U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 20 July 2006

Case No. 2005-STA-45

In The Matter Of:

Loren J. Guay,
Complainant

v.

Burford's Tree Surgeons, Inc.,
Respondent

RECOMMENDED DECISION AND ORDER

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("the Act"), and implementing regulations set forth at 29 C.F.R. Part 1978. The pertinent provisions of the Act prohibit the discharge or discipline of, or discrimination against an employee in retaliation for the employee engaging in certain protected activity.[1]

Procedural Background

Loren J. Guay (hereinafter "Complainant") was employed by Burford Tree Surgeons, Inc. (hereinafter "Respondent") from approximately January 14, 2004, until he was terminated on or about December 6, 2004. On December 9, 2004, the Complainant filed a complaint with the Department of Labor's Office of Occupational Safety and Health Administration (hereinafter "OSHA"), alleging that he had been discriminated against by the Respondent in retaliation for engaging in whistle blowing activities. After conducting an investigation, OSHA issued the findings of the Secretary on May 24, 2005, concluding that the Complainant's discharge was not related to protected activity.

On June 20, 2005, the Complainant filed an appeal of that determination with the Office of Administrative Law Judges (hereinafter "OALJ"). The matter was assigned to

[1] In his brief, the Complainant again requested that Progress Energy, a customer of the Respondent, be reinstated as a party-Respondent. At the Complainant's request, I dismissed Progress Energy as a party on August 25, 2005; I denied the Complainant's first request for reinstatement of Progress Energy as a party on January 12, 2006. As I have advised the Complainant, because Progress Energy did not employ the Complainant, it is not a proper party to this claim.

me, and I held a hearing on April 4, 2006 in Tampa, Florida. At that time, the parties appeared and were given the opportunity to present evidence and arguments. At the hearing, I admitted Claimant's Exhibits ("CX") 1, and 2A through 2E; Respondent's Exhibits ("RX") 1 through 15; and Administrative Law Judge Exhibits ("ALJX") 1 through 5 into the record.[2] The Respondent was represented at the hearing by counsel, Ms. Tammy Dobbs, Esq., and Ms. Kira Fonteneau, Esq.; the Complainant appeared *pro se*.[3] The Complainant submitted his closing brief on June 30, 2006; the Respondent submitted its closing brief on June 20, 2006. I have based my decision on all of the evidence, the laws and regulations that apply to the issues under adjudication, and the representations of the parties.

Factual Background

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence – analyzing and assessing its cumulative impact on the record. *See, e.g., Frady v. Tennessee Valley Auth*., 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995)(*citing Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Prod. v. Nat'l Labor Relations Bd*., 442 F.2d 46, 52 (7th Cir. 1971). Credibility is that quality in a witness which renders his or her evidence worthy of belief. For evidence to be worthy of credit,

> [it] must not only proceed from a credible source, but must, in addition, be 'credible' in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it.

Indiana Metal Prod., supra, 442 F.2d at 51.

I had the opportunity to observe the behavior and outward bearing of the witnesses; to the extent credibility determinations must be weighed for the resolution of

[2] The Complainant has argued that he was denied discovery from the Respondent. In a motion submitted by telefax on June 28, 2006, the Complainant asked for summary judgment based on the Respondent's failure to provide discovery, as discussed at the hearing. As part of the prehearing documents he filed on February 16, 2006, the Complainant also requested that the Respondent be compelled to provide drug testing records on Robert Breault, as well as the reason for his termination. At the hearing, the Complainant stated that he had asked for "records pertaining to everything that had to do with this case," but that he was specifically looking for records regarding employees Ed Sikes (DMV records) and Robert Breault (drug testing records). Counsel for the Respondent indicated that she had responded to the Complainant's timely requests, but in any event this information was not relevant to the Complainant's claim that he had been discharged in retaliation for making allegations of drug use to a third party. I advised the Complainant that his request was denied, but that he could revisit this issue later. Mr. Breault's name was not on the list of alleged drug users that the Complainant provided to Mr. Harrelson, but in any event, as I advised the Complainant at the hearing, the truth of his allegations is not relevant to his claim in this matter.

[3] The Complainant was initially represented by Mr. Paul Taylor Esq., of the Truckers Justice Center. Mr. Taylor withdrew his appearance, and the Complainant elected to proceed *pro se*.

issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

Respondent, Burford's Tree Surgeons, Inc., is a utility right of way contractor that performs tree trimming work for Progress Energy in Florida, and North and South Carolina. Respondent also has other related businesses, including herbicide spraying, grounding of trench lines across mountains, and wood waste disposal. The company's home office is in Anniston, Alabama. The Complainant was hired by the Respondent on January 14, 2004, to run a bucket truck. Among the documents provided to the Complainant when he started work for the Respondent was a description of the Respondent's Disciplinary Procedures Policy (RX 1). This policy provides for progressive discipline for certain infractions, such as excessive absence or lateness, and immediate dismissal or suspension without pay for other infractions, including violation of major safety rules, failure to follow a supervisor's instructions and insubordination, reporting to work under the influence of alcohol or drugs, and disregard for company policies.

At the hearing, the Complainant's foreman, Christy James Winter, testified that for several months, the Complainant's work was adequate (Tr. 163). However, as time went on, and the company started doing hurricane work, the Complainant began having problems getting to work on time, and Mr. Winter gave him verbal and written disciplines for tardiness (Tr. 164).[4] Mr. Winter also testified that when the company was performing hurricane work, there were several occasions when the Complainant was not able to complete the job he was sent to do, and Mr. Winter had to have other crews finish the job (Tr. 165).

The Complainant was written up by Mr. Winter on October 15, 2004, for failure to perform the duties of a top paid foreman in connection with the removal of a tree on October 14, 2004 (RX 5). On November 18, 2004, the Complainant filed a complaint with OSHA, alleging that this write-up was made in reprisal for his refusal to perform an unsafe task. This complaint was dismissed as untimely.[5]

The adverse action that is the subject of the instant case is the Complainant's termination on December 6, 2004, which the Complainant alleges was in reprisal for reporting allegations of drug use by Respondent's employees to an employee of

[4] The record includes a Warning Notice dated October 7, 2004, completed by Mr. Winter, indicating that for the past few weeks, the Complainant had been late for work many times, and that he had been verbally warned. The form indicated that the next time within the following 30 days that the Complainant was late, he would be suspended for 3 days without pay (RX 3).

[5] The Complainant testified that he reported drug use by fellow employees to OSHA when he filed his complaint on November 18 (Tr. 110-111). The determination letter in connection with the instant claim, dated May 24, 2005, indicates that in his November 18, 2004 complaint, the Complainant raised the issue of drug use, but did not claim that it was a factor in his October 15, 2004 write-up. The letter reflects that the investigator in that claim recommended that the Complainant report his allegations to management, the DOT, OSHA, or law enforcement (ALJX 1).

Progress Energy, the Respondent's customer.[6] Although disciplinary actions taken against the Complainant before his termination are not the subject of the instant complaint, the testimony about these incidents helps to provide context to this complaint.[7]

Company Policies

Mr. Burford is the president, owner, and operator of the Respondent; he started the business in 1978 (Tr. 253). He testified that from day one, safety has been the most important concern of the company, and that the biggest line item on their expense sheet is for insurance (Tr. 254). He hired a full time safety director in 1993 or 1994 (Tr. 254). He testified that employees are told that from the time they get out of their car, everything they touch can kill them, and if they are ever involved in a fatality or bad accident, it will affect them for the rest of their life (Tr. 256). They are told that if their gut tells them that something is unsafe, they can call and talk to someone, and get help (Tr. 256). He testified that he would never approve of the discipline or termination of an employee who refused to do something because they thought it was unsafe (Tr. 256). His employees are provided with numbers to call, and the names of people to provide help (Tr. 256). According to Mr. Burford, they have never had any underwriting problems, because theirs is one of the safest companies in the industry (Tr. 256).[8]

Mr. Keith Owens, who has been the human resource administrator for the Respondent for three years, testified that the Respondent has a zero tolerance policy with respect to the use of alcohol and drugs, and that they stress safety first. He travels to areas where the Respondent works, and conducts one-day training programs within about 90 days of hiring new employees, along with the safety director, Dennis Jones (Tr. 147-148). At this program, one of the first things discussed is the Respondent's drug policy, including how an employee lets the company know if he or she is using prescription drugs. The zero tolerance drug policy is also set out in the Respondent's job application (Tr. 149). Employees are instructed to report any safety issues first to an immediate supervisor, and if that is not possible, or the response is inadequate, to call phone numbers provided to the employees (Tr. 107-109).

[6] In his brief, the Complainant argues that he was "blacklisted" by the Respondent. However, the record contains no evidence that the Complainant was blacklisted by the Respondent, nor did the Complainant make any specific allegations of blacklisting in his complaint or testimony.

[7] In his brief, the Complainant for the first time argues that he was the victim of a hostile working environment. Thus, at page 9, the Complainant states that "There was disparaging, disparate, retaliatory, discriminatory treatment of the Complainant before the firing, with three separate bogus disciplinary write-ups, whose motivation was retaliation for STA protected activity." But the fact that the Complainant disagrees with the write-ups does not mean that they are "bogus," or a sham. Nor has the Complainant specifically identified any "protected activity" for which he was being retaliated against, much less established a nexus between any such activity and the disciplinary write-ups.

[8] Mr. Burford testified that if an employee is hurt on the job, he is not put on worker's compensation, but receives 100 percent of his salary. Mr. Burford does not believe that an employee would intentionally do something to hurt himself or the public. (Tr. 262).

Mr. Owens testified that at this meeting, he gives each employee a silver business card with his cell phone number, and tells them that he is available at all times. This number is called the "silver bullet."[9] In addition, each employee's PIN number, which is used for the fuel program, is put on the back of the business card, so that the employee will always have the silver bullet with him (Tr. 150). According to Mr. Owens, the only time his cell phone is not turned on is when he is on a plane. His phone number, as well as the Respondent's policies and procedures, are also on the employment application (Tr. 151). All employees are also given Mr. Jones' business card (Tr. 150).

Mr. Burford testified that his company takes drug and alcohol use very seriously, and they do everything they can to find out and act if someone is using drugs or alcohol. His employees are not required to take a pre-application drug screen, but every incident that involves an accident results in drug testing (Tr. 268). According to Mr. Burford, if the Complainant had provided names of persons who were using drugs, the company would not reveal that he did so (Tr. 272). He testified that they have received many such calls, some anonymous, that resulted in drug testing of employees (Tr. 272). Mr. Burford felt that once his employees had been through the safety class, they had an obligation to respect what the company asked them to sign off on, and to use the telephone number to get in touch with someone if necessary (Tr. 271).

Mr. Wayne Poole, who is the Respondent's supervisor for Florida, testified that he has been to the safety meetings, where Mr. Owens gives his employees his card, with the silver bullet, and discusses the Respondent's drug policies. Mr. Poole stated that the Respondent's phone number is on the trucks, the pay checks, and the business cards (Tr. 221). Mr. Winter also testified that he had attended the safety meetings, where the Respondent's policies, including zero tolerance for drugs and alcohol, are discussed (Tr. 176).

At the hearing, the Complainant recalled attending a meeting with Mr. Owens, and Dennis Jones, the safety director (Tr. 106).[10] He testified that nothing was said at this meeting about drugs, and that neither Mr. Owens nor Mr. Jones went over the company's policy about drug use (Tr. 107). The employees were told to report safety concerns first to their supervisor (Tr. 107). If their concerns were not addressed, they were to report to Mr. Jones or Mr. Owens (Tr. 108). He also testified that Mr. Owens gave them a card with a toll free number and a cell phone number (Tr. 108). The Complainant acknowledged that he had never reported safety violations to either of these persons, nor did he ever use the numbers on the card (Tr. 108).

Pine Tree Incident[11]

[9] Mr. Owens testified that this name came from his children, who refer to his cellphone as his silver bullet.
[10] The Complainant's name and signature appear on a Training Sign-in Sheet dated May 5, 2004 (RX 2).
[11] This was the subject of the Complainant's November 18, 2004 complaint filed with OSHA, which was dismissed as untimely.

The Complainant testified that on October 14, 2004, he was working as the acting foreman of a two man crew. At 8:35 to 8:45 that morning, Mr. Harold Taylor, a supervisor, and Mr. Winter, the general foreman, gave him a work order to go to Wildwood and take down a pine tree that had been damaged during the hurricane season (Tr. 32-33). According to the Complainant, this was a very big pine tree, about 26-30 inches in diameter, and 95-100 feet tall, at a 63 degree angle, in an up-heaving position. Its roots were broken, and it was falling on its own weight. The tree had absorbed massive amounts of water, and was very dense and heavy; it was leaning on the tree next to it, which was buckled from the weight (Tr. 33). The Complainant testified that he evaluated the condition of the tree, and talked to the resident of the house, telling him that the tree posed a serious threat to three 14,000 volt wires (Tr. 33). The Complainant told the resident that the situation was beyond his control, and he needed help, because he could not do the job with just one man; he needed to notify his supervisor and have him evaluate the situation (Tr. 34).

According to the Complainant, he called Mr. Winter and told him that he was concerned that if the tree broke, it would take out the wires. There was a school just across the street, with 50 to 75 children hanging on the chain link fence, and he was concerned about the safety of the children (Tr. 34). He testified that Mr. Winter and Mr. Taylor came to the site, and asked him why he couldn't handle the job. The Complainant told them that he needed proper ropes; he had his personal rope in his truck, and Mr. Winter helped him set it in the tree. The Complainant then went up in the bucket, about 58 feet, and set the rope. Mr. Winter helped the groundsman tie the rope to a tree, and told the Complainant to limb the tree, or remove limbs to reduce the tree's weight (Tr. 34-35).

Mr. Winter confirmed that the Complainant called him that morning to come out and look at the tree, but he testified that the Complainant wanted pointers, because he had not dealt with such a situation before (Tr. 165). According to Mr. Winter, the Complainant did not tell him that he thought it would be unsafe to take the tree down (Tr. 165). He also confirmed that he and Mr. Taylor went to the site, where they talked with the Complainant about the best way to take the tree down (Tr. 165). According to Mr. Winter, they suggested that he cut the limbs off up to the bucket height, and then pop the top of the tree off from the bucket. They helped the Complainant put a rope in the tree and secure it, and they left about 10:00 a.m. so that the Complainant could perform the job (Tr. 166). Mr. Winter testified that if the tree had fallen, it would not have fallen toward the power line. It was on the other side of the road from the power lines, and no part of it was over the top of the wires (Tr. 207-208). He and Mr. Taylor felt that the tree could be brought down safely, and the Complainant did not express any concerns about safety (Tr. 166-167).

According to the Complainant, he began taking limbs off; when he came down, Mr. Winter and Mr. Taylor were gone. His groundsman told him that they said they were going to use the restroom. The Complainant took a ten or fifteen minute break, and tried to get them on the radio, but got no answer. He then went back up in the bucket, and limbed as high as he could reach, until he finished, about 11:30 to 11:45

a.m. (Tr. 36). At that point, the Complainant felt that he needed help. He testified that he again called Mr. Winter, but got no answer. The Complainant told his groundsman that they would go to lunch.

According to Mr. Winter, he and Mr. Taylor returned to the site at about lunchtime to check on progress, but the Complainant was gone. They saw some brush on the ground (Tr. 166). Mr. Winter testified that the Complainant should have been there, but he and Mr. Taylor thought that he might have left to use the restroom (Tr. 167). They left to check on other crews.

According to the Complainant, he called Mr. Winter many times, and finally contacted him; Mr. Winter told him that he was not going to do his job for him. The Complainant testified that Mr. Winter came to the site, where the Complainant was on his cell phone talking with another foreman named Tommy, telling him that he had problems with Mr. Winter's judgment, and that he was only trying to do his job, but Mr. Winter was making him look like a crybaby (Tr. 37). The Complainant testified that Tommy told him that he should go by his gut instinct, and that if he did not feel safe, he should not do the job (Tr. 38).

Mr. Winter testified that about 3:00 or 3:30 that afternoon, he received a call from the Complainant, who told him that he had done as much of the tree as he could do, and that he could not reach any more (Tr. 167). Mr. Winter suggested that the Complainant climb the tree beside it. He then dropped Mr. Taylor off, and went back to the job site, where the Complainant was talking on the telephone (Tr. 167). It did not appear to Mr. Winter that anything had been done to the tree since he and Mr. Taylor had been there at lunchtime. He told the Complainant that he had been out there all day and had not gotten anything done, and he needed to pick up his things and go home (Tr. 168).

The Complainant testified that he also tried to get Mr. Taylor and Mr. Poole on the telephone, but was unable to do so. He did not call Mr. Owens, the safety director, because he did not have his telephone number with him. Nor did he call Mr. Jones or Mr. Smith, or Mr. Burford, whom he did not know (Tr. 115).

According to the Complainant, Mr. Winter confronted him about the fact that he was not going to take the tree down. The Complainant responded that he had been asking Mr. Winter all day for help, but he wanted to play games. The Complainant testified that he told Mr. Winter that if the tree fell off, it would take off his truck, and that they were on a one lane road. The tree had a crown, which would be dead weight if it fell. The wires could break, and they would have power; if they hit the fence, many children could be killed. According to the Complainant, he told Mr. Winter that he would not consider taking out the tree by himself (Tr. 37-38).

The following day, the Complainant asked Mr. Winter if he wanted him to go back and attempt the job, but Mr. Winter told him not to bother. He also told the Complainant that Mr. Poole wanted to see him (Tr. 40). Mr. Poole told the Complainant that he

understood that the Complainant refused to take the tree down (Tr. 40). The Complainant told Mr. Poole that he did not refuse to take the tree down, he refused to commit an act that would cause harm.[12] Mr. Poole asked the Complainant whether he would go out right then and help cut the tree, and the Complainant said he would do so. But Mr. Winter indicated that he had already sent a crew out to cut the tree. Mr. Poole asked Mr. Winter to have them stop, because he wanted to see the tree himself. Mr. Poole went to the site, while the Complainant went to Reddick to perform another job (Tr. 41).

The Complainant testified that he received a call from Mr. Poole, telling him to come to Wildwood. When he got there, Mr. Poole was there, and he told him to help the crew take the tree down. According to the Complainant, there were six people there. The Complainant got on a rope and helped Mr. Winter; an employee named Larry Mansuelo was up in the tree. The Complainant testified that when the tree hit the ground, it missed the wires by a foot (Tr. 42). He acknowledged that the tree was removed in about 45 minutes to an hour and a half (Tr. 113-114). According to the Complainant, he apologized to Mr. Poole, and told him that he did not mean to imply that Mr. Poole was not doing his job. He asked Mr. Poole if he still believed that he could take the tree down by himself, with just one man. Mr. Poole told him that there was no way he could do that. The Complainant proceeded to another job.

Mr. Winter testified he went back to the site with another crew that included Larry Mansuelo, Jeff Garner, and Wayne Poole (Tr. 168).[13] He called the Complainant to come and watch, and the tree was safely taken down in about an hour and a half. The crew also took down another tree, for a total of three hours work (Tr. 168).

Mr. Winter wrote the Complainant up for not doing the job of a top foreman, and reduced his pay by a dollar an hour. He told the Complainant that he should have called for additional people, or another truck; the write-up was for sitting out there all day, and basically doing nothing (Tr. 169). According to Mr. Winter, the Complainant was very angry and upset, and refused to sign the write-up (Tr. 169). Mr. Winter decided that they should go back to the site and look at the tree; when they arrived, the Complainant agreed that he should have been able to do the job (Tr. 170).[14]

Mr. Poole testified that he received a call from Mr. Winter, telling him that he was writing the Complainant up for spending eight hours on a job that required the removal of a pine tree, which he did not remove (Tr. 222). Mr. Poole met Mr. Winter at the site, where Mr. Winter gave the write-up to the Complainant; they got into a heated discussion (Tr. 222). At the site, Mr. Poole saw 24 limbs, about 2 inches around, that

[12] According to the Complainant, and apparently after the tree was cut down, Mr. Winter showed Mr. Poole a photograph of the tree, which only showed the stump, and told him that the Complainant did not do any work (Tr. 41).

[13] According to Mr. Winter, when the employees were later drug tested, Mr. Mansuelo, whose name was not on the list prepared by the Complainant, tested positive for marijuana.

[14] Mr. Winter testified that the brush and limbs on the ground, as shown in CX 2A, were chipped in about 15 minutes (Tr. 214).

had been removed from the tree in an eight hour period (Tr. 222).[15] He told Mr. Winter to pull the time sheet and deduct these hours from the customer's bill; he also told Mr. Winter that the write-up would stand (Tr. 222). He did not feel that it was right to bill the customer for 20-30 minutes work; however, the Complainant was still paid (Tr. 223). Mr. Poole testified that the Complainant was not written up for refusing to do something he thought was unsafe; he was written up for doing 30 minutes of work in an eight hour period (Tr. 223). He felt that the Complainant should have decided what he was going to do and how he was going to do it, and made the decision then to call for help, not eight hours later (Tr. 224).

Bucket Truck Incident

The Complainant testified that he was working on a Saturday in a town called Anthony; Mr. Winter was the general foreman.[16] An employee named Ed Sikes was at the job site; the Complainant did not like having him around, because he had seen him do drugs. He also knew that Mr. Sikes did not have a driver's license, and he had told Mr. Winter about this (Tr. 46). The Complainant was working in a bucket trimming wire, when Mr. Sikes and another employee, John Day, drove up. Mr. Day asked the Complainant to work on a line, and the Complainant told him that he needed to do his own work, which would take several days (Tr. 47-48). He told Mr. Day that he was the crew foreman, not his boss, and to go do his job; Mr. Day got mad and left. Mr. Winter also showed up in a pickup truck, gave the Complainant a dirty look, and drove off (Tr. 48).

The Complainant worked until lunch, and got to a turnaround point, but the truck would not come through the road, because the branches were too low (Tr. 49). He told his ground person that they would cut branches so that the truck could get through. He stood on top of the truck with a pole saw and cut branches, which he threw on the side, so they could go to lunch. They chipped the branches later in the afternoon (Tr. 49).

The following Monday, the Complainant was scheduled to work in Alachua by himself, with one crew man, clearing burning wires (Tr. 50). When he got to the jobsite, he inspected his bucket, and saw that it was cracked not quite four inches on all four corners (Tr. 50-51). He took the liner out and inspected it, and checked the boom for cracks in the metal (Tr. 52). He thought that the bucket had been slammed; when he went up in the air, he felt the bucket disengage from the boom. His ground man, Jeff Garner, helped him search the whole truck. The Complainant thought that someone had purposely sabotaged his truck, because he had made accusations of drug use (Tr. 53).[17] They found nothing else.

---

[15] The Complainant testified that he took photographs of the tree on October 14, but he never showed these photographs to anyone who worked for the Respondent (Tr. 112). He testified that he did not trust them, and felt that he was dealing with liars (Tr. 129).

[16] The warning notice completed by Mr. Winter reflects that this incident took place on November 20, 2004 (RX 6).

[17] The Complainant did not specifically describe these accusations, and the only testimony in the record, from the Complainant and Mr. Poole, concerns allegations made by the Complainant the previous April.

The Complainant called Mr. Winter, who was about 43 miles away in Lowell, told him that there was a major problem, and asked if anyone had used the truck (Tr. 53). Mr. Winter told him that no one had used the truck, and nobody else had keys to it (Tr. 54). The Complainant told Mr. Winter that Mr. Day had keys to every truck. He knew this because one day he arrived at work late, and although he was the only person with a set of keys, his truck was already started and warmed up. He stated that he was told that Mr. Day had a set of keys to everything, and that he did side work using the Respondent's equipment (Tr. 54). Mr. Winter told the Complainant to take the truck to Lowell.

When the Complainant arrived, Mr. Winter was waiting in a pickup truck. He told the Complainant to uncradle the truck and bring the bucket down (Tr. 55). Mr. Winter reached into a corner of the bucket, where there was a bunch of wood-like parts from a log. He told the Complainant that he had hit a branch on Saturday, and showed him a picture of the branch he hit; he told the Complainant that he had gone out that morning and found the limb that he hit (Tr. 55). But the Complainant disagreed; he showed Mr. Winter the shroud that covered the hydraulics, where there was not even a scratch. He claimed that there was no way to break a branch without hitting the shroud first (Tr. 56). However, Mr. Winter told him that he broke the bucket, and he would have to take it off, and run the truck with no bucket. The Complainant returned to work, but he had to use hand saws (Tr. 56).

Mr. Winter testified that the Complainant called him about 9:00 a.m. one morning, and asked him if anyone had used his truck over the weekend, because the bucket was broken (Tr. 170). He told Mr. Winter that he was in the process of pre-flighting his truck; Mr. Winter wondered why the Complainant was doing this and finding out that the bucket was broken at 9:00 a.m., when work started at 7:00 a.m. (Tr. 170). Mr. Winter went to look at the bucket, and found that all four corners were broken, and there was fresh green bark still in the cracks (Tr. 170-171). He shut the truck down, and put the Complainant in another truck (Tr. 171). He then went to the last place where the Complainant had worked, where he found a good sized limb that had been scraped and had bark knocked off (Tr. 171). Mr. Winter assumed that the Complainant had done the damage to the bucket, and he took him to the location and showed him the limb (Tr. 171). The Complainant claimed that he did not hit the limb (Tr. 171). However, Mr. Winter wrote him up for breaking a bucket. He later learned from Debra Hicks, who had been working with the Complainant that day, that she was with him when he hit the limb, and that he knew he had hit something (Tr. 171).

Mr. Poole testified that Mr. Winter called him about the broken bucket, and told him that the Complainant had called and said he thought someone used the truck over the weekend (Tr. 224). He confirmed that Mr. Winter went to the job, and saw the limb with paint from the bucket, and bark under the bucket lip; Mr. Winter determined that the Complainant hit the limb, and wrote him up (Tr. 224). According to Mr. Poole, it is company policy that an employee is responsible for the equipment. Mr. Poole talked to

the Complainant, who said that he would not be responsible for paying for the bucket (Tr. 224).

According to the Complainant, the bucket was repaired by the next morning. Mr. Winter came to Alachua with a paper for him to sign, and told him that he had to pay for the repairs or his services would no longer be needed (Tr. 57). As the Complainant needed the job more than the $140 repair charge, he agreed to pay (Tr. 57). The Complainant testified that the person who fixed the truck was Bob Walker, a co-worker. Mr. Walker told the Complainant that it only cost $30 plus material to fix the bucket, and that he should tell Bob Smith that he wanted to pay Mr. Walker directly. The Complainant testified that he asked Mr. Winter about this, and Mr. Winter said that he did not have a problem with it (Tr. 58). But Mr. Winter subsequently told him that he had talked with Mr. Poole and Mr. Smith, who told him that the Complainant would have to pay the company $140 (Tr. 59).

Mr. Poole testified that he called the home office, and talked with the operations manager, Tommy Gardner, who told him that if the Complainant did not pay for the repairs, he would be terminated (Tr. 225). Mr. Poole passed this along to Mr. Winter, who told the Complainant; the Complainant paid for the repairs (Tr. 225). Mr. Poole testified that the Complainant never approached him about repairing the bucket for less money (Tr. 225).

Allegations of Drug Use

The Complainant testified that his observations of drug use by fellow employees started almost immediately after he began working for the Respondent (Tr. 62). He stated that when he first started working, he saw a group of guys smoking a joint at a job site. He notified the general foreman, Donnie Tanney, who told him not to worry about it. But "little snippets" would happen every so many days (Tr. 63). According to the Complainant, employees would be smoking reefer, and would break up if he tried to be friendly. This made him very uncomfortable, but he did not want to lose his job. The Complainant also testified that the woman who was working with him was being verbally sexually harassed, and that he "got in the guys' faces" on her behalf. As a result, the crews did not like him (Tr. 64).

The Complainant testified that Mr. Tanney teased him a lot, and caused him very bad problems (Tr. 65). One morning, Mr. Tanney brought him a write-up sheet, and told him that he did not know how to trim; he was putting the Complainant to work on a chip truck, which he could do or quit (Tr. 66).

Subsequently, when Mr. Poole began working for the Respondent in April 2004, he put the Complainant back to work in a bucket truck. He also came to see the Complainant on the worksite, and asked him about problems. The Complainant testified that he told Mr. Poole that half of the crews were on dope, and needed to be drug tested; Mr. Poole told him that things were going to change, and he would get back with him (Tr. 68-69). The Complainant testified that on different occasions in April 2004,

he gave Mr. Poole names, including "Pops" (Ed Sikes), John Day, and Rob Breault (Tr. 104); he told Mr. Poole that several employees were doing drugs, and he needed to get a handle on it (Tr. 105-106). The Complainant also recalled conversations with Mr. Poole about other employees talking about him behind his back (Tr. 109).

Mr. Poole testified that when he began working for the Respondent, he visited the crews. He knew the Complainant from working with him previously, and he talked with him. He recalled that the Complainant told him that there were "different issues" going on, and that he was the honest one (Tr. 217). According to Mr. Poole, the Complainant mentioned that the "whole bunch" was using drugs, and that one of the employees, John Day, did not wear his harness when he was up in the bucket.[18] Mr. Poole subsequently went to jobsites and watched the crews with binoculars, but he never caught Mr. Day working without his harness. Nor did he ever see anyone using drugs on the job (Tr. 128).

Mr. Poole testified that he asked the Complainant if he had names, so he could have the employees drug tested; he told him that if he did not have names, he would have to depend on random testing (Tr. 217). He testified that if the Complainant had given him names, he would have picked the employees up and taken them to the clinic to be tested. But the Complainant never gave him any names (Tr. 220).

According to the Complainant, he saw everyone around him do drugs (Tr. 71). He testified that he talked about the drug use to friends who were narcotics officers. They asked the Complainant if he could get one of them a job, but the Complainant told them there were no openings. They also asked him to take photographs, but that never materialized (Tr. 66-67). The Complainant acknowledged that he did not call the police when he saw his fellow employees smoking joints. He testified that he called DOT law enforcement, and talked to an Officer Dennison (Tr. 123); however, the record does not include any evidence of reports to any law enforcement officers, nor did the Complainant provide any further details about his attempts to contact law enforcement.

The Complainant also testified about an incident involving Mr. Tanney and a truck accident, in which a bucket was broken off, and which resulted in $2000 in damages, which had to be taken out of paychecks. According to the Complainant, when this happened, he looked at Mr. Poole, and told him, "you see;" Mr. Poole responded that he was working on it (Tr. 72).

The Complainant also related an incident that allegedly occurred in Orlando, when he and other crew members were staying in a hotel while working on a job. According to the Complainant, when he took the payroll down to Mr. Winter's room, Mr. Winter's roommate was in the room. When the door opened, the air was thick with marijuana smoke, and "they" were hiding everything. The Complainant testified that he tried to call Mr. Poole, but could not reach him (Tr. 73). He did not report this to anyone; he stated that he did not know where to go (Tr. 119).

[18] Mr. Poole was in Ocala when he was talking with the Complainant, so he assumed that the Complainant was referring to the Ocala bunch as being potheads (Tr. 219).

The Complainant testified that the next morning, the crews were drinking coffee in the parking lot at the Greyhound track, and getting ready to get in their trucks. According to the Complainant, a person named "Ray Ray," or "Pee Wee," asked Mr. Winter if he knew where to get an "eight ball." The Complainant got in his truck, and he saw Ray Ray and his ground girl get into a truck; according to the Complainant, they were both higher than a kite. Ray Ray pulled out, and hit a Cadillac that was pulling into the parking space (Tr. 74).

According to the Complainant, Mr. Day and Mr. Sikes came up to him and gave him a sample bottle of Johnson's Baby Oil that they had bought at a convenience store. They asked him if he had Windex in his truck, and they cleaned and rinsed the bottle, and asked him to urinate into it. The Complainant testified that they told him they needed his urine because Ray was "high as hell." The Complainant asked his ground girl to take photographs; he told her that he was not really going to urinate in the bottle, but planned to fill it with something else. The ground girl told him not to do it. According to the Complainant, another employee named Jim urinated into the bottle. He testified that he told Mr. Poole about this incident, but he never heard anything back (Tr. 75-76).

The Complainant testified that he watched fellow employee Bob Smith do drugs many times when they both worked for Farens tree Co., where the Complainant was the foreman and Mr. Smith was an assistant. But he did not report this drug use, because he was getting ready to leave. He did not see Mr. Smith do drugs when he worked for the Respondent (Tr. 122).

Mr. Poole testified that the Complainant never talked with him about any safety or drug issues, other than their initial conversation in Ocala (Tr. 225). Mr. Winter testified that the Complainant never came to him with any complaints about employees using drugs (Tr. 172).

Reporting Alleged Drug Use to Progress Energy

On the same day that Mr. Winter wrote the Complainant up for breaking the bucket, he received a call from Mr. Owens, who told him that he had received a call from OSHA, and that he needed the Complainant to call him back (Tr. 172).[19] Mr. Winter told Mr. Owens that he was on his way to see the Complainant and look at the bucket, and decide about disciplinary action (Tr. 172).

The Complainant testified that he had just arrived at a job site in Alachua, and was performing a safety inspection for Progress Energy (Tr. 77). Don Harrelson, an employee of Progress Energy, arrived, and walked to the Complainant's truck, where they talked about the need for safety cones, and Mr. Harrelson cited the Complainant verbally for not having a list of contents in his first aid kit. The Complainant also watched a twenty minute training tape that Mr. Harrelson had brought. Mr. Winter

[19] This call was in connection with the Complainant's November 18, 2004 complaint filed with OSHA, involving the pine tree incident, which was ultimately dismissed as untimely.

pulled up, and had the Complainant sign a statement that he would pay to fix the broken bucket, and then Mr. Harrelson and Mr. Winter left (Tr. 79).

The Complainant finished his job and was ready to go back, when he got a call from Mr. Winter, who told him that Keith Owens had called, and wanted the Complainant to call him. The Complainant asked who Mr. Owens was, and Mr. Winter told him that he was the Human Resources person for the Respondent. The Complainant suspected that this was about the OSHA complaint he had filed about the dangerous tree in Wildwood, and his allegations of drug use (Tr. 80). The Complainant called Mr. Owens from the Archer yard, and Mr. Owens asked him what was going on. The Complainant told Mr. Owens he was having problems. According to the Complainant, Mr. Owens pulled his write-ups, and told him that he had been late for work, and was a troublemaker (Tr. 80).

The Complainant tried to explain to Mr. Owens why he had been late, but Mr. Owens told him he knew nothing about that, and that Mr. Poole and Mr. Winter never said anything to him about these problems or the problems with the tree. Mr. Owens reminded him that he had the Nextel channel and the "silver bullet." The Complainant told Mr. Owens that that was a "bunch of crap," and that he was watching his supervisors do drugs. He was very angry, and he told Mr. Owens that he had gone to them months earlier (Tr. 82-83).

The Complainant testified that Mr. Owens asked him why he did not know how to report a safety violation, and why he did not call him about the tree incident. But the Complainant did not trust Mr. Owens (Tr. 124-125). He testified that he did not use the "silver bullet" numbers because he did not have them available, and he would have had to travel 52 miles to get them.[20] He felt that he could not tell Mr. Winter or Mr. Poole, because they were involved (Tr. 126).

According to the Complainant, Mr. Owens asked him to fax a list of persons who were using drugs that same night. The Complainant told Mr. Owens that he did not have a fax machine, but that he would try to fax a list through his computer. He testified that he told Mr. Owens he did not know any names, just nicknames, and that it would take him a few days to find out the names (Tr. 83-84). According to the Complainant, Mr. Owens told him that he would be coming to Florida; the Complainant wondered why he should make a list and fax it, which was something he could not afford, when Mr. Owens was coming to Florida anyway (Tr. 84).

The Complainant testified that he did not send this list to Mr. Owens because he thought that Mr. Owens lied to him on the telephone (Tr. 83). He had the impression while talking on the telephone with Mr. Owens that "they" were ganging up on him, and gathering material to "cover up" (Tr. 135). He concluded that Mr. Owens was lying to him because Mr. Owens told him that Mr. Poole and Mr. Winter were sending him reports, when he had stated earlier that he knew nothing about the problems or the tree incident (Tr. 124). The Complainant testified that he was scared, and did not know

[20] Apparently, the Complainant lived 52 miles from the job sites.

whom to trust; he was worried that someone was going to kill him (Tr. 83). But he did not tell Mr. Owens that he had decided not to fax the list (Tr. 123).

The Complainant acknowledged that most of the time he worked for the Respondent, he had a Nextel company phone. But he claimed that he did not know that it would connect to the home office, and he did not know how to operate the two way feature (Tr. 131-132).

The Complainant testified that he went home and talked to an attorney, and told him that Mr. Owens had stated that he had letters coming from Mr. Poole and Mr. Winters, even though he said he had not heard from them (Tr. 84).

Mr. Owens testified that on the Wednesday before Thanksgiving 2004, he received a call from a man at OSHA, informing him that a complaint had been made by the Complainant, and asking for information. Mr. Owens asked that the information be faxed to him (Tr. 151). He received this information on the following Monday; he regarded the issue as fairly serious, and he began to gather information (Tr. 151). He was concerned that the Complainant had not come to him first, and he wanted to get his side of the story. When he found out that Mr. Winter was the Complainant's foreman, he called him and asked him to have the Complainant call him (Tr. 152-153). He told Mr. Winter that there was a situation involving OSHA, and that he needed some information (Tr. 153). According to Mr. Owens, Mr. Winter told him that he and Mr. Poole were on their way to see the Complainant about a damaged bucket (Tr. 153). Mr. Owens asked Mr. Winter to send him any information he had about the Complainant (Tr. 154).

Later that afternoon, Mr. Owens received a call from the Complainant, and he told him that there was a situation involving OSHA. The Complainant told him that he had been written up, and had his pay cut (Tr. 154). Mr. Owens testified that he asked the Complainant why he did not feel that he could come to him, and use the silver bullet (Tr. 155). The Complainant told him that he knew he should have done that, but he was just tired of all the "crap" (Tr. 155). When Mr. Owens asked him what he meant, he told Mr. Owens that everybody down there was on drugs (Tr. 155). Mr. Owens testified that he asked the Complainant who he was talking about, but the Complainant gave him nicknames, and said that he did not know the real names (Tr. 155). Mr. Owens asked the Complainant to get him the information and names, and the Complainant agreed to do so, telling Mr. Owens that he would call him or fax him the information (Tr. 155).

According to the Complainant, the next morning, as he was on his way to the yard, he was wondering if he should go to Progress Energy with his allegations, but he decided that he should go through the chain of command (Tr. 85). But when he got to the yard, an employee named Lee, who ran a chip crew, called on Jeff Garner's Nextel, and said that he had a visit from Mr. Winter, who said that Mr. Smith had called and told them to "get their shit cleaned up," because there was going to be drug testing. Mr. Lee indicated that Mr. Owens had called, and said that the Complainant had reported that the guys were doing drugs (Tr. 85). At this point, the Complainant knew that his fellow

employees had been tipped off, and he made his decision to go to Progress Energy; he did not want to do so, but he felt that he was pressured (Tr. 77).

The Complainant testified that he told his ground man he hoped that his system was clean, because the hammer was going to fall. He then called Don Harrelson and asked to see him (Tr. 85). When Mr. Harrelson asked him what it was about, he told him that there was a lot of drug use, and people were going to get hurt; he did not want that on his conscience. According to the Complainant, they agreed to meet the next morning (Tr. 86).

The Complainant testified that the following morning, he went to the Progress Energy yard with his ground man, and waited, but Mr. Harrelson did not show up at the set time. They left, and passed Mr. Harrelson on the road; the Complainant talked to Mr. Harrelson by cell phone, and they agreed to meet in Newberry (Tr. 86). The Complainant then met Mr. Harrelson in a parking lot, and got in his truck; he told Mr. Harrelson he was afraid that someone would get hurt. He testified that he told Mr. Harrelson that Robert Breault had cut down a primary wire three times, and that he had seen him do dope. According to the Complainant, he told Mr. Harrelson that he had given this information to Mr. Poole, but nothing was being done. He showed Mr. Harrelson photographs he had taken, and told him that the next thing he knew, he was being sent to work on dangerous trees (Tr. 87-89). He also showed Mr. Harrelson a list of employees who he claimed were doing drugs, and Mr. Harrelson laughed. The Complainant told him that he had already been to OSHA regarding another incident (Tr. 89). He told Mr. Harrelson that he knew he would lose his job, but Mr. Harrelson assured him that he would not, and told him that he was proud of him (Tr. 91-92).

In the meantime, Mr. Owens assumed that the Complainant would get back to him the next day, but he did not hear from the Complainant, either by phone or fax (Tr. 158). Instead, the day after he talked with the Complainant, Mr. Owens was called to Mr. Burford's office, where he learned that Mr. Burford had received a telephone call from a client about reported drug use (Tr. 156). Mr. Owens told Mr. Burford that he was waiting for the Complainant to get back to him with names, so that he could follow through (Tr. 156). Mr. Owens testified that he talked with Mr. Burford about the fact that the Complainant claimed to know about drug use, but did not let them know about it or give them the opportunity to address it, and did not get back to him with the list of names (Tr. 160).

Mr. Burford testified that on December 1 or 2 of 2004, a Burford employee, Mr. Steve Branham, told him that he had gotten information from Mr. Owens that there were employees in the field who were on drugs, and that they were all over it, but they needed to get names, not nicknames (Tr. 257). Mr. Burford testified that he spoke with Mr. Owens to make sure that he had his facts right. Mr. Owens told him that he had talked with the Complainant, and was waiting for information that he had not yet received (Tr. 258). Mr. Burford asked Mr. Owens several times if he had received the information from the Complainant, but he had not (Tr. 258). According to Mr. Burford, he asked Mr. Owens if the Complainant had been through the safety training class, and

if he had a clear understanding of the silver bullet (Tr. 258). He then decided to terminate the Complainant for insubordination (Tr. 258).

According to Mr. Burford, the silver bullet has helped many employees with personal and company problems (Tr. 259). He testified that if the Complainant had given the requested information to Mr. Owens, he would not have been terminated, because he would have been doing what he should to try to help protect the public and the employees (Tr. 259). The only reason the Complainant was terminated was for his failure to follow the company policy (Tr. 259). Mr. Burford testified that the Complainant should have followed the directions of the human resources and safety persons, and done what a good foreman should do if he were concerned about the safety of employees or the public (Tr. 259).

Having received the list of names from Mr. Harrelson, Mr. Owens decided to have everyone on it tested (Tr. 157).[21] Since Mr. Winter was on the list, Mr. Owens found out who was on his crew, and he tested them too, about 18 people in all (Tr. 157). Mr. Owens testified that he flew to Florida on Sunday and spoke with Mr. Smith, and told him that he needed to get Mr. Winter and his people together for a drug screen, and that they were not to know anything about it (Tr. 157).

Mr. Poole testified that he received a call from Mr. Owens on Sunday, December 5, 2004, telling him to terminate the Complainant on Monday morning for insubordination, and for not following company policy. According to Mr. Poole, Mr. Owens did not give him any further details. Mr. Poole testified that he saw the Complainant the following morning, in the Archer substation with Jeff Garner, and he told him that he was being terminated for insubordination (Tr. 226). According to Mr. Poole, the Complainant said that he knew it was coming (Tr. 226). Mr. Poole told Mr. Garner to go home, because he had nowhere to put him to work (Tr. 227).

The Complainant testified that on Monday morning, he got to work, and opened his truck and started the motor. Mr. Poole was sitting in the yard doing paperwork (Tr. 93). He came over to the Complainant, and told him that he was doing something he really did not want to do. He asked the Complainant if Mr. Owens had asked him to do something. When the Complainant responded that he had, Mr. Poole asked him if he did it. The Complainant told Mr. Poole that he had. But when Mr. Poole asked him if he had sent Mr. Owens a list, the Complainant told him that he did not, and that it was hanging in a clip in his truck. When Mr. Poole asked him why he did not send it, the Complainant told him that Mr. Owens said that he was coming to Florida, and he planned to give the list to Mr. Owens when he got there. The Complainant testified that Mr. Poole asked him if he went outside the company, and the Complainant told him he had been to OSHA. When Mr. Poole asked him if there was anybody else, the Complainant told him that he had talked with Progress Energy. According to the Complainant, Mr. Poole told him that Mr. Owens had called and told him to terminate the Complainant on the spot, because he went outside with his complaint (Tr. 94, 129).

[21] This handwritten list appears at Respondent's Exhibit 7.

The Complainant testified that he asked Mr. Poole to call Mr. Owens and tell him that if he fired the Complainant he would be in violation of the "Act." Mr. Poole told the Complainant that he did not want to get involved, and that he knew nothing about it. At that point, the Complainant's ground man, Jeff Garner, pulled up, and the Complainant shook his hand. According to the Complainant, Mr. Garner told him that it was "bullshit," and that the Complainant was one of the best men he had worked for. At that point, Mr. Poole told Mr. Garner that Mr. Owens was in Ocala assembling all of the crews, and that he needed to go for a drug test. The Complainant went home and called an attorney (Tr. 95).

According to Mr. Poole, after he told the Complainant that he was terminated and sent Mr. Garner home, and was leaving for Ocala, he got a call that everyone was to meet at the clinic for a drug test, and to let Mr. Garner know. But Mr. Poole had already released Mr. Garner to go home, and he did not reach him until the next day (Tr. 227). Mr. Poole testified that he was not aware that drug testing was going to be conducted until then (Tr. 227).

Mr. Winter testified that in December 2004, he believed on a Monday, he got a call from Mr. Smith shortly before 7:00 a.m., telling him that he and all of his people should go to a substation in Ocala to meet with Mr. Owens (Tr. 173). Mr. Winter told all of his employees to get in their trucks and go to the substation; he did not know that they were about to be drug tested (Tr. 174).[22]

Mr. Owens testified that on Monday morning, when he arrived at the substation, all of Mr. Winter's people were assembled. They were surprised to see him, and thought that he was there to buy them breakfast (Tr. 158). Instead, they all got in their vehicles and drove to the testing facility (Tr. 158). Mr. Owens stated that Mr. Winter was the first person to be tested; his results were lost by the courier, and he was later re-tested, with negative results (Tr. 158-159). Two of the employees refused to undergo drug testing, and they were terminated. Two employees, who were not on the Complainant's list, tested positive, and they were terminated (Tr. 158-159).

The Complainant started working for Davey Tree on December 22, 2004, and worked for them until June 2005, when he was laid off. He then got a job with Pinellas County, which he started in August 2005 (Tr. 99, 103).

Statement Of The Law

49 U.S.C.A. § 31105(a)(1) ("the Act"), 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. The protected activity includes making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order." § 31105(a)(1)(A). Internal complaints to management are

[22] Mr. Winter testified that the Complainant never came to him to complain about employees using drugs (Tr. 172).

protected under the Act. *Reed v. National Minerals Corp*., Case No. 1991-STA-34, Sec., Dec. and Order, slip op. at 4, July 24, 1992. A "commercial motor vehicle" includes "any self-propelled . . . vehicle used on the highways in commerce principally to transport passengers or cargo" with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. App. § 2301(1).[23]

The Act further provides protection for employees who have a reasonable apprehension of serious injury to themselves or the public due to an unsafe condition. § 31105(a)(1)(B)(ii). Whether an employee's apprehension of serious injury is reasonable is subject to an inquiry of whether a reasonable individual in the same circumstances would conclude that the condition represents a real danger of accident, injury, or impairment to health. *Id.* To prevail under the Act, a complainant must prove that he engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal connection between the protected activity and the adverse employment action. *Schwartz v. Young's Commercial Transfer, Inc.,* ARB No. 02-122, ALJ No. 2001-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); *Assistant Sec'y v. Minnesota Corn Processors, Inc.,* ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003). By establishing a prima facie case, a complainant creates an inference that the protected activity was the likely reason for the adverse action. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

Once the inference is established, the respondent has the opportunity to present evidence of a nondiscriminatory justification for the adverse employment action. *Carroll v. J.B. Hunt Transportation*, 1991-STA-17 (Sec'y June 23, 1992). The respondent need only articulate a legitimate reason for its action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). If such evidence is presented, then the complainant must prove by a preponderance of the evidence that the employer's articulated legitimate reason is pretext for discrimination. *Moon v. Transport Drivers, Inc*., 836 F.2d 226 (6th Cir. 1987); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and that the employer's explanation is not credible. *Hicks, supra*. In addition to discounting the employer's explanation, the fact finder must believe the complainant's explanation of intentional discrimination.

When an employer offers a nondiscriminatory justification for the adverse employment action, then it is necessary to decide whether that reason is pretextual. Instead of focusing on whether a prima facie case has been made out in this circumstance, "the proper inquiry is whether the complainant has shown that the reason for the adverse action was his protected safety complaints." *Pike v. Public Storage Companies Inc.,* ARB No. 99-071, ALJ No. 1998-STA-35 (ARB Aug. 10, 1999).

[23] In his brief, the Complainant for the first time argues that his "concerns about drugged workers" fall under the Toxic Substances Control Act (Complainant's Brief at p. 11). The Complainant's rationale appears to be that the employees who tested positive (and who were then fired) carry toxic materials, presumably the drugs in their system, on their trucks over the roadways (Complainant's Brief at p. 16). Such an allegation, even if true and logical, does not present a claim under the Toxic Substances Control Act.

However, "[w]hen a factfinder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." *Mitchell v. Link Trucking, Inc.*, ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

Whether The Parties Are Subject To The Act

The Respondent is an entity that operates vehicles with a gross weight rating in excess of 10,000 pounds, and is engaged in interstate commerce. As a bucket truck driver, and an employee of the Respondent, the Complainant was employed in a position that directly affects the safety of such vehicles. Neither party objected to the application of the Act. Accordingly, I find that the parties are subject to the Act.

Whether The Complainant Engaged In Activity That Is Protected Within The Meaning Of The Act

To establish that he engaged in protected activity, the Complainant need show only that he reasonably perceived a violation of the Act or regulations pertaining thereto. He need not prove an actual safety violation, but he must establish that his complaints were made in good faith. *Ashcraft v. University of Cincinnati*, ALJ No. 1983-ERA-7 (July 1, 1983). Although a *pro se* complainant may be held to a lesser standard than legal counsel with regard to matters of procedure, the complainant must still carry the burden of proving the necessary elements of discrimination. *Flener v. H.K. Cupp, Inc.*, 1990-STA-42 (Sec'y Oct. 10, 1991). This case was fully tried on its merits, and thus it is not necessary to determine whether the Complainant presented a prima facie case, and whether the Respondent rebutted that showing. *U.S.P.S. Bd. Of Governors v. Aikens*, 460 U.S. 711 (1983); *Roadway Express*, 929 F.2d at 1063. Once the Respondent has produced evidence in an attempt to show that the Complainant was subjected to adverse action for a legitimate reason, it no longer serves any analytical purpose to answer the question of whether the Complainant presented a prima facie case. *Ciotti v. Sysco Foods of Philadelphia*, 1997-STA-30 (ARB July 8, 2003). Instead, the relevant inquiry is whether the Complainant prevailed by a preponderance of the evidence on the ultimate question of liability.

The Complainant alleges that he engaged in protected activity by reporting his suspicions of illegal drug use by employees of Respondent to Don Harrelson, an employee of Progress Energy. Clearly, such an allegation, if true, would have a serious effect on safety. However, the Respondent challenges the reasonableness and good faith of the Complainant's claims.[24]

[24] Before the hearing, the Respondent requested that the Complainant's claim be dismissed, arguing that the Complainant's allegations were made to a third party, and not the Respondent or a legal body, and thus as a matter of law, did not fall under the Act. At the hearing, I advised the parties that in my view, the case law is not so clear cut, and to qualify as protected activity and thus fall under the Act, an allegation does not necessarily have to be made to an employer or to a legal body. In any event, as I have found that the Complainant is not entitled to relief on the merits, it is not necessary to decide this issue.

The Complainant's testimony contains numerous vague allegations of drug use by his fellow employees while he was working for the Respondent. With only two exceptions, the Complainant offered no details in his testimony at the hearing that would flesh out his claims. Thus, he described an incident that occurred while he and other employees were staying in a motel, and he smelled marijuana smoke coming from Mr. Winter's room; he did not identify the "roommate" who answered the door, or the persons who were hiding things. On that same trip, he described an incident in which a fellow employee was involved in a fender bender in the parking lot, and other employees allegedly asked the Complainant to urinate in a bottle because his fellow employee was high.

But several aspects of his testimony cast doubt on the reasonableness and good faith of the Complainant's allegations. According to the Complainant, he was aware of the alleged illegal drug use almost from the start of his employment with the Respondent, which was in January 2004. But for a person who argues that he was worried about his safety and the safety of the public, and the "workplace violence" that could result from drug use on the job, the Complainant did little, if anything, to report this activity and attempt to see that it was addressed.

The testimony of Mr. Owens and Mr. Burford makes it clear that the Respondent attempts to convey its safety policies to every employee, and to encourage every employee to bring safety concerns to management. Although the Complainant testified that the subject of drug use, and the Respondent's policies on drug use, were not discussed at the one day safety presentation, I accept the testimony of Mr. Owens, Mr. Winter, and Mr. Poole, who specifically stated that this subject was addressed. The record establishes that the Respondent requires each employee to attend the safety presentation, and provides each employee with the means to contact management if he or she has safety concerns, or any other concerns for that matter, by way of the "silver bullet." Indeed, the Complainant acknowledged that he had been provided with a "silver bullet," but claimed that, for one reason or another, he did not attempt to use it, or take his concerns to higher management. I do not credit the Complainant's testimony that he did not have access to a phone, that he did not know how to use a Nextel pager, that he did not have his "silver bullet" available, and that he did not know the Respondent's telephone number, which is printed on his paycheck and the company trucks.

The Complainant attended the training meeting on May 5, 2004, almost four months after he started working for the Respondent, where the employees were advised that they could contact Mr. Owens at any time, day or night, by using the number on the "silver bullet." Yet, although he had already complained to Mr. Poole about the group of "potheads" he worked with, the Complainant did not approach anyone at this training meeting to convey his concerns.

Nor did the Complainant report this alleged activity to law enforcement authorities, even anonymously. Although the Complainant testified that he told a friend who was a policeman about his suspicions, and that he talked to an "Officer Dennis" at

the DOT, he offered no testimony or evidence in corroboration. For example, the Complainant did not indicate when he supposedly talked to his policeman friend, or "Officer Dennis," or precisely what he told them, or whether there was any follow up. Even accepting the Complainant's testimony at face value, at best these appear to represent casual conversations, similar to the Complainant's comment to Mr. Poole that the whole group he worked with were "potheads." But there is no evidence that the Complainant made any attempts to make any type of official report that might be acted on by the appropriate authorities.

Nor, with one exception, did the Complainant notify his superiors about his alleged observations. Thus, Mr. Poole acknowledged that soon after he started working for the Respondent, the Complainant told him that the whole group he worked with were potheads. But Mr. Poole also testified that the Complainant did not give him any names, despite his request, and that there was nothing he could do with that information but rely on random drug testing. Other than that, Mr. Poole testified that the Complainant never came to him with any complaints about drug use. Even when the Complainant was allegedly asked to provide urine for a fellow employee who had been in a car accident, he did not pass this information along to Mr. Poole or anyone else.[25] Mr. Winter also testified that the Complainant never made any complaints to him about drug use.

It was not until the Complainant faced disciplinary action for damaging a bucket that he brought specific allegations of illegal drug use to any supervisor. Indeed, this discussion was triggered only when Mr. Owens got in touch with the Complainant to discuss his complaint to OSHA about the pine tree incident. But again, his allegations were vague: he gave Mr. Owens only nicknames. Mr. Owens asked the Complainant to provide him with names so that he could follow up, and the Complainant agreed to do so. But instead, he gave these names, and his allegations of drug use, to Mr. Harrelson.

I find that the Complainant's reasons for not providing this list to Mr. Owens are not convincing. Thus, the Complainant argues that he did not have the money for a fax,[26] and alternatively, that he decided to wait until Mr. Owens came to Florida. But he made no attempt to call Mr. Owens with the names; instead, he called Mr. Harrelson and arranged to meet him to give him the list of names.

The Complainant's testimony is replete with his statements of concern for safety, and his claims that safety was his motivation for bringing his allegations to Mr. Harrelson. But this simply does not square with the Complainant's failure to report this alleged activity to anyone with the authority to act on it during the eleven months that he worked for the Respondent. It is reasonable to expect that a person in the Complainant's position who was truly concerned about drug use by his fellow employees, and the dangers that this posed to the workers and the public, would have found a way over those eleven months to report it to authorities, either with the

[25] Again, the Complainant testified that he tried to get Mr. Poole on the phone, but was unable to do so.
[26] The list that the Complainant gave to Mr. Harrelson was one page long.

Respondent, whose Human Resources officer had made it clear that he could bring his concerns to management without fear of reprisal, to government authorities, such as the DOT or OSHA, or to law enforcement. But other than the Complainant's vague and uncorroborated claims, there is no evidence that he did so.

The Complainant repeatedly referred to his concerns for his own safety, at one point testifying that he was afraid that he would be killed. But the Complainant did not offer any basis for these concerns, or even testify to any activity, such as threats or threatening behavior, that caused him to be afraid. Nor does the record contain any evidence that would tend to support the Complainant's these subjective fears. Thus, I do not accept any argument by the Complainant that he did not report his suspicions about drug use for almost eleven months, despite encouragement by management to do so, and assurance that he would be free from reprisal, because he was afraid of what would happen to him.

In other words, the evidence as a whole leads me to the conclusion that the Complainant's allegations were neither reasonable nor in good faith, but were made to the Respondent's major customer in an effort to seek revenge for disciplinary actions. I find that this is a reasonable inference, based on the fact that the Complainant did not report his concerns over the eleven months long period that he worked for the Respondent, despite specific instructions and encouragement on how to do so, through the "silver bullet." Nor did he provide details as specifically requested by Mr. Owen, and he gave conflicting excuses for his failure to do so. The Complainant offered no corroboration at the hearing for any of his allegations, which were denied by each of the Respondent's witnesses.[27]

I find that the Complainant did not have a reasonable basis for his allegations of employee drug use, that his allegations were made in bad faith and with malicious intent, and thus that he did not engage in protected activity when he provided the list of alleged drug users to Mr. Harrelson.

Whether Complainant's Termination
Was Related To Protected Activity

But even if I were to conclude that the Complainant's concerns about drug use were reasonable, and that he had established that he engaged in protected activity in providing the list of alleged drug users to Mr. Harrelson, I find that the Respondent has demonstrated that the Complainant was terminated for a legitimate reason. I further find that the Complainant has provided no evidence that the Respondent's rationale for his termination was mere pretext.

Mr. Burford, who is the president and owner of Respondent, testified that he made the decision to terminate the Complainant for insubordination. I found Mr. Burford to be a thoroughly credible witness. He testified in great detail about his company's

[27] Indeed, Mr. Poole was the only witness who confirmed that the Complainant had ever said anything about drug use. But according to Mr. Poole, the Complainant never identified which persons were involved.

focus on safety, and its attempts to ensure that its employees observe safety precautions. Indeed, he testified that employees are fired on the spot if they are caught violating certain company safety policies. According to Mr. Burford, his employees are encouraged to bring safety concerns to management, free from fear of retaliation. This approach was corroborated by the testimony of Mr. Owens, the Safety Director, and Mr. Winter and Mr. Poole, whom I also found to be credible witnesses.

I find that the Complainant's allegations of illegal drug use, in and of themselves, did not factor into Mr. Burford's decision to terminate his employment. In other words, it was not the fact that the Complainant voiced such allegations that resulted in him being fired. Rather, it was his refusal to follow company policy, which had been explicitly conveyed to him in the safety meeting and with the silver bullet, and his failure to provide Mr. Owens with the names of the alleged drug users, as he had agreed to do, that got the Complainant fired.

Conclusion

Based on the foregoing, I find no evidence to indicate that the adverse action taken by the Respondent was in any way motivated by the Complainant having engaged in alleged protected activity. Because the Complainant has not established that his termination was motivated by any prohibited reasons, I find that he is not entitled to relief under the Act.

RECOMMENDED ORDER

IT IS RECOMMENDED that the complaint of Loren J. Guay for relief under the Act be DENIED.

A

LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's 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, 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 administrative law judge's 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.