U.S. Department of Labor

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Issue Date: 06 January 2009

CASE NO. 2008-STA-00031

IN THE MATTER OF

CAMERON L. MCCOY,
Complainant

v.

ACI MOTOR FREIGHT, INC.
Respondent

APPEARANCES:

Paul G. Taylor, Esq.
Truckers Justice Center
On behalf of Complainant

Terry J. Torline, Esq.
Martin Pringle, Oliver, Wallace & Bauer
On behalf of Respondent

Before: Clement J. Kennington
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. STATEMENT OF THE CASE

This case arises under Section 405 of the Surface Transportation Assistance Act (STAA), 49 U.S. C. § 31105 and The Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law No. 10-53, based upon a complaint filed by Cameron McCoy (Complainant or McCoy) against ACI Motor Freight, Inc. (Respondent or ACI) alleging ACI terminated McCoy on September 11, 2007 in retaliation for his efforts in reporting and trying to enforce Department

of Transportation (DOT) regulations dealing with random drug testing of truck drivers in violation of Section 405 of the STAA.

Following an investigation of this complaint, the Regional Administrator for Region VII of the Occupational Safety and Health Administration (OSHA) on February 22, 2008 concluded that there was no reasonable cause to believe ACI violated Section 405 of the STAA when it terminated McCoy. On February 29, 2008, McCoy filed objections to the Regional Administrator's findings and requested a hearing in this matter. A hearing was held in Wichita, Kansas on August 25, 2005.

Prior to the hearing Respondent filed a motion for summary decision arguing McCoy did not engage in protected activity or establish a *prima facie* case of discrimination under the STAA. Further Respondent had a legitimate non discriminatory reason for Complainant's discharge. After considering the pleadings and supporting exhibits, the undersigned concluded that there existed issues of material fact concerning McCoy's protected activity in voicing internal and written complaints that Respondent violated DOT regulations by allowing truck driver JM to drive even though JM did not show for his random drug test ; Respondent's motivation in discharging McCoy due to the temporal proximity between Claimant's protected activity and his discharge; and pretextual reasons for Claimant's discharge. *See Dutkiewicz v. Clean Harbors Environmental Services, Inc*, 146 F3d 12 (1st Cir. 1998).

At the hearing both parties were represented by well prepared counsel. McCoy's counsel called McCoy and adverse witnesses: Ms. Laura Hopkins, Respondent vice president; Rick Parker, Respondent line haul supervisor; and Ms. Janet Lewis, Safety Director and introduced 10 exhibits including Claimant's supervisory training certificate for recognizing the effects of Alcohol and drugs; Respondent's controlled substance policy guidelines, various e-mails from McCoy, Ms Lewis and Hopkins; letter to JM from Lewis concerning random drug testing; memo from Ms .Hopkins dated June 7, 2007 concerning purchases over $100.00; McCoy's 2007 W2; OSHA acknowledgement of receipt of complaint; McCoy's objections to OSHA's preliminary findings.(CX-1-10)

Respondent's counsel called Ryan Burrus, independent technology consultant, as well as Ms Hopkins, Ms. Lewis, and Parker and introduced 16 exhibits including purchase invoices from Dell Credit, O'Reilly Auto parts, American Auto Glass, Day's Inn, Office Depo, Original Wireless; Budget Car Receipt, Auto Wrecker receipt; Respondent policy manuals; McCoy e-mails dated March 9,2006 and November 23, 2006.(RX-1-13, 16-18). In addition the parties introduced depositions of Gary Davenport, former director of safety of Kansas Motor Carriers Association and Ms. Crystal Overstreet of Comdata as Joint Exhibits 1 and 2 (JTX 1,2).

Under Section 31105 (a) of the STAA a person is prohibited from discharging, disciplining, or discriminating against an employee because the employee has filed a complaint or begun a proceeding related to a violation of commercial motor vehicle safety regulations or refused to operate a vehicle because to do so would violate a regulation, standard or order of the United States related to commercial motor vehicle safety or the employee has as reasonable apprehension of serious injury to the employee or public because of the vehicle's unsafe condition. The Act protects employee complaints about vehicle safety related issues ranging

from voicing one concern's to one's employer to the filing of formal complaints related to commercial motor vehicle safety.49 USCA§ 31105 (a)(1); *See Young v. Slumberger Oil Field Servs.* ARB No. 00-075, 2000-STA-28, slip op. at 3-8 (Feb. 28, 2003) For an employee to be protected under the complaint clause, the employee need only be acting on a reasonable belief regarding the existence of a violation. *See Clean Harbors Envtl, Servs. Herman,* 146 F.3d 12 at 19-21 (1st Cir. 1998). Further in order prevail on a claim such as this which was fully litigated a complainant must prove by a preponderance of evidence that: (1) he was a covered employee and Respondent was a covered employer; (2) he engaged in protected activity; (3) Respondent was aware of the protected activity; (4) Respondent discharged, disciplined, or took other adverse action against him, and (5) the protected activity was the reason for the adverse action. *B.P.S. Trans. Inc., v. US. Dept of Labor,* 160 F. 3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys. Inc., Reich,* 27 F.3d 1133, 1138 ($_6$th Cir. 1994); *Cefalu v Roadway Express*, ARB Case No. 04-103, 04-161 (January 31, 2006).

A complainant can show protected activity likely motivated the adverse action by establishing a close time link or "nexus" between the protected activity and the adverse action so as to warrant an inference of retaliatory motive. *Kahn v. United States Sec'y of Labor,* 64 F.3d 261)(7th Cir. *1995).* Discriminatory motivation can also be inferred by a showing of pretext when the above elements have been established. *St. Mary 's Honor Center v. Hicks,* 509 U.S. 502, 511. (1993). A complainant can show pretext by proving that the articulated reason was false and discrimination was the more likely reason for the adverse action. *St. Mary's Honor Center v. Hicks,* at 515.

II. ISSUES

1, Whether McCoy engaged in protected activity when he complained to Respondent supervision about line driver JM being allowed to drive after he failed to timely show for a random drug test on August 30, 2007 after completing his line haul deliveries.

2. If so whether Respondent terminated McCoy for his protected activity or rather because of non discriminatory reasons including

> (i) a conversation vice president, Ms. Hopkins had with line haul supervisor, Parker on September 11, 2007, the day of McCoy's discharge, wherein Parker told Ms. Hopkins that McCoy had boasted to him on the previous day (September 10, 2007) that he (McCoy) as a credit card administrator or user had access to all company purchases including personal purchases of Ms. Hopkins and her husband and could purchase what he wanted without Ms. Hopkins' knowledge by the creation of at least 7 or 8 ghost or virtual credit card accounts
>
> (ii) McCoy's poor job performance by using e-mails to discipline employees rather than talking directly to them and by using a GPS system to track the location of employees he did not like.

(iii) McCoy's unchecked and out of controlled spending and apparent belief he could do anything he wanted (Tr. 43,43, 88)

III BACKGROUND

A. Protected Activity

In March 1980 Robert Carriker founded Respondent as a family owned motor carrier for the interstate transport of freight by use of commercial motor vehicles (tractors and trailers) with gross weight ratings of 10,001 pounds or more. (Tr. 15, 170). Respondent currently has 6 terminals in various locations including Wichita, Kansas; Oklahoma City, and Tulsa Oklahoma. During the day Respondent dispatches city drivers to pick up less than full truck load freight from shippers for transport to one of its terminals. There Respondent loads freight onto line haul trailers for delivery at night by line haul drivers to other terminals where it is broken down for day delivery by city drivers. (Tr, 15,16, 170).

In August and September 2007 Respondent employed about 115 employees 85 of which were drivers utilizing 75 trucks and 100 trailers. (Tr.17, 81). Of the remaining 25 to 30 employees, Respondent employed salesmen, dispatchers, clerical, and management personnel including vice president Ms. Laura Hopkins (daughter of Robert Carriker), Cameron McCoy, (operations manager), Rick Parker (line haul supervisor), Ms. Janet Lewis (safety director) and Clint Hopkins (warehouse supervisor). (Tr. 27,28,52).

McCoy and Ms. Lewis shared an office at Respondent's Wichita terminal where Respondent employed dispatchers and office clerical employees including Ms. Hopkins sister, an accounts payable clerk. Ms. Hopkins worked out of a warehouse office located several miles away. (Tr. 27,134, 205, 206, 218) As vice president Ms. Hopkins was responsible for supervision of McCoy, Parker and Ms. Lewis and formulation and enforcement of human relations and safety policies (Tr. 17).

In January 2002, Respondent hired McCoy as a dispatcher responsible for supervising and scheduling pickups by 20 drivers at Respondent's six terminals. From 2002 until his discharge in 2007 McCoy's duties steadily increased leading to an eventual promotion in 2004 to operations manager. (Tr. 170, 171).[1]As operations manager McCoy supervised and dispatched drivers during the day and ensured compliance with DOT regulations including random drug testing of drivers. McCoy notified drivers when they were to report for drug testing and once tested of insuring that the test results were reported to Ms. Hopkins so that drivers drove drug free. (191-192).

[1] Before his employment with ACI, McCoy had worked as a dispatcher and over the road CDL driver for various companies including Target, Phoenix-Ag Lines, Swift , Skillet & Sons and Pro Drivers. (Tr.. 165-169). He drove between 300,000 and 400,000 miles and underwent training in areas of controlled substance and alcohol testing, vehicle inspections and hazardous materials transportation.

In addition McCoy served as a purchasing agent using virtual and ghost master cards on a Comdata system to purchase and pay for computer, sales, turnpike, telephone and other related business expenses. (Tr. 27-29). [2] McCoy was responsible for the installation and operation of Respondent's computer system and the reduction of Respondent's operational expenses. (Tr. 172 180). McCoy cut fuel and tire costs by group purchasing and negotiated reduce cell phone costs. (Tr. 172-174). McCoy was also responsible for using a GPS tracking system called "ZORA" to monitor driver and then sales representative location (Tr. 179, 181, 182).

In contrast to McCoy who worked primarily during the day, Parker worked out of Respondent's Oklahoma City terminal on an evening shift from 6 pm to 6am during which time he hired, terminated. dispatched and supervised line haul and city drivers including line haul driver, JM, who failed to show for random drug testing prompting McCoy's attempt to prevent him from driving (Tr. 92,93,).

Regarding random drug testing Respondent submitted the names of all its drivers to an independent third party who, at the beginning of each quarter, sent a list of drivers to be tested to either the safety director or in her absence to Ms. Hopkins or McCoy. In turn one of these supervisors notified the driver to be tested either in person or through their supervisor or another terminal employee. (Tr. 193-95). Respondent drug testing policy in effect during McCoy's employment required all drivers to promptly submit to random drug or alcohol testing when notified by Respondent with a refusal to test resulting in immediate disqualification from any safety sensitive function. (CX-2; RX-17). Respondent on January 1, 2008 modified its random drug testing to provide that all drivers immediately proceed to testing when notified with failure to test deemed a "No Show" or refusal to test resulting in immediate disqualification from any safety sensitive function.." (RX-18, Tr.154-55).

In the present case on August 30, 2007, McCoy called Respondent's Dallas terminal and told either lead driver, Danny Turner, or salesman, Gary Adams, to have drive Johnny Miller (JM) report for testing after he complete his deliveries. Later that day at about 9 pm Parker called McCoy and informed McCoy that JM had not gone in for testing after finishing his shift as instructed but had rather rode his motorcycle after work, went home ,fell asleep, and apparently forgot to show for testing (Tr. 194-95). McCoy told Parker that JM was considered a "no show" and could not drive whereupon Parker said he did not have anyone else to send and would call Ms Hopkins.[3] Several minutes later Parker call McCoy and told him Ms. Hopkins had approved JM 's driving with the understanding that JM would go in for testing the next morning. (Tr.97-100; 196-97, 240).[4] During either that conversation or a subsequent one Parker told

[2] Ghost Master cards were internet cards created in advance by Comdata corporation to allow ACI to pay specific vendor reoccurring or monthly charges. Virtual Master cards were internet cards created by Comdata for one time use over a one to two month period.(Tr. 281, 282).

[3] Parker had assigned JM to deliver "hot freight" or time sensitive freight for a customer (Aerospeed) to Dallas early the following morning. (Tr. 101).

[4]Ms. Hopkins did not consider JM's failure to report for testing to be a refusal to test (Tr. 22, 70-72). Ms. Hopkins knew that McCoy had advised Parker that JM should not be allowed to drive. (Tr, 97, 98, 240).

McCoy that the testing clinic was closed whereupon McCoy replied that there were other sites JM could report to such as an emergency room for testing.

On the following morning August 31, 2007 Mc Coy approached Ms. Lewis, told her JM failed to show for random testing, and asked what needed to be done whereupon Lewis said she had to speak with Ms. Hopkins. (Tr. 127, 243). McCoy at 3:15 pm e-mailed Ms, Hopkins asking what "we" were going to do about JM's failure to report for testing.[5] Ms. Hopkins did not reply directly to McCoy but rather e-mailed Ms. Lewis asking "What is the regulation for a forget to test?? You may need to call Gary Davenport.

In turn Ms. Lewis at 3:30 pm e-mailed Gary Davenport, Director of Safety of the Kansas Motor Carriers Association.[6] The e-mail read as follows:

> Gary, I had a driver that was notified to take his random DOTdrug test. On his way he forgot to go. They had him go in this morning. What is the exact way to handle someone who forgot. He had worked a long day and I sincerely believe he just spaced it off. But I want to be legal on this. Could you instruct me as to how to handle this. I want to be compliant with DOT

Ms. Lewis followed up on this e-mail by calling Davenport with McCoy present and asking for his opinion. (Tr. 54-57). Davenport replied that Respondent should have called him after the initial failure to show. However since that was not done Respondent could consider Miller's actions as a refusal to test and terminate him or tell him he "messed up" and don't do it again and tell all employees that anytime a driver receives notice of a random test they should report immediately for testing. (JTX-2. p.15). Davenport believed Miller had not proceeded immediately to the collection site as required by the regulations but would allow RESPONDENT the discretion to discipline Miller as they saw fit according to company policy. (JTX-2, p.24,29). According to McCoy he spoke with Davenport who agreed with his assessment, namely that Miller's conduct was a refusal to test which should have prevented him from driving. (Tr. 240, 244, 245).

Following this call, Ms. Lewis at Ms Hopkins' suggestion issued a written warning to Miller. (Tr. 142, CX-5).[7] At 3:38 pm on September 3, 2007, Mc Coy e-mailed Ms. Lewis enclosing pdf files from the US DOT website and stating:

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[5] Ms Lewis and Ms. Hopkins knew as did McCoy that a refusal to test was considered by the DOT as a critical violation which could lead to unsatisfactory rating and potential loss of business (Tr. 132,132) They were also aware that anyone refusing to test was not to drive or perform any safety sensitive functions. (Tr, 69-72).

[6] The Kansas Motor Carriers Association (KMCA) is a trade association for the trucking industry in Kansas. The KMCA helps carriers such as ACI ,who is a member of KMCA, understand and comply with safety regulations (JX-2. pp7-9).

[7] Ms. Lewis issued the letter of warning on September 15, 2007 (Tr. 84-87).

> Failure to appear at the test collection site at the the designated time is considered "no-show". A No-show is considered a "Refusal to test"….
>
> If an employee refuses to test, RESPONDENT can use its discretion to determine whether the employee will be rehabilitated or terminated. Regardless of the decision, the employee must be provided with a list of Substance Abuse Professionals. If RESPONDENT decides to rehabilitate the employee, the employee must complete the return –to-duty requirements in 49 CFR Part 40-Subpart O…. (CX-3, p.1)

On September 4, 2007 at 7:53 am Ms Lewis emailed McCoy stating:

> The problem is that we sent him [Johnny Miller] in the next morning. Something should have been done that night in regards to a refusal to test. That is the problem according to Mr. Davenport. he would have considered that a refusal to test and would have terminated him that night. (CX-3. p.1)

McCoy took no further action on this issue prior to his discharge on September 11, 2007. (Tr. 146-47). However, McCoy did not considered the issue closed since in his mind he considered Miller's action as tantamount to a refusal to test which would have disqualified him from driving. (CX-3, pp.3-7; Tr. 201, 202). On September 15, 2007, Ms. Lewis gave Miller a written reprimand informing him he would be terminated in the future if he failed to appear immediately for random testing. (CX-5).

In addition to the dispute about JM. McCoy had disagreements with Parker and Ms Hopkins on allowing drivers to drive overloaded trailers. Trailers in Kansas would be loaded properly with freight weighing up to 100,000 pounds and then driven into Oklahoma overweight because Oklahoma had 80,000 pound weight limitations as opposed to Kansas that had 100,000 pound limitations. McCoy confronted Ms. Hopkins about this regular practice only to be told that it would continue and if caught Respondent would simply pay the fine (Tr. 185-187). On occasion when line haul driver, George Rotes complained about driving over weight trailers. Ms. Hopkins had Parker reassign Rotes to a lighter Tulsa run. (Tr. 108-113, 184-185).

B. Events Preceding and Leading to McCoy's Discharge

On May 28, 2007 (Memorial Day) Ms Hopkins while reviewing McCoy's personnel file discovered that McCoy had been using position as an administrator on Respondent's master card account with Comdata to make substantial personal purchases such as computers from Dell and a 42 inch plasma TV from Office Depot on company credit cards, turn in the receipts to Ms.

Hopkins' sister, the accounts payable clerk, and have the purchase deducted from his pay check (RX-1 through 11; Tr. 31-33, 40 41, 46, 176, 177, 227-235).[8]

On June 6, 2007, Ms. Hopkins told both McCoy and Parker that they had to obtain her approval for all purchases in excess of $100.00 (Tr. 107, 236). Mc Coy initially tried to comply with this directive. However, the policy soon became too impractical to follow for both McCoy and Parker since to do so would have halted Respondent operations as Mc Coy and Parker waited for approval to pay such expenses as telephone bills, turnpike tolls, road service calls and motel bills. (Tr. 104-107, 175, 262, 263). Unlike McCoy Parker was never disciplined for such purchases. (Tr. 103,105).

On June 7, 2007, Ms. Hopkins issued a directive to McCoy and Parker directing them to secure prior authorization from her before incurring any expense in excess of $100.00. (CX- 7, RX-11, Tr. 30).[i] After June 7, 2007 McCoy made a personal purchase of a computer and monitor on August 28, 2007 having obtained prior authorization from Ms. Hopkins. (Tr. 175-177). According to Ms. Hopkins this purchase was approved after the fact with the monitor going to Respondent and the computer to McCoy (RX-13, Tr. 49,50). Besides this purchase McCoy according to Ms. Hopkins also purchased chargers from Original Wireless for $220.00 without authorization on July 24, 2007 (Rx-12, Tr. 47,48).

Concerning the June 7, 2007 directive McCoy testified it lasted only a short period because of frequency of such purchases up to 50 times a month occurring at all times of the day or night and in fact Ms. Hopkins abandoned because of such impractically (Tr. 262-270). Hopkins testified that her directive applied only to virtual credit cards which were set up for short time periods as opposed to ghost cards established for reoccurring cards and that her June 7 directive applied to both McCoy and Parker. (Tr. 30) Parker testified that in 2007 single road service calls for trucks would exceed $100 and would be paid for by the Oklahoma City dock supervisor without seeking prior authorization and without any discipline (Tr. 102-107).

As a result of Ms. Hopkins alleged inability to limit or control McCoy's spending, Ms. Hopkins testified she decided to discharge McCoy in late July or early August, 2007 and consulted an outside IT person (Ryan Burras of Allen, Gibbs, & Houlik) to determine how quickly she could terminate McCoy's access to Respondent computer system (Tr. 50). Ms. Hopkins also consulted with Ms. Crystal Overstreet of Comdata to see how quickly she could remove McCoy from the Comdata System. (Tr. 51). Initially Ms. Hopkins planned on terminating McCoy on August 13, 2007. However, due to the death of her husband's grandfather and the death of a long term driver and attendance at a conference in Kansas City, Ms. Hopkins delayed the decision not for one or two weeks but for almost a month until September 11, 2007. (Tr. 50-52; 60-65). Burrras confirmed Ms. Hoskins testimony stating she informed him as early as the first week of August, 2007 of her intent to terminate McCoy which was delayed by family issues. (Tr. 271-276). Ms. Overstreet learned of Ms. Hoskins decision to terminate McCoy in mid August, 2007 (JTX-1 pp.15).

[8] Before May, 2007 Ms Hopkins knew McCoy had used ACI credit cards to make personal purchases and have it deducted from his pay . In fact this practice of reimbursing ACI had become routine. (Tr. 32, 33 259).

On Wednesday, September 5, 2007, McCoy rented a car and on the following day September 6, 2007 drove to Tulsa to install a computer and train employees on a new software package (Tr. 60). After finishing this work McCoy drove to the Oklahoma City terminal on September 7, 2007 where he fixed some computer problems and returned to Wichita. McCoy kept the car over the weekend and returned it on Tuesday, September 11, 2007 for a charge of $193.10. (EX-16; Tr. 61, 62,210, 211, 252, 253).

While at the Tulsa office on September 7, 2007, McCoy complained to Parker about not getting a bonus. Parker asked McCoy if he had received a new Respondent credit card. McCoy replied he had not received one but did not need it because he had 7 or 8 ghost cards which allowed him to purchase whatever he needed. Further he (McCoy) had looked into the Comdata account and saw Ms Hopkins and her husband spending a lot of money on dinners and gas. Parker replied that their spending was not his business since they owned Respondent. (Tr. 114-116). McCoy never told him Ms. Hopkins was unaware of his ghost or virtual credit cards. (Tr. 116).

On Monday, September 10, 2007, Parker drove McCoy to the repair shop where McCoy's company truck was being repaired and paid for the repairs on his Respondent credit card. The repair bill was over $100.00. Parker had no prior authorization from Ms. Hopkins for these repairs and was never disciplined for using his Respondent credit card to pay for them (Tr. 102,103). On the following day, September 11, 2007, Parker called Ms. Hopkins and reported what McCoy had told him on September 7, 2007 whereupon Ms. Hopkins became "pretty mad".(Tr. 115-119; 207-211, 214-216)[9]

On September 11, 2007, when McCoy reported for work he discovered various computer programs were not working. McCoy attempted to call Ms. Hopkins by phone but was unsuccessful so he drove to her office which was about two miles away from the Wichita terminal. There he met her and learned he was being terminated. After asking for his phone and keys Ms Hopkins told McCoy that she had talked with Parker who told her that he (McCoy) stated he was going to create virtual Mastercards and already had virtual accounts she was unaware of and was going to use those accounts to purchase what he wanted. McCoy said there was a misunderstanding and that he never implied or told Parker that he intended to use those accounts to just go out and buy something. McCoy further said he was not getting paid what she told him he was going to get paid but "Maybe this is better". (Tr.66, 217-19). Hopkins also said McCoy had failed to follow her instructions in dealing with other employees. (Tr. 257)

Following his termination Claimant checked the want ads and registered on several website. After applying for about 110 jobs Mc Coy eventually secured employment driving for Glenco of Pueblo, Colorado making $750.00 per week with no insurance for the first 90 days, and no

[9] In response to leading questions from Employer's counsel Ms. Hopkins claimed Parker told her that McCoy told him he did not need a company Master credit card because he had access to ghost and virtual credit cards to purchased whatever he needed to buy. Further McCoy boasted he had looked at personal expenses charged by Ms. Hopkins and her husband which were more than he felt was needed and he had seven or eight cards that Ms. Hopkins was unaware of (Tr. 62-64) . McCoy admitted telling Parker he had access to ACI's one credit card account and could find out what had been charged to that account on a 45 day basis by down loading that information on an Excel spread sheet as part of his job to monitor and cut expenses (Tr. 215-216)

vacation until after 1 year as opposed to $59,000.00 per year, health insurance, and 3 weeks vacation and use of an expense free company truck with Employer. (Tr. 161-163).

(IV) DISCUSSION, CONCLUSION AND RECOMMENDATION

In response to concerns over unsafe commercial trucking practices Congress enacted the STAA and prohibited the following conduct:

> A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because
>
> (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (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…. 49 U .S.C.. § 31105

A. Covered Employer and Covered Employee

A "person " is defined at 49 U.S.C. app.§ 2305 as one or more individuals, partnerships, associations corporations, businesses trusts or any other organized group of individuals for purposes of the subchapter, 49 U.S.C. app. § 2301 and includes Respondent. An "employee" is a driver of a commercial motor vehicle, a mechanic, a freight handler, or any individual other than an employer "who" is employed by a commercial motor carrier and who in the course of his employment directly affects commercial motor vehicle safety. Respondent is a commercial motor carrier owning and operating numerous (75 trucks and 100 trailers) commercial motor vehicles in interstate commerce. *See Ass't Sec'y & Killcreasee v. S & S Gravel, Inc.* 92-STRA-30 (Sec'y Feb. 2, 1993). Complainant was employed by Respondent as a dispatcher and later as an operations manager. As operations manager Complainant supervised and dispatched drivers during the day and was responsible for ensuring compliance with DOT regulations including random drug testing notifying drivers when they were to report for drug testing and ensuring test results were reported to Ms Hopkins so that drivers drove drug free. Although Respondent would have me find otherwise, Complainant was directly involved with vehicle safety (Tr. 25, 191-192). Accordingly I find that McCoy has established by a preponderance of evidence that he and Respondent were covered employee and employer respectively under the STAA.

As an interstate motor carrier Respondent was subject to the federal controlled substance and alcohol use and testing regulations set forth in 49 C.F.R. Parts 40 and 382 *See* 49 C.F.R.

Parts 40, and 382. 49 C.F.R. 382.305 (k) (1) requires random alcohol and controlled substances tests to be unannounced. 49 C.F.R. 382.305 (l) provides:

> Each employer shall require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site immediately, provided, however that if the driver is performing a safety-sensitive function, other than driving a commercial motor vehicle, at the time of notification, the employer shall instead ensure that the driver ceases to perform the safety–sensitive function and proceeds to the testing site as soon as possible.

Any employer or driver who violates 49 C.F. R. Parts 40 or 382 can be subject to civil and/or criminal penalty provisions of 49 U.S.C. 521 (b) which include assessments up to $10,000.00 for each civil offense and assessments up to $25,000.00and imprisonment up to one year for each criminal offenses.

B. Protected Activity and Respondent's Knowledge

Respondent argues that McCoy failed to demonstrate he engaged in protected activity because his concerns were too generalized, informal, and indefinite to put Respondent on notice that he was engaging in protected activity citing *Clean Harbors Environmental Services, Inc. v. Herman.,* 146. F. 3d 12 (1st Cir 1998). McCoy's argues that his oral and written complaints were neither generalized nor informal as seen by his August 30, 2007 conversation with Parker wherein he told Parker the controlled substances regulations prohibited JM from driving for Respondent On August 31, 2007, McCoy told Ms. Lewis that JM had failed to report for random controlled substance testing followed by an e-mail to Ms. Hopkins asking what Respondent was going to do about JM's failure to appear for testing and McCoy's conversation with Davenport wherein McCoy told Davenport about JM's failure to show for testing. Mc Coy was concerned about JM's failure to test because Ms. Hopkins allowed JM to drive in apparent violation of 49 C.F.R. § 382.211 and § 382.501 subjecting himself and Respondent to potential civil and criminal penalties under 49 U.S.C. § 521 (b) (2) (A) and 49 C.F. R. 382.507. Internal complaints to Respondent's supervision related to violations of commercial vehicle safety regulations constitute protected activity under 49 U.S.C. § 31105 (a) (1) (A). *Yellow Freight System, Inc., v. Martin,* 9545 F.2d. 353 (6th Cir. 1992); *Byrd v. Consolidated Motor Freight,* 1997-STA-9 (ARB May 8, 1998). McCoy's complaints were specific, definite, and formal enough to put Respondent on notice of his protected activity and the need to comply with commercial vehicle safety regulations.

C. Adverse Action and Causal Nexus

Concerning the third requirement of a STAA violation, namely adverse action Respondent never contested the fact that it discharged McCoy. Rather it contends it was motivated by legitimate non discriminatory reasons. Before examining these alleged reasons it is necessary to determine whether there exist a nexus or causal link between McCoy's protected

activities and his discharge. From the record it is clear that McCoy raised concerns about possible violations of random drug testing regulations with management from August 30, 2007 through September 4, 2007. On September 11, 2007 Respondent discharge him. Such temporal proximity is sufficient to establish the requisite causal link. *Moon v, Transport Drivers, Inc.*, 836 F. 2d 226 (6th Cir. 1987)

Given the serious nature of alleged violations which could result in substantial criminal and civil penalties, I find it highly likely that Ms. Hopkins, contrary to her testimony, discussed JM's action along with McCoy's response with both Parker and Lewis in the days immediately proceeding Mc Coy's discharge of JM's failure to appear for testing, which could include both civil and criminal penalties and possible disruption of ACI's business.

Further as argued by McCoy's counsel, the proximity between the protected activity and discharge along with the seriousness of the charges constitutes strong evidence of discrimination. This is supported by Ms. Hopkins animus towards the Act and regulations as seen by her refusal to comply with DOT and state weight limitations preferring fines over compliance. Indeed her action in approving JM driving after not showing for drug testing shows a preference for profits over compliance.

D. Pretext

In its brief Respondent asserts it had legitimate reasons for McCoy's discharge namely McCoy's alleged comments to Parker in which he boasted about his ability to purchase whatever he want by (1) his use of virtual and ghost credit cards and his assess to Hopkins' personal credit purchases, (2) McCoy's poor job performance and (3) McCoy's out of control spending and belief he could do whatever he wanted. (paragraph 53 of ACI brief . Regarding McCoy's alleged boasting I do not credit Parker's assertions because Hopkins and Parker already knew McCoy had the authority and ability to make necessary business purchases by virtual and ghost credit cards and made no personal purchases without prior authorization following the June 7, 2007 directive. Ms Hopkins also knew McCoy had assess to the entire Comdata account in his roll to reduce expenditures and as late as July 6, 2007 had approved and authorized McCoy's use of ghost cards. (CX-6, Tr. 29, 64, 65, 83, 84, 213-216, 255, 256))

Parker had both virtual and ghost credit cards and used them on occasion without clearance or discipline from Ms. Hopkins even though he was allegedly subject to the June 7, 2007 spending cap. (Tr. 30, 77, 78 107, CX-7). McCoy considered the June 7, 2007 memo to refer to personal purchases inasmuch as it did not in fact apply to other purchases and was abandoned several days after implementation (Tr. 172-180, 263, 268, 269).

Ms. Hopkins accused Mc Coy's of ordering phone chargers on July 24, 2007 and on August 28, 2007 ordering a Dell computer and printer without prior permission but according to McCoy he had prior authorizations from Ms. Hopkins for these items. (Tr. 176-180). It would seem logical for Ms. Hopkins to have approved the cell phone chargers since they were necessary for proper cell phone use .Ms. Hopkins by her own admission approved the Dell purchase after the fact.. (Tr. 172-180). Ms. Hopkins also accused McCoy of making an unauthorized side trip to Oklahoma City upon his return from Tulsa where he fixed internet and

computer problems while using a rental car which he did not return until Tuesday again without authorization.(Tr. 60-62, 114-117, 210-212, 267). McCoy rented the car because his company truck was in the shop and reduced the car rental charge by getting a weekly as opposed to a daily rental rate. Parker paid for the rental on company credit cards which exceeded $100.00 without prior authorization or criticism from Ms. Hopkins (Tr. 101-103). Indeed Parker authorize and paid for road service calls which were over $100.00 on company credit cards without prior authorization or criticism from Ms. Hopkins. (Tr. 105, 106). There is moreover no credible evidence to suggest that McCoy needed prior authorization to travel to Oklahoma City on company business

McCoy showed pretext by a preponderance of evidence by (1) demonstrating many instances of disparate treatment wherein Parker was allowed to purchase items in excess of $100.00 without prior approval or discipline; (2) showing Parker and Ms. Hopkins falsely accusing Mc Coy of boasting about his ability of purchasing whatever he wanted; (3) showing Ms. Hopkins criticizing McCoy's job performance for sending e-mails to dispatchers rather than reprimanding them in person but then admitting such conduct as well as his purchases prior to June, 2007played no part in McCoy's discharge; (4) showing Ms. Hopkins criticizing McCoy's past attempts to discipline JM but taking no corrective action until McCoy sought to have JM denied the ability to drive following JM's failure to show for drug testing (Tr. 43-45, 111-113, 145, 146, 203, 239, 240). Respondent's discharge of McCoy because of his treatment of JM following JM's failure to test constitutes adverse action in response to protected activity/

Respondent would have me believe that McCoy's protected activities played no part in his termination in that Ms. Hopkins allegedly made the decision to terminate McCoy as early as the beginning of August, 2007 when she talked to consultants Burrus and Overstreet about McCoy's termination. (Tr. 81, 82) Ms. Hopkins however did not discharge McCoy until September 11, 2007 which was well after her 10 day absence from the office on personal matters involving the death of her husband's grandfather and a long term driver. It was also well after any delay in removing McCoy's assess to ACI computer system

In essence McCoy presented Respondent with potentially serious violations of controlled substance regulations which were reinforced by McCoy's e-mail to Ms Hopkins asking her if she was going to do about JM's failure to test. This was further reinforced by McCoy's refusal to drop the issue as seen by his September 3, e-mail to Lewis.

McCoy further argues, assuming arguendo that Respondent discharged McCoy for protected activity related to his complaints regarding JM's failure to appear for random testing and for other non-related reasons, that Respondent had the burden in a mixed motive case to show that it would have terminated McCoy in the absence of protected activity. In other words Ms Hopkins had the task of separating legal from illegal motives which she failed to do. *Mackowiak v. University Nuclear Systems, Inc.,* 735 F.2d 1159, 1164 (9th Cir.1984). In this case McCoy's protected activity was a least the straw that broke the camel's back and as such precluded Respondent from separating legal and illegal motives citing *Dale v. Step 1 Stairworks,* 2002-STA-30 (ALJ April 11, 2003).

Once McCoy established that Respondent terminated him for protected activities, the burden shifted to Employer to show McCoy failed to mitigate his damage by showing (1) comparable jobs were available and (2) McCoy failed to make reasonable efforts to find such work. *Rasimas v. Michigan Dept of Mental Health*, 714 F. 2d 614, 624 (6th Cir, 1983). In this case there is no evidence to indicate any failure by McCoy to obtain comparable employment.

Under the STAA McCoy is entitled to reinstatement, compensatory damage including back pay, attorney fees and costs. 49 U.S.C. Section 31105 (b)(2)(A). McCoy did not achieve full time employment until August 18, 2008 when hired by Glenco at a weekly salary of $750 or $384.61 less than his weekly wage of $1,134.61 ($59,000 divided by 52). From September 12, 2007 to August 17, 2008 (48.6 weeks x $ 1,134.61) Mc Coy lost $55,142.04) From August 18, 2008 to December9 2008 (16.28 weeks x $84.61) McCoy lost$6,261.45 McCoy also loss$700 in monthly automobile expenses. McCoy is also entitled to $10,000.00 for emotional distress caused by his relocation to another state plus interest, attorney fees, interest on back pay in accord with 29 CFR Section 20.58 (a) which is the IRS rate for under payment of taxes as set forth in 26 U.S.C. Section 6621. *Ass't Sec'y and Cotes v. Double R. Trucking,* 1998-STA-34 (ARB Jan. 12, 2000). In order to discourage repetition of the same conduct which could result in death or injuries by drivers operating under the influence, an award of punitive damages in the amount of $10,000.00 is appropriate under 29 U.S.C. Section 31105 (b)(3)(C).

E. Order

Accordingly pursuant to 49 U.S.C. 31105 (b)(3) it is hereby ordered that Respondent do the following:

1. Purge McCoy's employment file of any reference to his protected activity and discharge;

2. Reinstate McCoy to his former position without loss of benefits or other privileges;

3. Compensate McCoy for loss back pay by payment of his weekly wage of $1,114,61 from September 12, 2007 to August 17, 2008 and payment of $384.61 per week from August 18, 2008 to reinstatement and payment of $700.00 per month in auto expenses from September 12, 2007 to reinstatement.

4. Pay McCoy $10,000.00 for emotional distress and $10,000.00 in punitive damages.

5. Pay Mc Coy interest on back due wages in accord with 29 CFR Section 20.58 (a) (IRS rate for underpayment of taxes).

6. Post a copy of this decision and order at all Respondent terminals for a period of 90 days.

[i] Ms. Hopkins knew of McCoy's personal purchases on ACI credit cards over a 2 ½ year period prior to June 7, 2007 and never did anything to correct it until June 7, 2007. (Tr.. 32, 33) Parker continued to use ACI credit cards for individual purchases in excess of $100.00 without any complaints or discipline from Ms Hopkins (Tr. 101-106)

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CLEMENT J. KENNINGTON
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, 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 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.

The order directing reinstatement of the complainant is effective immediately upon receipt of the decision by the respondent. All other relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).