



**Issue Date: 10 October 2014**

Case No. 2006-STA-00031

In the Matter of:

HARRY SMITH,  
Complainant,

v.

CRST INTERNATIONAL, INC.,  
Respondent.

APPEARANCES:

Richard Renner, Esq.  
Washington, D.C.  
For the Complainant

Thomas Wolle, Esq.  
Cedar Rapids, Iowa  
For the Respondent

BEFORE: LARRY S. MERCK  
Administrative Law Judge

**DECISION AND ORDER ON REMAND**  
**DENYING COMPLAINANT'S COMPLAINT**

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

This case is before me on remand from the Administrative Review Board ("Board"). *Smith v. CRST International, Inc.*, ARB No. 11-086 (June 6, 2013) ("Decision and Order of Remand"). The Board affirmed my decision to grant summary decision to Respondent ("CRST") on the ground that CRST is not Harry Smith's ("Complainant") employer under

STAA. However, the Board reversed my decision to grant summary decision to CRST on Complainant's Refusal to Hire Claim. (ALJ 2)<sup>1</sup>.

### **Procedural History**

In its Decision and Order of Remand, the Board summarized the pertinent procedural history in this case as follows:

Complainant Harry Smith filed a complaint against Respondent CRST International, Incorporated (CRST) under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1997), and its implementing regulations at 29 C.F.R. Part 1978 (2009). Complainant alleged that CRST refused to hire him as a driver in violation of the STAA. The Department of Labor's Occupational Safety and Health Administration (OSHA) dismissed the complaint, and Smith requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ).

Prior to the scheduled hearing, CRST filed a motion to dismiss the complaint alleging that Smith's failed to timely file his hearing request. The ALJ cancelled the hearing, granted CRST's motion, and dismissed the complaint. Smith appealed to the Administrative Review Board (ARB or Board), which affirmed the dismissal. Smith then appealed to the United States Circuit Court for the Sixth Circuit, which remanded the case for further proceedings on the grounds of equitable tolling.

On remand, the ALJ set September 7, 2011, for a hearing, but CRST filed a motion for summary decision on May 9, 2011. On August 15, 2011, the ALJ entered summary decision in CRST's favor, and dismissed Smith's complaint. The ALJ determined that, based on "undisputed evidence," CRST demonstrated that it was not Smith's employer and that its refusal to hire him did not violate the STAA. The ALJ concluded that Smith failed to show that CRST was not entitled to summary decision and dismissed Smith's complaint. Smith petitioned the ARB for review.

(ALJ 2 at 1-2) (footnotes omitted).

### **Issues**

The parties do not contest that Complainant is an employee, he engaged in protected activity,<sup>2</sup> and CRST took an adverse action in refusing to hire him.<sup>3</sup> As the parties do not dispute

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<sup>1</sup> In this Decision and Order on Remand, "RX" refers to Respondent's exhibits, "CX" refers to Complainant's exhibits, "ALJ" refers to Administrative Law Judge exhibits, "Tr." refers to the transcript of the hearing before the undersigned on April 1, 2014, and "TR" refers to the transcripts from the hearing in *Smith v. Lake City Enterprises*, OALJ Case No. 2006-STA-32, dated April 16, 2007, April 17, 2007, and May 9, 2007.

these elements of Complainant's complaint, I will not address them. The only issue in this case is whether CRST's refusal to hire Complainant was causally related to his protected activity.

### Summary of the Evidence

In my Decision and Order Granting Respondent's Motion of Summary Decision and Dismissing Complaint and Order Cancelling Hearing, issued on August 15, 2011, I summarized the pertinent factual findings as follows:

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.

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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

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<sup>2</sup> At the hearing, counsel for Complainant read the following Requests for Admissions into the record. CRST admitted every statement, except as otherwise noted. (1) Respondent is an employer, as defined in 49 U.S.C. 31101(3); (2) Respondent is a person as that term is used in 49 U.S.C. 51105(a)(1); (3) Complainant was an employee as that term is used in 49 U.S.C. 31105 (a)(1); (4) Milton Parks was Respondent's agent in 2005; (5) Mike Hardin was Respondent's agent in 2005; (6) in September 2005, Complainant attended Respondent's training program in Rockport, Indiana; (7) During its September 2005 training program in Rockport, Respondent instructed Complainant on the use of Comchecks to purchase fuel; (8) Complainant engaged in protected activity; (9) and before November 8, 2005, Harry Smith asked Respondent to join its lease/purchase program. (Respondent admits that before November 8, 2005, Harry Smith talked to one or more of its employees several times about the possibility of joining its lease/purchase program). (Tr. at 33-34).

<sup>3</sup> In its Brief in Support of Motion for Summary Judgment, CRST stated it does not dispute that Complainant engaged in protected activity, or that he was the subject of an adverse employment action. (Respondent CRST International Inc.'s Brief in Support of Motion for Summary Judgment at 4).

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.

(ALJ 1 at 3-7).

In its Prehearing Submission, CRST identified the following stipulated exhibits pursuant to the scheduling order: (1) All exhibits contained in Respondent's Appendix in Support of its Motion for Summary Judgment<sup>4</sup> ("CRST's Appendix"); (2) Smith Hearing Exh CX 1<sup>5</sup>; and (3) Smith Hearing Exh CX 16<sup>6</sup>. (Respondent's Prehearing Submission at 2).

I held a hearing on April 1, 2014 in Canton, Ohio. Complainant and Craig Smith testified at the hearing. I marked and admitted as ALJ 1 the Decision and Order Granting Respondent's Motion for Summary Decision and Dismissing Complaint issued on August 15, 2011, and as ALJ 2 the Board's Decision and Order of Remand issued on June 6, 2013. (Tr. at 5-6). I also admitted CX 40<sup>7</sup>-52, 54-60, 64, and 65 and RX A into evidence.<sup>8</sup> (Tr. at 13). Both parties

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<sup>4</sup> CRST's Appendix includes the following evidence: 1) Excerpts from Harry Smith's deposition 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 Lake City; 5) Excerpts from deposition of Craig Smith taken on March 15, 2011; 6) Lake City's 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) Lake City Enterprises-CRST Exclusive Agency Agreement; 10) Lake City Enterprises -CRST Independent Contractor Operating Agreement; 11) Excerpts from the deposition of Harry Smith taken on February 21, 2011; and 12) Lake City Enterprises pay records for Harry Smith.

<sup>5</sup> CX 1 is Lake City's Management Overview, admitted at the hearing in *Smith v. Lake City Enterprises, Inc.*, 2006-STA-32, on April 16, 2007. (TR at 9). It was also admitted as CX 50 at the hearing on April 1, 2014. (Tr. at 13).

<sup>6</sup> CX 16 is Lake City's Notice of Personnel Action, admitted at the hearing in *Smith v. Lake City Enterprises, Inc.*, 2006-STA-32, on April 16, 2007. (TR at 13). It was also admitted as CX 54 at the hearing on April 1, 2014. (Tr. at 13).

<sup>7</sup> The parties stipulated, and I agree, that they may use the exhibits and transcripts from the record in *Smith v. Lake City Enterprises*, OALJ Case No. 2006-STA-32, in the present case without further authentication. (CX 40).

submitted post-hearing briefs and reply briefs. On September 22, 2014, Complainant filed Complainant Harry Smith's Notice of Additional Authority. On September 29, 2014, CRST filed CRST International Inc.'s Reply to Smith Notice of Additional Authority. The record is now closed. While I have considered all of the evidence of record, I have only summarized evidence that is relevant to the issues in this case.

### Complainant's Testimony

Complainant testified at the hearing on April 1, 2014. (Tr. at 34-49). He stated he is employed as "a line foreman, a truck driver/equipment operator" at Environmental Trenching. (Tr. at 35). He testified he obtained employment at Lake City Enterprises ("Lake City") through conversations with recruiters at CRST Malone.<sup>9</sup> (Tr. at 36). Specifically, he stated:

I originally called CRST Malone about their lease/purchase program. Spoke with a couple recruiters -- I don't remember the name of the first recruiter -- that instead of basically sticking my neck out and not knowing the company, not knowing the equipment that they had, they recommended I go through a company that already had trucks, to drive for one of them until I got familiar with the company. Then I could always come on as a lease/purchase driver.

(Tr. at 36). Complainant "vaguely" remembers conversations with Milton Parks about working for CRST. (Tr. at 37-38).

Complainant started working at Lake City and "loved" his job until Lake City "refused to replace a faulty trailer." (Tr. at 37). Complainant said he explained his concerns regarding the accident to Crystle Morgan's husband. *Id.* According to Complainant, his employment with Lake City ended after the trailer accident. (Tr. at 38). He described the sequence of events as follows:

I had an accident at a truck stop where the center of the trailer, [] rolled over to the side. And we reported the accident. And I had made some remarks [to Lake

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<sup>8</sup>The parties submitted the following exhibits at the hearing April 1, 2014: (1) portions of *Smith v. Lake City Enterprises, Inc.*, 2006-STA-32, Recommended Decision and Order (ALJ May 21, 2008) (CX 41); (2) *Smith v. Lake City Enterprises, Inc.*, ARB Nos. 08-091 and 09-033, ALJ No. 2006-STA-31, Final Decision and Order of Remand (ARB Sept. 28, 2010) (CX 42); (3) *Smith v. Lake City Enterprises, Inc.*, ARB No. 11-087, ALJ No. 2006-STA-32, Final Decision and Order on Remand (ARB Nov. 20, 2012) (CX 43); (4) Carl Rochford's deposition, dated March 24, 2011 (CX 44); (5) portions of Craig Smith's deposition, dated February 15, 2011 (CX 45); (6) Jeff Loggins' deposition, dated May 23, 2011 (CX 46, RX A); (7) Richard Renner's fax to Mike Hardin on November 15, 2005 (CX 47); (8) CRST document No. 212 (CX 48); (9) CRST Carrier Group Hiring Guidelines ("CRST Hiring Guidelines") (CX 49); (10) Lake City's description of the incident involving Complainant, entitled "Management Overview" (CX 50); (11) portions of Crystle Morgan's deposition, dated November 22, 2006 (CX 51); (12) portions of Ken Morrison's deposition, dated November 22, 2006 (CX 52); (13) Lake City's Notice of Personnel Action (CX 54); (14) Complainant's schedule C (CX 55); (15) CRST Document Nos. 98-101 (CX 56); (16) CRST pro forma (CX 57); (17) CRST's answer to Interrogatory Four, including supplemental answer (CX 58); (18) portions of Lake City's Exhibit RX, Harry Smith's deposition, dated December 23, 2006 (CX 59); (19) Crystle Morgan's fax to CRST on November 11, 2005 (CX 60); (20) Milton Parks' Employment History (CX 64); and (21) the transcript from the hearing in *Smith v. Lake City Enterprises, Inc.*, 2006-STA-32, dated April 16, 2007 (CX 65).

<sup>9</sup> CRST Malone is the flatbed division of CRST International. (Tr. at 50).

City] about replacing the trailer and what I would do if they didn't [] and they said, "Well, come into the yard and we'll replace the trailer." Which the following day I delivered a load, [went] into the yard, they asked me to [go] upstairs; they wanted to discuss something with me. I went upstairs. They immediately took my phone and said they w[ere] accepting my resignation, which I never at no time quit or said I wanted to quit. I just wanted them to replace their trailer.

(Tr. at 38).

Complainant testified that Crystle Morgan gave three reasons for ending his employment with Lake City, but he could not recall all of them. He said one reason was that he "threatened" her company by stating he would "go to" the Department of Transportation ("DOT"). He is "pretty sure" she also said "she was not happy with" his "performance as far as what [he] was doing about her trailer." (Tr. at 38). As to why CRST refused to hire him, Complainant opined that CRST "just -- they said I was not -- I don't -- how you would say it, eligible for hire." (Tr. at 40). He further said CRST never explained what made him ineligible for hire. *Id.*

On cross-examination, Complainant testified that the trailer incident occurred on November 7, 2005. (Tr. at 42). Although he informed Lake City of the accident, he did not contact CRST about it. (Tr. at 43). Complainant provided the following testimony regarding the individuals with whom he discussed the incident:

Q: All right. Now, you didn't -- you didn't tell anyone at CRST about that incident though.

A: I was informed from Lake City not to.

Q: Just answer my question, sir. You didn't call CRST and say, "Hey, I had an incident in Illinois."

A: No.

Q: Okay. And, in fact, your conversation with Milton Parks about concerns you had about the Lake City trailer that you were driving, that was before that incident, right?

A: Correct.

Q: All right. And, I mean, that's what you testified to in the prior hearing that you had talked with Milton Parks at a prior time before that incident in Illinois.

A: Correct.

Q: And you didn't talk with CRST after that about the Illinois incident.

A: I was -- no.

Q: Okay. And you didn't talk to anyone at CRST about safety concerns about the trailer after that Illinois incident; it was just before that, right?

A: Correct.

Q: And you don't -- you talked about that you didn't have a conversation with anyone at CRST about the circumstances of this unreported accident; isn't that true?

A: I was unable to.

Q: So you didn't -- you don't recall any conversation you had with anyone at CRST when you called up and said, "Hey, I really didn't have an unreported accident. Here's what happened."

A: No, I did not have a conversation with them.

(Tr. at 43-44).

Furthermore, Complainant testified that he had no knowledge of any conversations between Crystle Morgan and CRST. (Tr. at 46). Specifically, he stated in response to the following questions:

Q: And just to be clear, sir, you're not -- you don't have knowledge of any conversations as between Crystle Morgan and CRST.

A: As it references to?

Q: To you, sir.

A: To me, the only knowledge I have is the report[] that she g[a]ve to CRST.

Q: And that report indicated that you had an unreported accident.

A: Correct.

Q: Correct. And you're aware of that.

A: Correct.

Q: And you're aware that based on your knowledge of the industry that if a driver has an unreported accident, that that's the kind of thing that's going to disqualify a driver from working.

A: In some cases it does. In some cases an employer will look at the previous employer. They'll look at the rollover of the drivers. They'll look at their rating, their DOT rating. And they can basically distinguish whether, you know, if the company is a credible company or if it's a fly-by-night company.

Q: All right.

(Tr. at 46-47).

### Craig Smith's Testimony

Craig Smith, Vice President of Operations for Besl Transfer, a subsidiary of CRST International, also testified at the hearing on April 1, 2014. (Tr. at 49-83). He served as Vice President of Operations for CRST Malone from November 2007 until March 2012. (Tr. at 50). Although not affiliated with CRST from September 2005 until November 2007, Craig Smith said he is familiar with this case. *Id.*

Craig Smith testified CRST has a policy that involves reviewing "accident and unsafe driving behavior" of potential drivers. (Tr. at 51). He stated that at CRST, "[u]nreported accidents, from a policy and practice standpoint ... have always been a disqualifying event." *Id.* Although CRST has hiring guidelines on unsafe operating habits and accidents, it does not have a written policy that specifically addresses unreported accidents. *Id.* Nonetheless, he reiterated that an unreported accident "is a disqualifying event" and that CRST would not accept an individual with a history of an unreported accident. (Tr. at 53). He stated CRST typically looks back at an applicant's record over a three-year period. *Id.* If an applicant has a record of certain "serious accident events" within the three-year period preceding the application, CRST "would take the position that [he or she is] not qualifiable." *Id.* Beyond that timeframe, CRST may look at the rest of the individual's driving record, moving violations, and other "unsafe events" to determine whether the individual qualifies. (TR 53-54).

When asked about the contents of Complainant's Notice of Personnel Action, Craig Smith testified as follows:

Q: Okay. And as you look at that *Notice of Personnel Action*, is -- it indicates there's an unreported accident. Is that the kind of thing that falls within the hiring guidelines that you spoke of?

A: Yeah, absolutely. Based on the description here of the circumstances for the separation between the driver and the owner, there's no question that that -- that in that case, the driver would not be qualified or eligible for rehire.

(Tr. at 55).

Craig Smith explained that on CRST document No. 212 (CX 48), which contains a list of sixteen drivers who failed to report accidents, "R" stands for "review." (Tr. at 55). Of the sixteen drivers, one individual had an "R" listed next to his name. (Tr. at 55; CX 48). Craig

Smith explained that the “R” does not mean CRST would rehire the individual. (Tr. at 55). Rather, it means CRST would review “the circumstances for the separation” and the safety department would “ultimately [] make a decision as to whether or not the driver could be qualified again.” (Tr. at 55-56). Craig Smith testified he reviewed the CRST system to determine whether CRST ever hired the individual with the “R” next to his name, and “found there was no record that he did work for” CRST. (Tr. at 56).

Craig Smith testified that when CRST receives a Notice of Personnel Action like the one it received from Lake City, CRST relies on it. (Tr. at 58). Furthermore, it is not CRST’s practice to follow up with a driver to ensure the accuracy of the information provided in a Notice of Personnel Action. (Tr. at 58-59). However, he noted, “if the driver contacts us through the safety department, the operations group, we would listen to whatever issues that -- you know, that they brought up. And then circulate that back through and review with the owner of the truck.” (Tr. at 59).

On cross-examination, Craig Smith stated CRST has a compliance program that it has developed over time. (Tr. at 61). CRST’s management runs the compliance program. *Id.* He explained that the compliance program includes policies informing drivers how to raise compliance concerns. (Tr. at 62). At orientation, drivers are encouraged to “notify their direct supervisors” in the event of an issue. *Id.* Otherwise, they are encouraged “to contact anybody in management to address those concerns if they’re not being followed through.” *Id.* Craig Smith clarified that Milton Parks was not part of CRST’s management; rather he was a driver recruiter. *Id.*

Craig Smith testified he does not know whether CRST’s compliance program had any record of Complainant’s complaint to Milton Park regarding Complainant’s concern over the unsafe equipment at Lake City. (Tr. at 63). Furthermore, he does not know whether CRST conducted an investigation into whether Lake City’s report was accurate. *Id.* However, he testified that CRST’s internal records, specifically the accident hotline, “would have supported or substantiated” the report from Lake City. *Id.* According to Craig Smith, all drivers are taught to report “any kind of an accident or incident” to an accident hotline, which is available “24/7.” (Tr. at 64).

As to whether CRST would approve Complainant as a driver now, Craig Smith responded:

Even to this day I can’t give you a definitive answer if we would approve him now because I would have to look at his safety record with other driving jobs within the recent past, being defined in th[is] case [as] accidents or unsafe behaviors, within approximately three years.

With respect to criminal activity, and we change that from time-to-time, it could be five to seven years, drug and alcohol, going back to ten years or before. So with respect to this particular incident, it would probably not carry a lot of weight because so much time has passed. Even in the event of a driver that did have an unreported accident many years ago, I would probably take that into account as

not as important, especially if he had a clean driving record in the recent pa[st] being defined [as] the last three years.

(Tr. at 65). Later in his testimony, Craig Smith reiterated that although CRST's policy changes periodically, DOT regulations require CRST to consider the last three years of an applicant's motor vehicle records. (Tr. at 71). Therefore, "typically," CRST has used that standard for considering "unsafe behavior and accident history." *Id.*

Counsel for Complainant asked Craig Smith a series of questions regarding differences between hiring practices at CRST Malone and CRST's van division. (Tr. at 66). Craig Smith testified that although the hiring qualifications each division considers are usually similar, they are "not necessarily the same." (Tr. at 69). Nevertheless, he said, "all of" CRST's divisions "always have[] treated unreported accidents, especially severe ones[,] as a disqualifying offense." *Id.*

### Carl Rochford's Deposition

Carl Rochford was deposed on May 24, 2011. (CX 44). He testified he was CRST's Safety Director from 2002 to 2006. (CX 44 at 7). He described CRST's process of hiring individuals to drive for CRST, noting that, typically, recruiters would approach him and recommend drivers. (CX 44 at 11). Carl Rochford testified he was responsible for reviewing applicant files and using them to make hiring decisions. (CX 44 at 12). In this case, Mike Hardin, a CRST recruiter, approached Carl Rochford and asked whether Complainant could drive for CRST. (CX 44 at 11). When asked about the nature of Mike Hardin's recommendation, Carl Rochford responded as follows:

Q: Did Mike Hardin make any written report to you about the information he had or his recommendation?

A: The only thing we would have had is what was in the driver's file.

Q: Well, did you personally talk to Mike Hardin about it?

A: I'm sure I did, yes.

Q: Do you remember if Mike Hardin had a recommendation?

A: Normally the recruiters want to get a guy on board, so they will, you know, want to have that person, so they'll... show the file and, you know, hope that I would approve it.

(CX 44 at 14-15).

Counsel for Complainant questioned Carl Rochford concerning Carl Rochford's interactions with Milton Parks. Carl Rochford said Milton Parks' name was familiar, stating, "I

think he was a recruiter.” (CX 44 at 18). When asked whether he knew about Milton Parks’ relationship with Complainant, Carl Rochford testified as follows:

Q: Did you ever talk to [Milton Parks]?

A: I’m sure I -- yeah, absolutely.

Q: Did you know that he was involved in negotiating with [Complainant]?

A: I don’t recall.

Q: So when you made the decision about [Complainant], do you recall having any information from Milton Parks about what he knew about the alleged unreported accident?

A: No, sir.

(CX 44 at 18-19).

Carl Rochford discussed the investigation he launched after Complainant filed a complaint with OSHA. (Tr. at 24-33). He said he “looked at the files” and “questioned individuals.” (Tr. at 25). When asked whether he had spoken to Milton Parks as part of his investigation into Complainant’s OSHA complaint, Carl Rochford responded, “No, I cannot say that I did o[r] not. I don’t recall that.” (CX 44 at 32). When asked, “At any point in your investigation did you learn about [Complainant’s] claim that he reported the accident to both Cryst[le] Morgan and to Milton Parks?” Carl Rochford responded, “No.” *Id.*

Carl Rochford also discussed CRST’s hiring policies. He testified that he was asked to review Complainant’s qualifications. (CX 44 at 10). In doing so, he learned that Complainant had “parted company” with one of CRST’s fleet owners and “had some unreported accident damage that he never reported to safety on I believe one of the trailers, and that is a definite thing that we will not rehire a person or, you know, release.” (CX 44 at 12). When asked “[o]ther than the allegation from Lake City Enterprises about the alleged unreported accident, are you aware of any other reason [Complainant] should be disallowed as a driver?” Carl Rochford responded, “I am not at this time aware of anything.” (CX 44 at 36). When questioned whether CRST had a written policy, Carl Rochford responded, “I can’t tell you for sure. I do know that I had a policy that if [an individual] had an unreported accident, it would be automatic termination . . . . I can at least tell you it was a definite policy practice; I can’t tell you if it was a written policy.” (CX 44 at 12-13). Carl Rochford provided the following testimony regarding whether CRST had ever hired an individual with a history of an unreported accident:

Q: Are you aware of any cases in which a driver was noted as having an unreported accident but was permitted to be considered for rehire by CRST?

A: No, sir.

...

Q: []. When you were reviewing a driver's record for consideration of approval as a driver for CRST, how many years back d[id] you look on that driver's record?

A: Well, it would depend on certain situations and depend on hiring guidelines. I don't recall the hiring guidelines that we had at CRST at the time, but for things, for example, like traffic violations, normally three years. If it was some kind of criminal [offense], it could be lifetime. If it was like a DUI, you know, it could be a longer length of time as well. I don't recall what the policy was. So it would be based upon what particular aspect you're looking at.

Q: Is there a policy on unreported accidents?

A: Once again, I can't tell you what the policy is. I don't have access to any of those documents anymore. I can tell you what the practice was, but I can't tell you [if it] was [] in the policy book.

(CX 44 at 21-22).

### Jeff Loggins' Deposition

Jeff Loggins was deposed on May 23, 2011. (CX 46; RX A).<sup>10</sup> He testified he is the Director of Contractor Relations at CRST and has been for three and a half years. (RX A at 8). He stated he does not have the authority to decide who drives for CRST. *Id.* He explained that CRST Document No. 212 is "a list of drivers that were canceled for the reason of what we call the 22 code, unreported accident." (RX A at 10, CX 48). The code "R" next to a driver's name means that management will review the driver's record and make a hiring decision in the future. (RX A at 37-38). According to Jeff Loggins, CRST's safety department makes the decision to put the code on a driver's record. (RX A at 11, 17, 34). He provided the following testimony regarding CRST's policy to "cancel" everyone with an unreported accident:

Q: Do you know if they put that code on all drivers who have unreported accidents or only those who are canceled because of unreported accidents?

A: Both. Every -- if we have somebody with an unreported accident, they are canceled.

Q: You're saying that's a CRST policy?

A: It is, yes.

Q: Is that policy in writing?

A: I -- I am not sure. I believe it is, but I'm not sure.

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<sup>10</sup> Jeff Loggins' Deposition is contained in both CX 46 and RX A. Because CX 46 only contains portions of the deposition, I will refer to RX A for citation purposes.

(RX A at 11-12). Jeff Loggins stated CRST typically looks at the last three years of a driver's driving record in determining whether he or she is eligible to drive for CRST. (RX A at 15).

Crystle Morgan's Deposition (CX 51)

Crystle Morgan was deposed on November 22, 2006. (CX 51). She discussed the trailer incident involving Complainant. (CX 51 at 15-16). She made the following statements regarding the information she reported to CRST:

Q: What did you report to CRST?

A: That [Complainant] had an unreported accident with the equipment. To the best of my recollection, that's what I reported.

Q: And by that, you are referring to the issue he had with the coil?

A: And the damage to the equipment.

(CX 51 at 38). She explained Lake City's policy regarding what employees should do if they are concerned about the safety of their equipment. (CX 51 at 41-43). She also discussed her communications with CRST. Specifically, she testified as follows:

Q: Did you tell CRST anything about whether or not CRST should hire [Complainant]?

A: I believe one of the recruiters asked me, at one point, if I would have any problem with [Complainant] being put on my board if he became an owner-operator, and I don't know if that's in there or not, but I recall saying no, that, you know, if he was, that he should be put on my board because it would be most profitable for an owner-operator in that area to be put on my board.

Q: Did you have any other discussions with anyone from CRST about [Complainant]?

A: Only after he left and was going - I guess he bought a truck. I don't know if it was the next day or two days later, he had bought a truck and was going to sign it on with CRST, and they - [] recruiting called me because I didn't send in the - they call it the green form.

Q: Did you send that in?

A: Yes, but I guess the person that normally receives it was out on vacation, so another person received it, and they hadn't had the information put into their system yet.

Q: What d[id] the green form[] say?

A: That the employee quit the owner and that he had an unreported accident.

Q: Do you know what effect that would have on CRST's decision about [Complainant]?<sup>11</sup>

A: No, I didn't.

(CX 51 at 86-87).

## Law and Analysis

### Applicable Law

Complainant filed this claim in 2005. The STAA amendments were enacted into law on August 3, 2007; thus, at the time Complainant filed his complaint, the 2007 amendments were not yet in effect and the *McDonnell Douglas Title VII* burden of proof framework applied.<sup>12</sup> In its Decision and Order of Remand, the Board directed me to apply the pre-2007 burden of proof framework in this case. Specifically, the Board described Complainant's burden as follows:

To prevail on his STAA complaint filed prior to 2007, [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 action against him, and (4) and the "existence of a 'causal link' or 'nexus,' between the protected activity and the adverse action." The causal link required for a prima facie showing under the pre-2007 standard requires evidence that the "protected activity was a 'motivating factor' in the employer's decision to take adverse action." "Evidence of each of these elements raises an inference that the employer violated the STAA." Under the pre-2007 standard, "[o]nly if the complainant makes out this prima facie showing does the burden shift to the employer to articulate a nondiscriminatory reason for the adverse action."

(ALJ 2 at 7) (footnotes omitted). Thus, although I am rendering a decision in this case after the effective date of the 2007 amendments, the Board cited the pre-2007 law as applicable in this

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<sup>11</sup> Mr. English objected to this question, but did not state a reason. In any event, I find this question relevant and I admit the answer.

<sup>12</sup> Before August 2007, Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000 *et seq.*, often referred to as the *McDonnell Douglas* burden of proof framework, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973), governed the burdens of proof in STAA cases. *See e.g. Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21-22 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994). In 2007, the 9/11 Commission Act of 2007 (Pub. L. No. 110-53, 121 Stat. 266 (Aug. 3, 2007)) amended the STAA at 49 U.S.C.A. § 31105. *See 77 Fed. Reg.* 44122 (July 27, 2012). STAA complaints are now governed by the legal burdens of proof articulated in the Aviation Investment and Reform Act for the 21<sup>st</sup> Century ("AIR 21"), located at 49 U.S.C.A. § 42121(b). *See 49 U.S.C.A. § 31105(b)(1)*. The AIR 21 burden of proof standards replaced the *McDonnell Douglas Title VII* burden of proof standards with a two-part framework.

case. *Id.* Therefore, I will apply the pre-2007 framework in determining whether CRST's Refusal to Hire Complainant was causally related to his protected activity.<sup>13</sup>

### Analysis

As previously discussed, the parties agree that Complainant engaged in protected activity when he reported concerns regarding unsafe equipment to Lake City, and CRST took an adverse action in refusing to hire him. Thus, Complainant has met the first two elements of entitlement. In its Decision and Order of Remand, the Board held that "[t]aken as a whole, the temporal proximity between [Complainant's] November 9, 2005 complaints, Morgan's verbal and written communication with Parks then and shortly afterward, and Rochford's refusal to hire on November 15" raise a genuine issue of material fact as to whether Complainant's protected activity played a motivating role in CRST's refusal to hire him. (ALJ 2 at 11-12). Thus, in this Decision and Order on Remand, I will consider all of the evidence of record in determining whether Complainant's protected activity was a motivating factor in CRST's adverse action against him.

Close proximity between Complainant's protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action. *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec'y Oct. 1, 1993) (citing *Moon*, 836 F.2d at 229). In this case, Lake City terminated Complainant on November 9, 2005. CRST decided not to hire Complainant on November 15, 2005. Only six days passed between the protected activity and the adverse employment action. Furthermore, the evidence shows that Milton Parks, a driver recruiter at CRST, knew about Complainant's protected activity. (CX 50 at 2-3). Specifically, Complainant discussed the incident with Crystle Morgan, Lake City's President and sole shareholder, who then spoke with Milton Parks. (TR at 334, 553; CX 50 at 2-3). Crystle Morgan told Milton Parks that Lake City "needed to re-seat" the truck that Complainant drove because he gave Lake City "an ultimatum and told us to find another driver for the truck because we had faulty equipment." (CX 50 at 2). Milton Parks then told Crystle Morgan that he had just received a call from Complainant, and Complainant had said "that he was going to take [Lake City's] trailer and have it DOT inspected." *Id.* Weighing the evidence in the light most favorable to Complainant, I find that he has met his prima facie burden of showing a nexus between the protected activity and the adverse action. Thus, the burden shifts to Employer to show a legitimate, non-discriminatory reason for refusing to hire Complainant.

CRST argues that Complainant's unreported accident is the only reason it made the decision not to hire Complainant. (Respondent's Post-Hearing Brief at 6). I find the weight of the evidence supports CRST's argument. Carl Rochford, the person in charge of making hiring decisions at CRST, testified that Complainant "had some unreported accident damage that he

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<sup>13</sup> Even assuming the post-2007 law is applicable in this case, Complainant has failed to show that his protected activity was a contributing factor in CRST's decision not to hire him. Furthermore, even assuming, *arguendo*, that Complainant did show that his protected activity was a contributing factor in CRST's decision not to hire him, CRST has shown by clear and convincing evidence it would have taken the same unfavorable personnel action against Complainant. CRST has shown that it reasonably believed Complainant had failed to report an accident, as evidenced on the Notice of Personnel Action it received from Lake City. Testimony from Craig Smith, Carl Rochford, and Jeff Loggins regarding CRST's hiring policies supports a finding that CRST automatically disqualifies individuals with records of unreported accidents.

never reported to safety on I believe one of the trailers, and that is a definite thing that we will not rehire a person or, you know, release.” (CX 44 at 10, 12). On various occasions during his deposition, Carl Rochford reiterated that, although he could not remember if CRST had a written policy on the issue, his policy was to terminate automatically an applicant with a record of an unreported accident. (CX 44 at 12-13). In addition, Craig Smith’s testimony supports Carl Rochford’s statements. Craig Smith testified, “[u]nreported accidents, from a policy and practice standpoint at CRST have always been a disqualifying event.” (Tr. at 51). He explained that CRST typically looks back at an applicant’s record over a three-year period, and that any driver with an unreported accident would not qualify to drive for CRST. (Tr. at 53). Furthermore, Craig Smith testified that when CRST receives a Notice of Personnel Action, such as the one CRST received from Lake City, CRST relies on it in making hiring decisions. (Tr. at 58). I find that CRST has successfully rebutted the inference of causation, and it has shown that its adverse action was unrelated to Complainant’s protected activity.

As CRST has rebutted the inference of retaliation, the burden shifts back to Complainant to show by a preponderance of the evidence that the legitimate, non-retaliatory reason was a pretext for unlawful retaliation. Complainant argues that “temporal proximity, deviation from normal practice, inconsistency with written policies, and pretext” suggest causation between Complainant’s report to Lake City and CRST’s decision not to hire him. (Complainant’s Post-Hearing Brief at 22). In addition to considering Complainant’s arguments, I have followed the Board’s guidance and considered the applicability of *Staub v. Proctor*, 131 S. Ct. 1186 (2011), to this case.

### Cat’s Paw Theory

In its Decision and Order of Remand, the Board held I “focused too narrowly on Rochford’s asserted lack of knowledge of [Complainant’s] protected activity” in granting CRST’s motion for summary decision. (ALJ 2 at 11). Referencing the “cat’s paw” theory of liability discussed in *Staub v. Proctor*, 131 S. Ct. 1186 (2011)<sup>14</sup>, the Board said, “knowledge of protected activity and actions by others can influence the final decision-maker and result in a finding of liability.” (ALJ 2 at 11). Furthermore, referencing its decision in *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 24, 2011), the Board noted that “proof that an employee’s protected activity contributed to the adverse action does not necessarily rest on the decision-maker’s knowledge alone, but may also be established by evidence demonstrating ‘that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee’s protected activity[.]’” (ALJ 2 at 11) (quoting *Bobreski*, slip op. at 14).

In *Staub*, the Supreme Court held that “if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.” *Staub*, 131 S. Ct. at 1194. In *Staub*, the Court found the two supervisors who

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<sup>14</sup> *Staub v. Proctor* 131 S. Ct. at 1192 (“When a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a ‘factor’ or a ‘causal factor’ in the decision. . .”).

influenced the final decision-maker were “motivated by hostility towards” the complainant’s military obligations, their actions were “causal factors underlying” the ultimate adverse employment action, and they had the “specific intent to cause” the complainant to be terminated. *Id.* Thus, I will consider whether individuals with knowledge of Complainant’s protected activity influenced Carl Rochford, and whether they intended for the adverse action to occur.

*Alleged Communication between Carl Rochford and Milton Parks*

In this case, Carl Rochford was responsible for deciding whether to allow Complainant to drive for CRST. At his deposition, he discussed his interactions with Milton Parks. Carl Rochford said Milton Parks’ name was familiar, stating, “I think he was a recruiter.” (CX 44 at 18). When asked whether Carl Rochford knew about Milton Parks’ relationship with Complainant, Carl Rochford testified as follows:

Q: Did you ever talk to [Milton Parks]?

A: I’m sure I -- yeah, absolutely.

Q: Did you know that he was involved in negotiating with [Complainant]?

A: I don’t recall.

Q: So when you made the decision about [Complainant], do you recall having any information from Milton Parks about what he knew about the alleged unreported accident?

A: No, sir.

(CX 44 at 19). Thus, at the time Carl Rochford made the decision not to allow Complainant to drive for CRST, he had no information from Milton Parks regarding Complainant’s protected activity.

In January of 2006, Carl Rochford began investigating Complainant’s OSHA complainant. (CX 44 at 27). At Carl Rochford’s deposition, counsel for Complainant asked him whether he had spoken to Milton Parks *as part of his investigation into Complainant’s OSHA complaint*, and Carl Rochford responded, “No, I cannot say that I did o[r] not. I don’t recall that.” (CX 44 at 32). When asked, “At any point in your investigation did you learn about [Complainant’s] claim that he reported the accident to both Cryst[le] Morgan and to Milton Parks?” Carl Rochford responded, “No.” (CX 44 at 32). The record shows that Carl Rochford had not spoken with Milton Parks regarding what Milton Parks knew about Complainant’s protected activity. His uncertainty regarding whether he had spoken with Milton Parks related only to his communication with Milton Parks regarding the OSHA investigation, not regarding his decision not to hire Complainant.

Complainant has failed to show that Milton Parks influenced the final decision-maker, Carl Rochford, or that Carl Rochford knew about Complainant’s protected activity. Furthermore,

even assuming, *arguendo*, that Milton Parks had influenced Carl Rochford in some way, Complainant has not shown that Milton Parks had a discriminatory motive towards Complainant. Unlike in *Staub*, Milton Parks was not hostile towards Complainant, his actions were not causal factors underlying CRST's failure to hire Complainant, and he did not have the specific intent to prevent CRST from hiring Complainant. Here, Milton Parks was aware of Complainant's protected activity, as Complainant told Milton Parks he was going to take Lake City's trailer to the DOT for inspection. (CX 50 at 2). However, even with this knowledge, Milton Parks was recommending Complainant to drive for CRST. On November 11, 2005, Milton Parks spoke with Crystle Morgan on the phone and informed her that Complainant had just bought his own truck and wanted to lease it to CRST. (ALJ 1 at 6; CX 50 at 4). Milton Parks asked Crystle Morgan if she would have a problem with Complainant being on CRST's dispatch board, and she answered "no." *Id.* Complainant has failed to prove that Milton Parks was trying to prevent CRST from hiring Complainant. Rather, Milton Parks' actions suggest he wanted CRST to hire Complainant. It was not until Carl Rochford reviewed Complainant's file and noticed Complainant had a record of an unreported accident that he made the decision not to allow Complainant to drive for CRST. As previously discussed, that decision was consistent with CRST's policy not to hire any driver with a history of an unreported accident. Therefore, I find that Milton Parks neither influenced Carl Rochford, nor intended to prevent CRST from hiring Complainant.

#### *Alleged Communication between Carl Rochford and Crystle Morgan*

The record also supports a finding that Carl Rochford did not communicate with Crystle Morgan regarding Complainant's protected activity. At her deposition, when asked if she told CRST whether CRST should hire Complainant, Crystle Morgan responded that she did not have a problem hiring Complainant as an owner-operator for CRST. (CX 51 at 86). Moreover, she testified that Complainant "should be put on" her "board," as doing so would be very profitable for an owner-operator. *Id.* When asked if she had "any other discussions with anyone from CRST" regarding Complainant, Crystle Morgan testified that CRST called requesting Complainant's green form.<sup>15</sup> *Id.* She testified that the green form said Complainant "quit the owner and that he had an unreported accident." (CX 51 at 87). She testified she did not know what effect Complainant's unreported accident would have on CRST's decision to hire him. *Id.*

The record shows that Crystle Morgan sent CRST Complainant's Notice of Personnel Action. (CX 51 at 86). However, Complainant has failed to show that Crystle Morgan communicated with Carl Rochford, the final decision-maker. Complainant even testified that, other than the report Crystle Morgan sent to CRST, he had no knowledge of any conversations between Crystle Morgan and CRST. (Tr. at 46). Unlike the supervisors in *Staub*, Crystle Morgan did not have the specific intent to prevent CRST from hiring Complainant. Rather, she testified she was not opposed to having Complainant drive as an owner-operator for CRST and even recommended that he work on her "board." (CX 51 at 86). Finally, she testified that she did not know what effect the unreported accident would have on Complainant's ability to drive for CRST. Thus, I am not persuaded that she had the specific intent to prevent CRST from hiring Complainant.

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<sup>15</sup> The fax cover sheet Crystle Morgan sent to CRST states she sent CRST Complainant's "Green Form-Notice of Personnel Action." (CX 60).

In sum, Complainant has not shown that Carl Rochford spoke with either Milton Parks or Crystle Morgan regarding Complainant's protected activity, or that their knowledge of Complainant's protected activity influenced Carl Rochford's decision not to hire Complainant.

### CRST's Normal Hiring Procedures

Complainant argues that CRST "deviated from its normal practice of documenting its driver qualifications in the CRST Hiring Standards" and noted that the "requirement at issue in this case, no unreported accidents, does not appear in the written policy." (Complainant's Brief at 27-28). An employer's failure to follow normal hiring procedures may provide evidence of a discriminatory motive. *Settle v. BWD Trucking Co., Inc.*, 92-STA-16 (Sec'y May 18, 1994) (holding that respondent's reason for firing complainant - that his logs were fifteen days late - was pretext because respondent failed to follow its own policy, which provided that it would suspend drivers who submitted logs twenty days late.).

The evidence supports a finding that CRST followed its normal hiring procedures in Complainant's case. The CRST Hiring Guidelines provide "direction to" the recruiting, training, and safety departments and show CRST considers an applicant's employment history, experience, driving history, and criminal history. (CX 49). Complainant correctly notes that the CRST Hiring Guidelines do not specifically state that an unreported accident is a disqualifying event. (Complainant's Brief at 27). However, the evidence supports a finding that CRST always disqualifies an applicant with a record of an unreported accident. (CX 49). That the policy was not in writing does not negate its existence. *Frechin v. Yellow Freight Systems, Inc.*, 96-STA-34 (ARB Jan. 13, 1998) (respondent did not act with pretext when it discharged complainant for taking excessive time to depart from the terminal. Although respondent did not have a written policy requiring drivers to leave the terminal within fifteen minutes of receiving their manifests, complainant and other drivers knew the policy existed). Craig Smith, Carl Rochford, and Jeff Loggins all testified that CRST's policy is to terminate automatically an applicant with a record of an unreported accident. (See CX 44 at 12-13; Tr. at 51; Tr. at 53; CX 44 at 10, 12; RX A at 11-12).

Furthermore, CRST Document No. 212 (CX 48) and credible testimony from Jeff Loggins, Carl Rochford, and Craig Smith all support a finding that CRST treated Complainant in the same manner it treats other applicants with records of unreported accidents. (CX 48). Jeff Loggins, CRST's director of contractor relations, testified that CRST Document No. 212 is "a list of drivers that were canceled for ... what we call the 22 code, unreported accident." (RX A at 10, CX 48). He explained it is CRST's policy to cancel anyone with an unreported accident. (RX A at 11-12). Similarly, when asked whether he was "aware of any cases in which a driver was noted as having an unreported accident but was permitted to be considered for rehire by CRST," Carl Rochford responded: "No, sir." (CX 44 at 21). At his deposition, Craig Smith corroborated Jeff Loggins' testimony. He stated that CRST Document No. 212 contains a list of sixteen drivers who had unreported accidents, and, of them, one individual had the notation "R" next to his name in the "rehire" column. (Tr. at 55). Craig Smith said "R" stands for "review." *Id.* He explained that "R" does not mean CRST would rehire the individual. *Id.* Rather, "[i]t means that the circumstances for the separation would have been reviewed" and the safety department

would “make a decision as to whether or not the driver could be qualified again.” (Tr. at 55-56). He further stated he reviewed CRST’s system to determine whether the individual with the “R” next to his name was ever hired, and “found there was no record that he did work for” CRST. (Tr. at 56). Thus, CRST treated Complainant the same way it treats all other drivers who fail to report accidents. CRST has provided sufficient evidence to support finding that it has never hired anyone with a history of an unreported accident.

Finally, Craig Smith stated that although CRST’s policy changes periodically, DOT regulations require CRST to consider the last three years of an applicant’s motor vehicle records, so “typically” CRST has used that standard for considering “unsafe behavior and accident history.” (Tr. at 71). Similarly, Carl Rochford and Jeff Loggins testified that CRST typically looks at the last three years of an applicant’s driving record in determining whether he or she qualifies to drive for CRST. (CX 44 at 21-22; RX A at 15). Thus, that CRST looked back at Complainant’s recent accident history is consistent with its normal hiring procedures.

In sum, I find that CRST did not deviate from its normal hiring procedures in refusing to hire Complainant. In this case, Complainant’s record showed he had an unreported accident within the three years preceding his application to work at CRST; because of that, CRST refused to hire him. Credible testimony from Carl Rochford, Craig Smith, and Jeff Loggins supports a finding that CRST has a policy of refusing to hire any individual with a history of an unreported accident. Furthermore, CRST Document No. 212 and Craig Smith’s testimony show CRST has no record of hiring anyone with a history of an unreported accident. For all of the abovementioned reasons, I find that CRST followed its normal hiring procedures in refusing to hire Complainant.

### CRST’s Good Faith Belief

Counsel for Complainant also argues that because Complainant did not actually fail to report an accident, CRST’s reason for not hiring him was pretext. (Complainant’s Brief at 30-32). Employer argues it was acting in good faith in relying on the information provided by Lake City. (Employer’s Brief at 9-11). The “honest belief” rule “provides that so long as the employer honestly believed in the proffered reason given for its employment action, the employee cannot establish pretext even if the employer’s reason is ultimately found to be mistaken, foolish, trivial, or baseless.” *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6<sup>th</sup> Cir. 1998); *See also Philbrick v. Holder*, Case No. 13-2569, slip op. at 14 (6<sup>th</sup> Cir. 2014) (unpub.); *McCoy v. WGN Continental Broad. Co.*, 957 F.2d 368, 373 (7<sup>th</sup> Cir.1992). The “inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action.” *Smith* 155 F.3d at 807 (6<sup>th</sup> Cir. 1998); *See also Philbrick*, Case No. 13-2569, slip op. at 14. If an employee produces “sufficient evidence to establish that the employer failed to make a reasonably informed and considered decision before taking its adverse employment action, thereby making its decisional process ‘unworthy of credence,’ then any reliance placed by the employer in such a process cannot be said to be honestly held.” *Smith*, 155 F.3d at 807.

Complainant has not offered sufficient evidence to show that CRST did not act in good faith when it relied on the Notice of Personnel Action it received from Lake City. At his deposition, when asked “[o]ther than the allegation from Lake City Enterprises about the alleged

unreported accident, are you aware of any other reason [Complainant] should be disallowed as a driver?" Carl Rochford responded, "I am not at this time aware of anything." (CX 44 at 36). Craig Smith testified that CRST relies on a Notice of Personnel Action when it receives one from a former employer. (Tr. at 58). He said that based on the description contained in Complainant's Notice of Personnel Action, Complainant would not be qualified or eligible for rehire at CRST. (Tr. at 55). Furthermore, he testified it is not CRST's practice to follow up with a driver to ensure the accuracy of the information provided in the Notice of Personnel Action. (Tr. at 58-59). However, he noted, "if the driver contacts us through the safety department, the operations group, we would listen to whatever issues that -- you know, that they brought up. And then circulate that back through and review with the owner of the truck." (Tr. at 59). In this case, Complainant testified that he never had a conversation with anyone at CRST explaining that he did not actually fail to report an accident. (Tr. at 44).

In sum, Carl Rochford considered Complainant's Notice of Personnel Action and saw Complainant failed to report an accident. He testified that he based his decision not to hire Complainant on Complainant's unreported accident history. Craig Smith testified CRST's practice is to rely on a Notice of Personnel Action it receives from an applicant's former employer. Therefore, Carl Rochford's reliance on the Notice of Personnel Action was in good faith and consistent with CRST's policy and treatment of other drivers. I find that Complainant has not shown that CRST failed to make a reasonably informed and considered decision before taking its adverse employment action.

#### Temporal Proximity

Finally, Complainant argues that the temporal proximity between Complainant's protected activity and CRST's adverse employment action suggests that Complainant's protected activity was the likely reason for the adverse action. (Complainant's Brief at 23-25).

In *Spelson v. United Express Systems*, ARB No. 09-063, slip op. at 3, n. 3 (ARB Feb. 23, 2011), the Board held that "[a]n inference of causation is decisive at the prima facie level of proving a case, but is not dispositive at the merits stage, when a complainant is required to prove each element by a preponderance of the evidence." Furthermore, the Board found that "temporal proximity alone cannot support such an inference in the face of compelling evidence to the contrary." *Id.*; see also *Moon*, 836 F.2d at 229 (temporal proximity alone insufficient to establish a causal connection in light of evidence that the employer encouraged safety complaints). Therefore, even if temporal proximity supports an inference of retaliation in a complainant's prima facie case, it "is not necessarily dispositive." *Jackson v. Arrow Critical Supply Solutions, Inc.*, ARB No. 08-109, slip op. at 7, n. 5 (ARB Sept. 24, 2010). Rather, "temporal proximity is 'just one piece of evidence for the trier of fact to weigh in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.'" *Spelson*, ARB No. 09-063, slip op. at 3, n. 3. (quoting *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010)).

Although I found temporal proximity was sufficient to raise the inference of causation in Complainant's prima facie case, temporal proximity alone does not support a finding of

causation in the face of compelling evidence to the contrary. As discussed, I have found that CRST had a legitimate, non-discriminatory reason for not hiring Complainant. Complainant has failed to show, by a preponderance of the evidence, that CRST's legitimate, non-retaliatory reason for not hiring him was a pretext for unlawful retaliation. Therefore, temporal proximity alone is insufficient to support a finding that Complainant's protected activity was the likely reason for the adverse action.

### **Conclusion**

Complainant has failed to show by a preponderance of the evidence that CRST's stated reason for refusing to hire him was pretext for a discriminatory motive. First, Milton Parks and Crystle Morgan, who were aware of Complainant's protected activity, did not influence or communicate with Carl Rochford, who made the ultimate decision not to hire Complainant. Second, because Complainant's Notice of Personnel Action showed he failed to report an accident while he was working at Lake City, Carl Rochford determined Complainant was not eligible for hire; CRST followed its normal hiring practices in making that determination. Third, CRST submitted compelling evidence that it has never hired an individual with a history of an unreported accident. Fourth, Carl Rochford's reliance on Complainant's Notice of Personnel Action was both in good faith and consistent with CRST's normal practices. Finally, although only a few days elapsed between Complainant's protected activity and CRST's adverse action, in light of the abovementioned evidence, temporal proximity alone is insufficient to support Complainant's burden of establishing causation. For all of the abovementioned reasons, I find that Complainant has failed to establish that his protected activity had any causal connection to CRST's decision not to hire him. Because he has failed to carry his burden of proof, his claim against CRST must fail.

### **ORDER**

Accordingly, the complaint of Harry Smith for relief under the STAA is **DENIED**.

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 fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. 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 may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1978.110(a).

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

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(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1978.110(b).