRST Guidelines at 3). Furthermore, CRST provided a list of drivers who had a code 22, or an unreported accident, and were cancelled by CRST. (Loggins Depo. at 10). If a driver is put on 22 code, they are automatically cancelled. *Id.* at 11. But one driver, Daryl Campbell, had been put on review, meaning management would review his record and make a decision in the future whether to rehire. *Id.* at 38.

On or about November 15, 2005, Carl Rochford, CRST’s safety director, reviewed the qualifications of Complainant and determined, based on the information LCE had provided to CRST in the Notice of Personnel Action, that Complainant was not qualified to drive a truck that was leased to CRST because he had an unreported accident. (CRST Appendix at 19-20 paragraphs 3,4,5, 6; Rochford Depo. at 12). Mr. Rochford stated:

At the time [he] made the decision in November 2005 that Smith was not qualified, [he] had no information that [Mr. Smith] had complained to LCE about the safety of the trailer that had been assigned to him and had threatened to take the trailer to the DOT to be inspected, or had complained in any other way about the trailer. [He] did not receive the information about that until [he] investigated the matter following receipt of a letter from the Department of Labor on or about January 13, 2006.

(CRST Appendix at 20 paragraph 7; Rochford Depo. at 19).

ARGUMENTS OF THE PARTIES

Respondent’s Arguments

Respondent argues that CRST should be granted summary judgment because Respondent was not an employer of Complainant when he was discharged from LCE. Respondent contends that CRST was not a joint employer with LCE; therefore, LCE’s actions in discharging Complainant in violation of the STAA cannot be imputed to CRST. In support of this argument, CRST submits the following: 1) Complainant had no contractual relationship with CRST; 2) LCE, not CRST, had the right to manage, supervise, assign work to, and terminate Complainant and; 3) LCE paid Complainant, provided his benefits, and withheld taxes on his behalf. Furthermore, the agreements between LCE and CRST strictly limit the extent of LCE’s agency for CRST. LCE’s only authority under the Exclusive Agent Agreement was limited to those services necessary to carry out the duties related to soliciting interstate freight shipments.

Respondent does not dispute that Complainant engaged in protected activity or that he was subject to an adverse employment action when CRST refused to allow him to drive one of their leased trucks. Rather, Respondent argues that there is no causal link between the protected activity and the adverse employment action as CRST based its refusal on information it received that Complainant had an unreported accident. Respondent contends that there is no evidence to demonstrate that this proffered reason is pretext, or that CRST acted in bad faith. Thus, CRST is entitled to summary judgment.

(Respondent CRST International Inc.'s Brief in Support of Motion for Summary Judgment and CRST International Inc.'s Reply to Smith's Opposition to Cross-Motion for Summary Judgment).

Complainant's Arguments

Complainant argues that there is evidence in the record to demonstrate a genuine issue of material fact regarding CRST's role as a joint employer with LCE. Complainant states that the record "shows how LCE was intertwined with CRST, particularly in the area of employing and directing drivers." CRST also had control over "safety and risk management." Thus, CRST exercised a sufficient degree of control over LCE to create joint employer liability. Complainant also argues that CRST should be liable under agency principles as "an employer is properly liable for actions that are proximately caused by its agents acting within the scope of their agency" and both LCE and CRST employees were acting within the scope of their agency when they discharged Complainant.

Complainant also argues that CRST's decision not to allow Complainant to drive one of the trucks of its independent contractors was motivated by Complainant's safety complaints to LCE. Complainant asserts that CRST's proffered reasoning for refusing Complainant—that Complainant had an unreported accident—was pretext for its discriminatory action. Evidence to support this includes the temporal proximity between the protected activity and the refusal to hire; the fact that the practice of not hiring drivers due to unreported accidents is not in the hiring guidelines; that in at least one instance CRST stated it would review a driver for future rehiring who had an unreported accident; and that one of CRST's recruitment employees was aware of the safety complaints Complainant was expressing against LCE.

(Complainant Harry Smith's Memorandum in Opposition to Summary Decision and Cross-Motion for Partial Summary Decision).

STANDARD OF REVIEW

Any party may move, with or without supporting affidavits, for summary decision on all or any part of a proceeding. 29 C.F.R. § 18.40(a). An administrative law judge “may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” 29 C.F.R. § 18.40(d). Thus, the standard for summary decision is essentially the same standard governing summary judgment in the federal courts. *See* Fed. R. Civ. P. 56; *Menefee v. Tandem Transport Corp.*, ARB No. 09-46, ALJ No. 2008-STA-55, slip op. at 4 (ARB April 30, 2010). The determination of whether facts are material is based on the substantive law upon which each claim is based. *Menefee*, ARB No. 09-46 at 4. A genuine issue of material fact is one, the resolution of which “could establish an element of a claim or defense, and, therefore, affect the outcome of the action.” *Id.* (quoting *Bobreski v. U.S. EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003)).

Once the moving party has demonstrated an absence of evidence supporting the non-moving party’s position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35, slip op. at 4-5 (Sept. 30, 2005). The non-moving party “may not rest upon the mere allegations or denials” of his pleadings, but “must set forth specific facts showing that there is a genuine issue of fact for the hearing.” 29 C.F.R. § 18.40(c). The evidence must be viewed in the light most favorable to the non-moving party. *Menefee*, ARB No. 09-46 at 4.

DISCUSSION

The STAA provides that an employer may not “discharge,” “discipline,” or “discriminate” against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activity. 49 U.S.C. § 31105(a)(1). Such protected activity includes: 1) filing a complaint or beginning a proceeding “related to a violation of a commercial motor vehicle safety regulation, standard, or order”; 2) refusing to operate a vehicle because doing so would violate a regulation, standard, or order of the United States related to commercial motor vehicle safety; or 3) refusing to operate a vehicle because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition. *Id.*

Joint Employer

As previously discussed, I found LCE liable under the STAA for discharging Complainant on November 9, 2005. Complainant alleges that CRST should also be liable for the unlawful discharging of Complainant because CRST was a joint employer of Complainant at the time of his discharge.

To prevail on a claim of unlawful discrimination under the whistleblower protection provisions of the STAA, the complainant must establish that he is an employee and the respondent is an employer. *Forrest v. Dallas and Mavis Specialized Carrier Comp.*, ARB No. 04-052, ALJ No. 2003-STA-53, slip op. at 3 (July 29, 2005). In order to be found an employer under the STAA, the respondent must have “acted in the capacity of an employer, that is, exercised control over, or interfered with, the terms, conditions, or privileges of the complainant’s employment.” *Id.* at 4. Such control includes “the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant.” If the complainant is unable to establish the requisite degree of control, the entire claim must fail. *Id.*

If two or more companies have the requisite degree of control over an employee, then both can be held liable under the STAA as joint employers. *Palmer v. Western Truck Manpower*, 85-STA-6 (Sec’y Jan. 16, 1987); *Cook v. Guardian Lubricants, Inc.*, 95-STA-43 (Sec’y May 1, 1996). Whether a corporation exhibits this requisite degree of control is a factual issue. *Palmer*, 85-STA-6 at 3. The Sixth Circuit has described the joint employer analysis as follows:

The basis of the [joint employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the ‘joint employer’ concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment.

Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 993 n. 4 (6th Cir. 1997) (citing *NLRB v. Browning-Ferris Ind. of Pennsylvania, Inc.*, 691 F.2d 1117, 1122-23 (3rd Cir. 1982)).

In *Palmer*, the complainant was an employee of Western Truck Manpower (“WTM”), which leased the complainant’s services as a truck driver to Ryerson Steel

("Ryerson"). 85-STA-6 at 1. The Board held that WTM and Ryerson were joint employers, explaining that both companies exerted control over the complainant's employment. *Id.* at 3. For instance, Ryerson owned the trucks driven by the complainant, supervised his daily assignments through their supervisors and dispatcher, computed complainant's weekly wages, base pay, overtime, days-off, and vacation time by processing his time card, and made final decisions regarding overtime and other time off. *Id.* at 2. WTM maintained time records for the complainant, issued his paychecks, withheld his state and Federal taxes, made his social security payments, and maintained workers' compensation coverage for him. *Id.* at 2.

In contrast, the Board held in *Forrest* that a company did not exercise the sufficient degree of control over the complainant's employment to be considered a joint employer. In *Forrest*, the complainant was a truck driver for Robertson Brothers. ARB No. 04-052 at 1. Robertson Brothers was an independent contractor for Dallas and Mavis, another commercial motor carrier. *Id.* The Board upheld the ALJ's dismissal of Dallas and Mavis, stating:

Dallas and Mavis was a carrier that operated through independent contractor drivers under Dallas and Mavis's Department of Transportation (DOT) authorization. It paid its independent contractors a percentage (generally 75 percent) of gross receipts. Dallas and Mavis screened drivers to make sure they qualified under its liability insurance and DOT regulations. But it did not engage in the hiring and firing decisions of its independent contractors, who were responsible for withholding state and federal taxes and providing workers' compensation and unemployment insurance for their employees.

Robertson Brothers was one of Dallas and Mavis's independent contractors. It hired, controlled and ultimately discharged Forrest. The factual record supports the ALJ's conclusion that Forrest was an employee of Robertson Brothers and not Dallas and Mavis.

Id. at 4 (internal citations omitted).

Here, the facts demonstrate that CRST did not exercise a sufficient degree of control over the terms, conditions, or privileges of Complainant's employment to be considered an employer of Complainant. LCE was an independent contractor of CRST; this arrangement was controlled by the Independent Contractor Operating Agreement. The parties specifically agreed in this contract that LCE would be solely responsible for "selecting, setting the compensation, hours, and working conditions, adjusting any

grievances, and supervising, training, disciplining, and firing all drivers” Furthermore, LCE was required to control the activities of LCE’s drivers to ensure the dispatch instructions of CRST were followed. The Agreement also specifically stated: “No person [LCE] may engage shall be considered [CRST’s] employee.” LCE paid for Complainant’s workers’ compensation insurance, withheld taxes, and provided all other benefits and pensions for LCE’s drivers. Complainant was not under any contract with CRST, and received all his dispatch instructions from an LCE employee. Complainant’s tractor and trailer were both owned by LCE.

LCE did, however, have an obligation to follow CRST policies, which included requiring its drivers to follow certain procedures. CRST would first screen drivers to determine their qualifications to drive a CRST leased truck. CRST would generally look at the Complainant’s driving records, DAC report, and application. If the driver was determined not to be qualified under CRST’s standards, he or she could not drive a truck being leased to CRST. All drivers had to attend a safety orientation prior to beginning their dispatches, and their equipment had to be DOT inspected by a CRST approved facility. Drivers also had to submit to an initial drug test conducted by CRST, and random drug tests throughout their employment. If they failed a drug test, they were no longer eligible to drive for CRST. Finally, drivers were required to submit daily driving logs to CRST. If a driver failed to submit his driving log, he would be put on “stop dispatch” until his log was completed.

Upon review of these facts, it is clear that LCE’s and CRST’s contractual arrangement is similar to the facts in *Forrest*. LCE had the sole responsibility to hire, discipline, supervise, provide equipment, dispatch, and terminate Complainant. Furthermore, LCE paid Complainant, withheld his taxes, and provided his benefits. CRST’s policies regarding the drivers of its independent contractors were designed to comply with DOT regulations. Unlike in *Palmer*, CRST did not dispatch Complainant, determine his wages, overtime, and vacation time, or own the trucks that Complainant operated. Rather, CRST’s limited involvement in the drivers’ employment included screening the drivers, conducting drug tests, providing an initial orientation, and reviewing the drivers’ log books. There is no evidence that CRST controlled Complainant’s day-to-day activities, or that it had any role or influence in LCE’s termination of Complainant. Thus, I find CRST was not an employer of Complainant at the time of his discharge from LCE.

Agency

In the alternative, Complainant argues that CRST should be liable under the STAA for the termination of Complainant by LCE because LCE was CRST’s agent. Case

law supports the theory that under employment discrimination statutes, an employer may be held liable for the actions of its agents. *Swallows*, 128 F.3d 990, 994. The agent, however, must be an agent with respect to employment practices. *Id.* Such practices would include delegating the agent to make employment decisions on behalf of the employer, or retaining control over the agent's employment decisions. *Id.*

Here, LCE's and CRST's agency relationship was controlled by the Exclusive Agent Agreement. Under this Agreement, the parties agreed that LCE would solicit freight for CRST. The Agreement also limited the scope of LCE's agency, stating: "[LCE] shall not have any authority to act on behalf of or bind CRST, except as specifically provided herein." Finally, the agreement specifically states:

If Agent deems it necessary to hire other employees to fulfill its duties and obligations under this Agreement, such employees shall be subject to the full control and direction of Agent at all times and at its own expense. . . . The Agent has, and shall retain, complete and sole responsibility, subject to any regulatory and/or legal requirement which may be placed on CRST by various governmental agencies, for maintaining an operation as is necessary to carry out the terms of the Agreement, including, but not limited to: hiring, setting wages, hours and working conditions, adjusting any grievances, and supervising, training, disciplining, and firing all employees of the Agent

Clearly, under this Agreement CRST did not delegate to LCE the authority to make employment decisions on its behalf, as the agency agreement was limited to soliciting freight for CRST. The Agreement also states that LCE has full control and direction of LCE employees; therefore, CRST did not retain the requisite degree of control over LCE's employment decisions. There are no facts in the record that would suggest that CRST directed or in any way controlled LCE's decision to terminate Complainant. In fact, the evidence is clear that Crystle Morgan called Milton Parks, in CRST's recruitment department, after she made the decision to fire Complainant. Therefore, I find that LCE was not CRST's agent with respect to employment decisions; accordingly, CRST cannot be held liable for LCE's discharge of Complainant.

Failure to Hire

To prevail under an STAA claim, a complainant must prove by a preponderance of the evidence that 1) he engaged in protected activity; 2) his employer was aware of the protected activity; 3) his employer took an adverse employment action against him; and 4) his protected activity was a contributing factor in the adverse employment

action. *Reiss v. Nucor Corporation-Vulcraft –Texas, Inc.*, ARB No. 08-137, ALJ No. 2008-STA-11, slip op. at 4 (Nov. 30, 2010). A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-52, slip op. at 6 (Jan. 31, 2011) (quoting *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-28 (Jan. 30, 2008)).

A complainant can succeed by providing either direct or indirect proof of contribution. *Williams*, ARB No. 09-092 at 6. Direct evidence is “smoking gun” evidence that conclusively links the protected activity and the adverse action and does not rely upon inference. *Id.* If the complainant does not produce direct evidence, he must proceed indirectly, or inferentially, by showing that retaliation was the true reason for the adverse employment action. *Id.* For instance, the complainant may demonstrate that the respondent’s proffered reasons for the adverse action are pretextual or not credible. *Reiss*, ARB No. 08-137 at 6. If the complainant proves pretext, it may be inferred that his protected activity contributed to the adverse action, although a fact finder is not compelled to do so. *Williams*, ARB No. 09-092 at 6.

If the complainant proves discrimination, the employer may avoid liability if it “demonstrates by clear and convincing evidence” that it would have taken the adverse action in any event. *Williams*, ARB No. 09-092 at 6 (quoting *Reiss*, ARB No. 08-137 at 6).

In the present case, CRST does not contest that Complainant engaged in protected activity and that CRST took an adverse employment action against Complainant when it refused to allow him to drive one of its leased trucks. Rather, CRST contends that Complainant offers no evidence to demonstrate a causal connection between the protected activity and the adverse action. Complainant offers no direct evidence that CRST refused to allow Complainant to drive one of its leased trucks because he complained about the safety of his trailer to LCE. Complainant instead offers indirect evidence to demonstrate a causal connection. Complainant specifically relies on the following facts: 1) the temporal proximity between the protected activity and the adverse action; 2) Milton Parks, a member of CRST’s recruiting department, was aware that Crystle Morgan terminated Complainant after he complained about his trailer and informed Ms. Morgan that Complainant had said he was going to take the trailer to get inspected by DOT; 3) at least one driver was allowed to be reviewed for rehire after an unreported accident; and 4) Complainant did not actually have an unreported accident as he reported the accident to LCE.

Complainant was terminated from LCE on November 9, 2005. CRST made its decision not to allow Complainant to drive one of its leased trucks on November 15,

2005. Thus, the time between the protected activity and the adverse employment action was a mere six days. This short time period may give rise to an inference of suspicious timing, but temporal proximity alone will rarely be sufficient in and of itself to create a triable issue. *Culver v. Gorman Company*, 416 F.3d 540, 546 (7th Cir. 2005); *see also Reiss*, ARB No. 08-137 at 5. Here, the inference created by temporal proximity is even more tenuous than a typical case, as it was Complainant's decision to immediately apply to become a driver for CRST; therefore, it was inevitable that CRST's employment decision would be made in close temporal proximity to Complainant's discharge from LCE.

Complainant fails to offer any other evidence to strengthen the inferential link between the protected activity and the adverse employment action. The evidence does demonstrate that Milton Parks knew about Complainant's safety concerns about his trailer prior to CRST's decision to not allow Complainant to drive one of its trucks. However, there is no evidence in the record that Carl Rochford, who actually made the employment decision, was aware of these safety complaints. Mr. Rochford testified that he had not spoken with Mr. Parks prior to making his decision, and stated in his affidavit that he had no knowledge of Complainant's safety complaints to LCE or Mr. Parks. Complainant offers no evidence suggesting that Mr. Parks imparted this knowledge to Mr. Rochford, or in any way influenced Mr. Rochford's hiring decision.

Complainant also submitted evidence that in at least one instance, CRST reviewed a driver for rehire even though that driver had an unreported accident on his record. Complainant argues that this fact undermines CRST's alleged practice that it does not rehire drivers with unreported accidents. Proof that CRST rehires drivers on a regular basis who have unreported accidents would give rise to an inference of pretext. *See Williams*, ARB No. 09-092 at 8; *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998). The evidence clearly shows, however, that out of a list of 16 drivers with unreported accidents, only one was given a review for rehire. The rest were clearly marked as "no" for rehire. This evidence actually supports, rather than contradicts, that CRST generally has a policy not to allow drivers with unreported accidents to drive its leased trucks.

Finally, Complainant argues that he did not actually have an unreported accident, and that CRST should have allowed him to explain before deciding not to allow him to drive. Under Sixth Circuit law, a company is only required to have a good faith belief, formulated through a reasonable reliance on particularized facts, for its employment decision. *Bowie v. Advanced Ceramics Corp.*, 72 Fed. Appx. 258, 263 (6th Cir. 2003). CRST relied upon a written report by Crystle Morgan, who stated that Complainant had an unreported accident and that he had damaged her equipment. I find that CRST has met its burden of establishing a good faith belief, formulated

through a reasonable reliance on particularized facts, that Complainant had an unreported accident.

Based on the foregoing, Complainant has failed to offer any evidence that CRST's stated reason for refusing to allow Complainant to drive one of its leased trucks—that he had an unreported accident—is pretext for a discriminatory motive. Thus, Complainant has failed to demonstrate a causal link between Complainant's protected activity and CRST's adverse employment action. Accordingly, his claim against CRST must fail.

CONCLUSION

In summary, I find that CRST's undisputed evidence demonstrates that it was not an employer of Complainant when he was terminated by LCE. Furthermore, CRST's undisputed evidence shows that there was no causal connection between CRST's decision not to allow Complainant to drive one of its leased trucks and Complainant's protected activity. Complainant failed, therefore, to meet its burden to set forth specific facts showing that there is a genuine issue of fact for the hearing. Accordingly, there is no genuine issue as to any material fact and CRST is entitled to summary decision.

ORDER

It is hereby **ORDERED** that Respondent's Motion for Summary Decision is **GRANTED** and Complainant's complaint is **DISMISSED**. It is **FURTHER ORDERED** that the hearing scheduled to begin on September 7, 2011, is **CANCELLED**.

A

LARRY S. MERCK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the

final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).