



**Issue Date: 30 June 2009**

*In the Matter of*

**Rick Jackson**

Complainant

v.

Case Number 2009 STA 00022

**Major Transport Inc.**

Respondent

**APPEARANCES:**

Rock Jackson Pro Se.  
For the Complainant

Steven C. Zach, Esq.  
For the Respondent

**BEFORE:** DANIEL F. SOLOMON  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

***DISMISSAL OF CLAIM***

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

**APPLICABLE LAW**

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

(a) Prohibitions:

(1) A person may not discharge an employee [or prospective employee] or discipline or discriminate against an employee [or prospective employee] regarding pay, terms, or privileges of employment because:

(A) the employee [or prospective employee], or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;

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

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

(ii) The employee [or prospective employee] has a reasonable apprehension of

serious injury to the employee [or prospective employee] or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a).

Under the Statute:

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

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

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

“employer”--

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

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

49 USC § 31101 (2) and (3).

#### PRIMA FACIE CASE

Most claims under the STAA are adjudicated pursuant to the standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework, the complainant must initially establish a prima facie case of a refusal to hire, which raises an inference that the protected activity was likely the reason for the adverse action. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987); see also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To establish a prima facie case under the Act, the complainant must prove: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of an adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of the employer. *Moon, supra*.

#### FINDINGS OF FACT

I held a telephone conference in this case on March 27, 2009, at which time I Ordered the Respondent to produce certain documents and responses to discovery requests. This case came to hearing in Madison, Wisconsin on April 7, 2009. Testimony was taken from Complainant, Sherry Kircher, Donald Lindser, and Mark Lurvey.<sup>1</sup> During the hearing, I admitted Joint Exhibits 1-14, “JX” 1-JX 14 into evidence. At the hearing, Complainant moved for Summary Decision, which I held in abeyance, as it was not timely. Transcript, “TR” 9. After the hearing, the case remained open for briefs, which both parties have filed

Complainant testified that he applied for as job as a truck d4river with Respondent on or about April 4, 2008. TR 21-22, JX 2. At an interview with “Val,” he completed an application as a background check was being made. JX5. After that, he was scheduled for a road test with Don Lindser, who tested Complainant and told him that he passed. TR 24. However, he was called back for a second test.

---

<sup>1</sup> Note that the name is misspelled in the Transcript.

Complainant was sent a letter stating that he was well qualified but that the Respondent could not use him at that time. TR 24, JX 14, April 11, 2008.

Sometime thereafter, he contacted OSHA and filed a complaint.

I directed Complainant to an allegation by Respondent that he was hesitant to drive in heavy traffic and was worried about cars behind him and needed improvement. JX 13. Complainant alleged that it had been raining, and had been asked to back up the tractor trailer, but that he did not know what was meant by the allegations. TR 26. He denied that he had any trouble during the test, and “was just... driving safe.” TR 27.

I also directed him to an allegation that he had “trouble with air hoses.” JX 13. He testified that on the trailer the hoses were bent. TR 26. He said that the hole was bent and he had to adjust the hose. TR 41.

He also had a prior accident, when he was rear-ended in June, 2007. TR 26.

He also alleged that if hired, Mr. Lindser told him that he would have to “run illegal.” TR 32. If he was overloaded, he was to bypass the scales. TR 32. He directed my attention to JX 4, which is a job description for a short haul driver. “[T]he overweight for sod will be your responsibility...Drivers who knowingly route themselves on roads where scales are are responsible for the overweight” Id., TR 31.

Respondent directed the Complainant to JX12, the preliminary interview questionnaire. Complainant admitted that he had been a van driver. However, Complainant testified that he had experience both in short and long haul driving. TR 39. He admitted that he last did short haul driving in 2000. 40. But he later testified that there is no difference in driving a van, a reefer or a flatbed. TR 41.

Ms. Kircher initially testified that she was Respondent ‘s bookkeeper, and that she obtained the moving violations report and that she was part of the hiring process. However, on cross examination she admitted that she was a human resource employee and that she shared the position with Val Weedreck. And did not have hiring authority TR 58.

She said the company needed three short haul drivers and ran an ad. TR 46-47, JX 2. She testified that Complainant when arrived for his job interview, he looked upset and immediately started filling out the application packet. Although he passed the background check., she testified that Complainant was “very intimidating” to her. TR 49. She also stated that the fact that Complainant had a lot of jobs raised questions. TR 50. She stated that as soon as he completed his written application, she determined that Complainant was only qualified as a long haul driver. TR 51.

On cross examination, Ms. Kichner admitted that she was upset because the Complainant was prepared to provide more proof than most other applicants. Complainant provided copies of the police report and accident insurance records to show that he had been involved in a non-chargeable accident. TR 65-66. She indicated that Complainant was over eager, “...you coming in armed is what intimidated me.” Ms. Kirchner stated during cross examination that by asking questions, during cross examination, ”this is exactly the same behavior that intimidated me to begin with.” TR 67.

Ms. Kirchner indicated that Mr. Lurvey had the final hiring authority. TR 51. She said that by the time that she had taken Complainant’s application, Mr. Lurvey had already hired the three drivers that he needed. TR 74. She had recommended that Complainant not be hired. Id. However, Mr. Lurvey determined that Complainant should be given the driving test. TR 52.

Ms. Kirchner indicated that the next day, after the driving test, Mr. Lindser told her

that Complainant didn't know how to hook up hoses. TR 54-55.

Donald Lindser testified that he administered the road test and that Complainant had trouble with the air lines. TR 81. He was also hesitant to people following him. TR 82. He testified there was no discussion driving over the limit. TR 83-84. He wrote the letter to Complainant explaining that although Complainant was well qualified, the Respondent did not need him. TR 85, JX 14. Ms. Kirchner also recommended that the Complainant not be hired. TR 85.

On cross examination, Mr. Lindser admitted that it would be a violation to bypass a weigh station. But "... [I]t's not illegal to go around a scale house, he, he could. I mean if he took a different route..." TR 91. He later stated that if a driver knew he was overweight, he would "call us and if he thought that he was close....we'd get him to the closest scale to get it rectified before he went on, or back to the customer and get some taken off." TR 95.

Mr. Lindser testified that despite his allegations of concerns over Complainant's driving, he still stood by his statement in JX 14, that Complainant was well qualified. TR 105. However, on re-direct examination he recanted that testimony. TR 107.

I asked Mr. Lindser whether he had been advised by the company that Complainant was not to be hired before he administered the road test. He indicated that he was not. TR 107. He later stated that Mr. Kirchner told him that Complainant was a little "peculiar."

Mark Lurvey, Respondent's president, testified that his company operates in 48 states, but was looking for short haul drivers. Ms. Kirchner did discuss Complainant's application, but on direct examination, he did not state that he had already determined not to hire Complainant. TR 112-114. After the driving test, Mr. Lindser, Ms. Kirchner, and Mr. Lurvey discussed Complainant's qualifications and at that time a decision was made not to hire him. TR 115. On direct questioning he indicated the primary reason was due to the high turnover rate. TR 115. However, on cross examination, he was directed to the fact that Complainant had worked for only two employers over three years. TR 117. Respondent hired four to five new drivers every year. TR 118. As of 2008, Respondent had a pool of drivers it could call back. TR 119.

The Respondent had hired three drivers. TR 116. However, after one did not work out, the company decided to fill the position. Id.

Mr. Lurvey testified that he had not heard anything about the "overweight" issue and it was not a factor in deciding not to hire Complainant. TR 116.

#### DISCUSSION

Under the burden-shifting framework, the Complainant must first establish a prima facie case of discrimination. That is, the complainant must adduce evidence that he engaged in STAA-protected activity, that the respondent employer was aware of this activity, and that the employer took adverse action against the complainant because of the protected activity. Evidence of each of these elements raises an inference that the employer violated the STAA.

Only if the complainant makes this prima facie showing does the burden shift to the employer respondent to articulate a legitimate, nondiscriminatory reason for the adverse action. At that stage, the burden is one of production, not persuasion. If the respondent carries this burden, the complainant then must prove by a preponderance of the evidence that the reasons offered by the respondent were not its true reasons but were a pretext for discrimination. *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002). The ultimate burden of persuasion that the

respondent intentionally discriminated because of the complainant's protected activity remains at all times with the complainant. *St. Mary's Honor Ctr.*, 509 U.S. at 502; Poll, slip op. at 5; *Gale v. Ocean Imaging and Ocean Res., Inc.*, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 8 (ARB July 31, 2002).

At the evidentiary hearing the complainant initially must merely adduce some evidence as to each of these elements. *Smith v. Sysco Foods of Baltimore*, ARB No. 03-134, ALJ No. 2003-STA-32 (ARB Oct. 19, 2004); *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 5-6 (ARB Sept. 30, 2004).

Initially, I note that Employer argues that Complainant failed to initiate a safety complaint to Respondent in this matter. Respondent argues that even if there had been a discussion about the "overweight" policy, it does not rise to the standard of an internal complaint. "Jackson's mere inquiry into Major Transport's policy, even if reasonable, does not constitute an internal complaint." Respondent cites to *Patey v. Sinclair Oil Corp.*, 96-STA-20 (ALJ Aug. 2, 1996), adopted (ARB Nov. 12, 1996), where similar concerns were simply apprehension on the part of a complainant and did not constitute protected activity. However, I find that this does not fit the instant fact pattern. Here, Complainant alleges that he "questioned" Mr. Lindser about whether "you're supposed to bypass the scales." TR 31-32. According to the testimony, Mr. Lindser "inferred" that to bypass the scales was an "illegal" activity. I find that if Mr. Lindser had to infer this from the conversation, there was no complaint issued.

In reviewing all of the evidence, I find that Complainant never raised any safety concerns with Respondent. Although I find that the language of JX 4 is suspicious, and there may have been a discussion whether a driver could by pass the scales, there is no allegation in testimony that Complainant affirmatively raised the issue to Respondent. To the contrary, the allegation is that the Claimant was passively told about a driver's responsibility and there is no showing that he rendered an objection to Mr. Lindser or to anybody else. He did not respond directly to the letter from Mr. Lindser in JX 14 to allege that he had not been hired due to safety concerns.<sup>2</sup> He did initiate the Department of Labor complaint with OSHA, and told them that he was not hired because he objected to driving overweight vehicles, but this accusation was made well after the fact.

Complainant must also prove by a preponderance of the evidence that the person responsible for the adverse action knew about Complainant's alleged protected activity. *Baughman v. J.P. Donmoyer, Inc.*, ARB No. 05-105, ALJ No. 2005-STA-00005 (ARB Sep. 28, 2007); *Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-00039 (ARB June 29, 2007). I find that Complainant is unable to do so. He relies on his dealing with Mr. Lindser to establish notice when the preponderant evidence shows that Mr. Lurvey, owner of the company, had the power to hire Complainant. He is unable to show that Respondent had the necessary awareness of protected activity when it refused to hire him.

Therefore, I find that Complainant failed to establish a prima facie case. *Smith v. Sysco Foods of Baltimore*, *supra*.

#### ARTICULATION OF NONDISCRIMINATORY REASON

Alternatively, once a respondent has presented his rebuttal evidence, the answer to the question whether the plaintiff presented a prima facie case is no longer particularly useful.

---

<sup>2</sup> I note that this Complainant was the same party in *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-3 (ARB June 30, 2008), who failed to raise a complaint with another employer.

*Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007), citing to *Carroll v. Bechtel Power Corp.*, No. 1991-ERA-46, slip op. at 11 (Sec'y Feb. 15, 1995). In an abundance of caution I discuss

Respondent argues several reasons for a refusal to hire:

- He had a spotty work history which included employment by a number of different employers over short periods of time.
- Jackson was only qualified for long hauls and Major Transport was hiring primarily for short hauls.
- His behavior at the time he submitted his application was unusual, intimidated Kircher and caused Major Transport to be concerned about his customer service skills.
- Jackson continued to call Kircher notwithstanding her direction to him that she would call him.
- Jackson hooked up the hoses on the truck and trailer wrong.
- Jackson was overly cautious, nervous and unsure of himself during the driving test.
- At the time that Jackson applied for employment, Major Transport had already hired its full contingent of employees. Even when one of these hires did not show up for work, Major Transport did not hire any additional drivers after Jackson applied because it did not have sufficient work to employ more employees.

See Brief.

In reviewing all of the evidence I note that there are inconsistent and conflicting statements among the three Respondent witnesses as to when the decision was made not to hire Complainant. If I accept Ms. Kirchner's allegation that a decision had been made not to hire Complainant even before the road test, the issue of safety or violation of statutes would not have come up, and therefore there would be no protected activity, no notice and no nexus. She also alleged that Mr. Lurvey had already hired the three drivers that he needed. TR 74.

If I accept Mr. Lindser's testimony, the reason not to hire Complainant was due to his unacceptable road test. However, the letter at JX 14 impeaches this testimony and he also made several inconsistent statements relating to the Complainant's qualifications. His allegation that the road test was the basis for not hiring Complainant is impeached by the testimony of Ms. Kirchner and the fact that three applicants had been previously chosen for the three vacancies.

I reject the first five (5) arguments as unproven due to inconsistent statements.

However, both Ms. Kirchner and Mr. Lindser defer to Mr. Lurvey's authority. All acknowledged that the three other candidates had been chosen. Although one of the positions was not filled, Employer asserts that economic circumstances precluded filling that job. There is argument, but no evidence to the contrary and I accept this position.

The employer "need not persuade the court that it was actually motivated by the proffered reasons." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The evidence, however, must be sufficient to raise a genuine issue of fact as to whether the employer

discriminated against the employee. "The explanation provided must be legally sufficient to justify a judgment for the [employer]." Id. at 255.

I find that Respondent has provided a genuine issue of fact that the position had already been filled. Therefore, if there was no job left, Complainant was not hired because of that fact. *Coppola v. Quality Associates, Inc.*, ARB No. 02 114, ALJ No. 2002 STA 13 (ARB Aug. 29, 2003).

#### PRETEXT

Complainant must still establish that the adverse action was linked to his protected activity. Generally, Complainant may rely either on direct evidence of Respondent's discriminatory motive or indirect evidence that undermines the credibility of the employer's articulated reasons

Complainant did not present any evidence to establish that refusal to hire was based on a pretext. I accept that the witnesses were inconsistent and that there are differing stories given for refusal to hire. However, I find that Complainant has not proffered any evidence to show that there was an available position as of the time that he was given the road test. Therefore, I find that Complainant has not established pretext.

### **RECOMMENDED ORDER**

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

A

Daniel F. Solomon  
Administrative Law Judge

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

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