

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 29 October 2004**

Case No.: 2004-STA-0013

*In the Matter of:*

CHARLES JENKINS,  
Complainant,

v.

OLD DOMINION RECYCLING, INC,  
Respondent.

Before: DANIEL A. SARNO, JR.  
  
Administrative Law Judge

Appearances:

*For the Complainant:*  
Charles Jenkins, *pro se*

*For the Respondent:*  
Tim Hand, *pro se*, Owner, Old Dominion Recycling, Inc.

**RECOMMENDED DECISION AND ORDER DENYING RELIEF**

Complainant, Charles Jenkins, filed a complaint with the Occupational Safety and Health Administration (OSHA) of the United States Department of Labor on or about October 6, 2003, alleging that Respondent, Old Dominion Recycling, Inc. discriminated against him in violation of Section 405 of the Surface Transportation Assistance Act (STAA) of 1982, 49 U.S.C. § 31105 (formerly 49 U.S.C. § 2305) and the regulations at 29 C.F.R. 1978. Complainant alleged that he was terminated as a truck driver due to writing down on his pre-trip inspection reports his safety concerns with trucks assigned to him.

A formal hearing was held in Newport News on July 29, 2004. Complainant submitted exhibits (CX) 1 and 2.<sup>1</sup> Complainant and Respondent agreed to certain stipulations, which were read into the record and accepted by the court. As Complainant and Respondent were appearing *pro se*, the court permitted the parties to deliver closing statements at the trial in place of submitting post hearing briefs. After consideration of the entire record and the arguments of the parties, this court recommends that the complaint be dismissed.

### STIPULATIONS

1. Respondent is an employer within the meaning of 49 U.S.C. § 31101, 49 U.S.C. § 31105, and 29 C.F.R. § 1978.101.
2. Respondent is also a commercial motor carrier within the meaning of 49 U.S.C. § 31101.
3. Respondent is engaged in transporting commercial goods on highways and maintains a place of business in Hampton, VA.
4. Respondent hired Complainant as a driver of a commercial motor vehicle, to wit, a truck with a gross vehicle weight rating of 10,000 pounds or more.
5. Complainant was employed by Respondent, a commercial motor carrier, and drive Respondent's trucks over highways engaging in commerce. Complainant was an employee within the meaning of 49 U.S.C. § 31101.
6. Complainant directly affected commercial motor vehicle safety. The parties stipulate that Complainant and Respondent are covered under the Act.
7. Complainant was hired by Respondent to drive locally on October 7, 2003.
8. Complainant's supervisor was Steve St. Pierre.
9. Tim Hand is the Owner and President of Respondent, Old Dominion Recycling, Inc.
10. Complainant's last day of work was October 20, 2003.
11. Complainant filed a timely claim with OSHA on or about October 29, 2003.
12. On or about November 13, 2003, Richard Soltan, the Regional Administrator of OSHA, issued "Secretary's Findings" determining that Respondent did not violate 49 U.S.C. § 31105(a)(1)(B)(i).

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<sup>1</sup> CX 1 is a log kept by Complainant, detailing his employment at Old Dominion and his communications with an OSHA Investigator. CX 2 consists of Complainant's personal copies of the Vehicle Safety Status Report. Complainant filled out the reports and submitted them to Respondent from October 8 – 14, 2003. Complainant also filled out a second copy of the reports which he then kept for himself.

13. Complainant timely requested a hearing in front of the Administrative Law Judge on December 3, 2003.

### ISSUE

Did Respondent terminate Complainant's employment based on Complainant's commercial motor vehicle safety complaints in violation of Section 405 of the STAA?

### TESTIMONY OF WITNESSES

#### Testimony of Charles Jenkins

Complainant stated that he started taking notes from his first day on the job because he was suspicious of the company's practices when they hired him without a drug test. Tr. 13-14. He told the Respondent's foreman, Steven St. Pierre, who was responsible for hiring Complainant, that he was a "stickler for safety." Tr. 15. Complainant began working October 7, 2003, the morning he was hired. He pre-checked his truck, informed Mr. St. Pierre of the problems with the truck, and then drove the truck. Complainant noted that the mirror was broke and the steps missing on the right side of the truck. Tr. 17. Complainant also drove that truck the next day. Tr. 19. He stated that he made two copies of the pre-inspection report; he kept one copy for himself, and turned in the other copy to a woman who worked in Respondent's office. Tr. 19. Complainant asserts that Mr. St. Pierre told him to "stop writing up his trucks." Tr. 22. Complainant noted that the truck was sent to the shop. Tr. 22-23. Complainant stopped writing up trucks after October 14, 2003; he could not exactly recollect why he did not file any more reports, but stated that he "just documented things that were important" to him." Tr. 44.

On October 15, 2003, Mr. St. Pierre asked Complainant if he wanted to take the next day off. Tr. 25. Complainant thought that if he said yes, Respondent would use it as an excuse to fire him. *Id.* On October 17, 2003, Respondent received its new roll-off truck. Tr. 26. Complainant stated that another employee (whose name he doesn't know) told him that Respondent was prejudiced and would not let Complainant drive the new truck. Tr. 26-27. Complainant was then assigned to drive the truck. Tr. 27.

On October 20, 2003, Complainant was instructed to pick up a box, using the new roll-off truck, at Newport News Marine Terminals. Complainant states that the roll-off already contained an empty box, and having not received any instruction from Mr. St. Pierre, Complainant assumed that he should bring the empty box. Tr. 28. Upon arriving at the Marine Terminals, Complainant was told that an empty box wasn't needed. Complainant then drove back to Respondent's and asked Mr. St. Pierre why he wasn't told not to bring an empty box. Tr. 28. Complainant then stated that Mr. St. Pierre started yelling and cussing. *Id.* Complainant responded, "You don't talk to me like that." CX 1. Mr. St. Pierre then told Complainant that he [Mr. St. Pierre] no longer needed Complainant. *Id.*, Tr. 28. Complainant could not recall whether he or Mr. St. Pierre said anything else during the exchange. Tr. 52. He stated that no one else was in the vicinity when he and Mr. St. Pierre had this exchange. Tr. 91-92. Thereafter

Complainant went to Mr. Hund's office and relayed the exchange he had with Mr. St. Pierre. Mr. Hund told Complainant that he didn't have anything to do with personality conflicts. Tr. 28. Complainant then told Mr. Hund that he planned to file a complaint, which Mr. Hund "considered ... a threat." Tr. 29. Complainant believes that the firing was pre-planned and that he was fired for writing up Respondent's trucks every day.

Following his discharge on October 20, 2003 at Old Dominion Recycling, Complainant was hired as a driver at Pete Customs on or about October 27, 2003. Tr. 33. Complainant was hired at \$12.00, the same hourly wage he had earned working for Respondent. Tr. 35. Complainant then quit his job at Pete's because, in his opinions, their trucks "were just as bad [as Respondent's]." *Id.* Thereafter Complainant began doing janitorial work for a company named ARC, where he earns \$11.32 an hour. Tr. 36. Complainant stated that he did not desire to be rehired by Respondent. Tr. 35.

#### Testimony of Steven St. Pierre

Steven St. Pierre is a foreman for Old Dominion Recycling. He hired Complainant after interviewing him and speaking with one of his references. Tr. 56-57. Complainant was hired because he had experience driving a roll-off truck<sup>2</sup>, and Respondent had just purchased a new roll-off truck. Tr. 56. Mr. St. Pierre stated that Respondent wanted a driver who would care for the new roll-off truck. *Id.* According to Respondent, the company had previously had drivers who had not properly cared for the trucks, which resulted in damage to the trucks. Tr. 67. Mr. St. Pierre noted that Complainant was "a little persnickety" but for that reason, seemed like the perfect driver for the new roll-off truck. Tr. 70. Mr. St. Pierre also stated that because Complainant had roll-off experience, he was hired at a wage two dollars higher than the other drivers. *Id.* Mr. St. Pierre admitted that Complainant was hired without a drug test.<sup>3</sup>

Complainant was told that he would have to drive a regular tractor-trailer truck until the new roll-off arrived. Tr. 57. Therefore, Complainant was first assigned to drive truck 103. Mr. St. Pierre instructed Complainant to complete his pre-inspection report by writing down all problems with the truck onto a legal pad, which Mr. St. Pierre provided to Complainant. Tr. 57-58. Mr. St. Pierre was aware that the truck had some problems, including some broken mirrors, which had been damaged by a previous driver. Tr. 58. Complainant noted several problems with the truck, which resulted in truck 103 being taken for repairs. Tr. 57-58. Complainant was then instructed to drive truck 104, which was normally driven by another employee who had taken the day off. Tr. 58. Following repairs, Complainant returned to driving truck 103.<sup>4</sup> Mr. St. Pierre stated that while some items were immediately fixed, others were not, because the

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<sup>2</sup> A roll-off truck differs from a tractor trailer in that the roll-off is a straight truck that has a container on the back which slides off. Tr. 56.

<sup>3</sup> Mr. St. Pierre testified that the company was ignorant of federal law requiring drug tests before hiring truck drivers. He stated that the company paid a fine for these violations.

<sup>4</sup> Complainant stated that several of the items he marked as broken were not fixed; Mr. St. Pierre noted that some items could not be immediately repaired because parts were needed which were not in stock. Tr. 58 -59.

parts had to be ordered. Tr. 58. However, Mr. St. Pierre noted that despite some broken parts, the truck was safe to drive. Tr. 69.

Complainant then continued to drive truck 103. Mr. St. Pierre noted that Complainant continued to write the trucks up with daily pre-trip and post-trip reports, which he stated was “perfectly fine.” Tr. 59. He also explained that he asked Complainant if he wanted October 16, 2003 off because he sometimes allowed workers to take leave when their truck was out of commission or there wasn’t any work to do. Tr. 61. According to Mr. St. Pierre, this was the situation on October 16, 2003, when truck 103 was being repaired, the new roll-off hadn’t arrived, and as such, Complainant was offered, but did not ultimately accept, to take the day off.<sup>5</sup> On October 17, 2004, the new roll-off truck had arrived.

On October 20, 2003, Mr. St. Pierre instructed Complainant to drive the roll-off to Newport News Marine Terminals, pick up a box of aluminium wheels, and bring it back to Respondent’s warehouse. Tr. 62. Mr. St. Pierre was aware that there was an empty box on the truck. Tr. 62. When Complainant returned from the Terminals, Mr. St. Pierre was finishing a conversation with Mr. Gresham Sackett behind Respondent’s back building. Mr. St. Pierre stated that when Complainant returned, he was “ranting and raving” about the situation. Tr. 62-62. Mr. St. Pierre told Complainant that he was never told to take an empty to the Terminals, but that it wasn’t a “big deal;” he told Complainant that he should just drop the box and return to the Terminals which was only five minutes away. Tr. 63. Complainant continued to argue with Mr. St. Pierre. *Id.* Mr. St. Pierre then told Complainant “if you don’t drop it, you can leave. Make your choice. You can go take care of the customer or go.” *Id.* Complainant then made a derogatory comment to Mr. St. Pierre, collected some paperwork out of the truck, and left, apparently to go to Mr. Hund’s office. Mr. St. Pierre agreed that the words he used could be characterized as “either do your work or you’re fired.” Tr. 65.

#### Testimony of Gresham Sackett

Gresham Sackett, a warehouse manager for Old Dominion Recycling, stated that Complainant “had this chip on his shoulder from day one” of his employment at Old Dominion. Tr. 75. Mr. Sackett testified that he heard part of the October 20, 2003 exchange between Complainant and Mr. St. Pierre. Mr. Sackett was leaving a conversation with Mr. St. Pierre when Complainant pulled up in the roll-off truck. Tr. 75. Mr. Sackett noted that he was outside and to the back of the warehouse because he was making a spot for the rims that he assumed Complainant was bringing back from his trip to Newport News Marine Terminals. Tr. 79. Complainant was hollering at Mr. St Pierre and “would not let up.” *Id.* Mr. St. Pierre then informed Complainant that taking the truck with the empty box was not what he was told to do and Complainant responded by yelling a profanity at Mr. St. Pierre. As Complainant and Mr. St Pierre were leaving and going around the corner of the warehouse, Mr. Sackett heard Mr. St. Pierre say to Complainant that he should “leave it alone; if you don’t want to do it, just go.” Tr. 76.

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<sup>5</sup> Mr. Hund noted that Complainant was on the payroll for October 16, 2004, and Mr. St. Pierre believed that Complainant may have worked in the warehouse that day. Tr. 61-62.

### Testimony of Tim Hund

Tim Hund, owner of Old Dominion Recycling, testified that the new roll-off truck cost over \$100,000, which is why he was so particular about who would be driving it. Tr. 80. Mr. Hund noted that Mr. St. Pierre felt that “he had [sic] person who was perfect for the position.” *Id.* During the course of Complainant’s employment, Mr. Hund had to travel to Dallas for a few days to pick up the new roll-off truck. Tr. 82-83. Upon his return, he was informed that a discussion had taken place regarding Complainant’s attitude towards Mr. St. Pierre and other employees. Mr. Hund did not personally witness Complainant’s behaviour, but was told that Complainant had a poor attitude towards other employees and towards his work assignments. Tr. 83. Mr. Hund was concerned that Complainant’s attitude would cause problems with the company’s customers.

Mr. Hund did not witness the events of October 20, 2003. When Complainant approached him in his office, Mr. Hund was already aware of the issues surrounding Complainant’s attitude; therefore, Mr. Hund chose not to override Mr. St. Pierre’s decision. Tr. 84. He reiterated the company’s interest in hiring someone who would adequately care for the new roll-off truck. Tr. 85-86.

Mr. Hund noted that Complainant presented himself to the company on the day of his interview “in a neat appearance.” Tr. 86. Mr. Hund testified that prior to Complainant’s hiring, the company had drivers who were careless and who had damaged the trucks. *Id.* He stated that Complainant was given a legal pad on his first day of employment to list the problems with the truck so that the company could get its fleet back in order. *Id.*

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Congress passed the STAA in 1982 to fight the "increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987)(quoting remarks of Sen. Danforth at 128 Cong. Rec. 32509, 32510 (1982)). *See also, Yellow Freight Systems, Inc., v. Reich*, 8 F.3d 980, 984 (4th Cir. 1993) ("Congress enacted the STAA to promote safe interstate commerce of commercial motor vehicles.") *quoting Lewis Grocer Co., v. Holloway*, 874 F.2d 1008, 1011 (5th Cir. 1989). The STAA attempts to fulfill this goal, in part, by prohibiting discrimination against trucking employees who complain of commercial motor vehicle rule violations by trucking companies. *See* 49 U.S.C. § 31105(a); *Brock*, 481 U.S. at 258; *Yellow Freight*, 8 F.3d at 984. The employment discrimination jurisprudence governing Title VII also governs actions under the STAA. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Specifically, the STAA prohibits the discharge, discipline, or discrimination against an employee who:

- (A) 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; or
  - (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 311005 (a)(i)(A) – (a)(i)(B).

To establish a prima facie case of discriminatory treatment under the STAA, Complainant must prove that he was engaged in an activity protected by the STAA, of which the employer had knowledge; that he was the subject of an adverse employment action; and that a causal link exists between his protected activity and the adverse employment action. *BSP Trans. Inc. v. United States Dept. of Labor*, 160 F.3d 38, 46 (1<sup>st</sup> Cir. 1998); *Moon v. Transport Drivers, Inc.*, 838 F.2d 226, 299 (6<sup>th</sup> Cir. 1987). The causal connection component may be established by showing the employer was aware of the protected conduct and that the adverse personnel action followed closely thereafter. *Ertel v. Giroux Brothers Transportation, Inc.*, 88-STA-24 (Sec'y Feb. 16, 1989). Close proximity between the protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action. *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec'y Oct. 1, 1993)

Even assuming that Complainant could present sufficient evidence that his protected activity is causally linked to the adverse action, Respondent could still prevail. Once the prima facie case is established, the burden of production shifts to the employer to present sufficient evidence to rebut the inference of discrimination. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). The employer must articulate a legitimate, non-discriminatory reason for its employment decision. *Id.* If the employer presents evidence of a non-discriminatory reason for the adverse employment action, the complainant must prove by a preponderance of the evidence that the reason proffered by the employer is a mere pretext for discrimination. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To prove that the proffered reason is pre-textual, the complainant must prove both that: (1) the asserted reason is false; and (2) that discrimination was the true reason for the adverse action. See *Hicks*, 509 U.S. at 2752-56.

Complainant has satisfied the elements of the prima facie case. By filling out his pre-inspection reports and listing his safety concerns with the vehicle, Complainant has engaged in protected activity under the STAA. See 49 U.S.C. § 311005 (a)(i)(A), *supra*. Complainant has also shown that Respondent had knowledge of Complainant's protected activity. Respondent reviewed the pre-inspection reports and responded to Complainant's concerns by having the trucks repaired, and, importantly, told Complainant to make a list of problems with the truck on his first day of employment. Lastly, Complainant has shown that a causal connection exists between his protected activity and the adverse action. Complainant's termination occurred on October 20, 2003, just a few days after he had submitted his last pre-inspection report on October

14, 2003. Respondent's knowledge of this protected activity and the close proximity of the adverse action establishes a causal connection.

The burden of production then shifts to Respondent to show a non-discriminatory reason for the adverse employment action. The testimony of Mr. St. Pierre and Mr. Hund showed that Complainant was terminated after being disrespectful to a supervisor and refusing to complete a work assignment. The argument between Complainant and Mr. St. Pierre which took place on October 20, 2003 provides a legitimate, non-discriminatory reason for Complainant's dismissal. Respondent's witnesses testified that Complainant began the argument with Mr. St. Pierre, and continued to argue even though Mr. St. Pierre had resolved the issue regarding Complainant's work assignment. Specifically, Mr. St. Pierre and Mr. Sackett testified that Complainant kept yelling at Mr. St. Pierre and would not "let up." During this argument, Complainant was told by Mr. St. Pierre that he could complete his job assignment or "just leave". The evidence shows that both parties understood this language to mean that Complainant was terminated if he chose not to complete his assignment. The company owner, Mr. Hund, stated that he chose not to override Mr. St. Pierre's decision because he was aware that Complainant had presented attitude problems in prior exchanges with other employees. Complainant chose to leave the workplace and was accordingly terminated.

Once the employer has presented a non-discriminatory reason for the adverse employment action, it is incumbent on the Complainant to prove, by a preponderance of the evidence, that the reason proffered by Respondent is a mere pretext for discrimination. Complainant has not met this burden and the record does not support the argument that Mr. St. Pierre's termination of Complainant for insubordination was a pretext for discrimination.

Mr. St. Pierre stated that he was aware that his trucks had sustained damage from previous drivers, and needed to be repaired. Mr. Hund and Mr. St. Pierre testified that they specifically hired Complainant because they wanted a driver who would take care of the company's new roll-off truck. Mr. St. Pierre stated that during the interview, Complainant made it clear that he was safety conscious. Complainant testified that Mr. St. Pierre used a "smart tone" with him and discouraged him from writing up his trucks. On the other hand, Mr. Hund and Mr. St. Pierre both testified that they were aware that their trucks had sustained damaged and needed repair.

Complainant and Mr. St. Pierre had very similar accounts of their October 20, 2003 exchange. Complainant admitted that he left the premises and did not complete his assignment after he sought Mr. Hund's intervention. Mr. Sackett corroborated Mr. St. Pierre's account of Complainant's disrespectful attitude. The court also finds it noteworthy that Complainant's termination occurred several days after he submitted his last pre-inspection report, and, more importantly, after the new-roll off truck arrived and to which Complainant had been assigned. The court recognizes that Complainant appeared *pro se*, and thus does not have the courtroom skills or abilities which an attorney would have. However, Complainant's testimony was not supported by any other witnesses. While the court recognizes that it can be difficult for witnesses to recall specific facts of past events, Complainant's testimony was often vague, and



mostly inflammatory rather than substantive.<sup>6</sup> In comparison, Respondent's testimony, also *pro se*, was consistent and supported by company witnesses. The court finds that Respondent's discharge of Complainant for disrespect to his supervisor is grounded in fact and was not a pretext for discrimination.

### CONCLUSION

Complainant established a prima facie case of discrimination under the STAA. Respondent rebutted the inference of discrimination by offering a legitimate nondiscriminatory reason for the adverse employment action. Complainant has not shown, by a preponderance of the evidence, that the legitimate, non-discriminatory reason given by Respondent is a pretext for discrimination

### RECOMMENDED ORDER

It is hereby RECOMMENDED that the complaint filed in this matter is DISMISSED.

A

Daniel A. Sarno, Jr.  
Administrative Law Judge

DAS/JRR

**NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.7(d) and 24.8.**

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<sup>6</sup> For example, when asked why he stopped writing up trucks as of October 14, 2003, Complainant could not recall the reason. Tr. 41. Complainant claimed he was told by an unnamed employee that Respondent company was "prejudiced" and would never assign Complainant to the roll-off, yet Complainant admitted that he was assigned to drive the roll-off soon after it arrived at the company. Furthermore, Complainant was able to recollect what he believed Mr. St. Pierre said during their October 20, 2003 exchange, yet Complainant couldn't recall what he said to Mr. St. Pierre in response. Tr. 50.