



**In the Matter of:**

**HARRY SMITH,**

**ARB CASE NO. 15-004**

**COMPLAINANT,**

**ALJ CASE NO. 2006-STA-031**

**v.**

**DATE: DEC 21 2016**

**CRST INTERNATIONAL, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Richard R. Renner, Esq.; Washington, District of Columbia**

*For the Respondent:*

**Mark J. Herzberger, Esq.; Simmons Perrine Moyer Bergman, P.L.C.; Cedar Rapids, Iowa**

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Administrative Appeals Judge; and Joanne Royce, Administrative Appeals Judge**

### **FINAL DECISION AND ORDER**

Harry Smith filed a complaint against CRST International, Inc. (CRST) under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1997),<sup>1</sup> and its implementing regulations at 29 C.F.R. Part

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<sup>1</sup> Congress amended the STAA in 2007 to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121(b) (Thomson/West 2007). See Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007); 49 U.S.C.A. § 31105(b)(1)(Thomson/West Supp. (2010)). Smith filed his complaint on November 15, 2005, prior to the effective date of the amendments.

1978 (2009).<sup>2</sup> Complainant alleged that CRST refused to hire him as a driver in violation of the STAA. The Department of Labor's Occupational Safety and Health Administration (OSHA) initially dismissed the complaint, and Smith requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ).

Subsequently, an ALJ granted CRST's motion to dismiss the complaint, which the Administrative Review Board (ARB or Board) affirmed. Smith appealed and the United States Court of Appeals for the Sixth Circuit remanded the case for further proceedings. Prior to a hearing, the ALJ granted CRST's motion for summary decision, which the ARB affirmed, in part, and reversed and remanded, in part, for further consideration.<sup>3</sup>

On remand after an evidentiary hearing,<sup>4</sup> the ALJ concluded that Smith failed to prove that CRST's refusal to hire him violated the STAA and denied his complaint. Smith appealed to the ARB. For the following reasons, we affirm the ALJ's decision on causation, the only issue we remanded for an evidentiary hearing.

## BACKGROUND

In November 2005, Smith was an over-the-road truck driver for Lake City Enterprises, Inc., (LCE), a small leasing fleet under contract with CRST. Smith initially contacted CRST through its website to learn about contracting with CRST as a truck driver through its lease-purchase program. Smith was not entirely comfortable with the details of the program, and a CRST recruiter suggested that possibly he could drive for LCE and perhaps obtain a better understanding of CRST's operation.

Shortly after LCE owner Crystle Morgan hired him, Smith complained that a trailer he was hauling was structurally unsafe and informed the LCE dispatcher "to get me another trailer or get yourself another driver." LCE interpreted Smith's ultimatum as a resignation, and it terminated his employment on November 8, 2005.

A few days later, Smith contacted a friend, Sean Dostie, and agreed to drive the truck Dostie owned, if Smith could become an independent contractor with CRST. Both then contacted a CRST recruiter about the arrangement. On November 11, 2005, Milton

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<sup>2</sup> 49 U.S.C.A. § 31105(b)(2)(B); 29 U.S.C.A. § 1978.105.

<sup>3</sup> The prolonged procedural history of Smith's complaint is detailed in the ARB's remand for further proceedings. *Smith v. CRST Int'l, Inc.*, ARB No. 11-086, ALJ No. 2006-STA-031 (ARB June 6, 2013).

<sup>4</sup> At the hearing on April 1, 2014, Smith and CRST's Craig Smith testified. The ALJ admitted Complainant's exhibits 40-52, 54-60, and 64-65, along with Respondent's exhibit A, Jeff Logan's deposition. The parties agreed to the stipulations in footnote 2 of the ALJ's October 10, 2014 decision, and CRST did not contest that Smith engaged in protected activity and that CRST refused to hire him.

Parks informed Morgan that Smith had obtained the use of a truck and wanted to drive it under lease to CRST. Parks asked Morgan if she would object to Smith driving for CRST; she replied that she did not object.<sup>5</sup>

Subsequently, Morgan sent CRST a Notice of Personnel Action dated November 9, 2005, stating that Smith had quit LCE, had not reported an accident, and had damaged equipment. She noted that Smith had defaced the truck's tires by painting them white, that one of the tarps was missing from the trailer, and that the trailer was now in the shop to be repaired because of the accident. On November 15, 2005, CRST's safety director, Carl Rochford, reviewed Smith's qualifications and, in keeping with CRST's practice, disqualified him from driving a CRST-leased truck based on Morgan's notice that he had failed to report an accident.<sup>6</sup>

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the STAA.<sup>7</sup> The ARB "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."<sup>8</sup>

### DISCUSSION

The STAA 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.<sup>9</sup> A "refusal to hire" constitutes a separate actionable discriminatory employment practice.<sup>10</sup>

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<sup>5</sup> CRST Appendix at 7-8, Management Overview at 4.

<sup>6</sup> CRST Appendix at 19.

<sup>7</sup> Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1978.109(a).

<sup>8</sup> 29 C.F.R. § 1978.109(c).

<sup>9</sup> 49 U.S.C.A. § 31105(a)(1).

<sup>10</sup> *Sasse v. U.S. Dep't of Labor*, 409 F.3d 773, 783 (6th Cir. 2005) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)), which has described adverse employment actions as failure to promote, denial of transfer, termination, and refusal to hire.

To prevail on his STAA complaint filed prior to 2007, Smith must prove by a preponderance of the evidence that (1) he engaged in protected activity, (2) his employer was aware of the protected activity, (3) his employer took an adverse action against him, and (4) and a causal link or nexus exists between the protected activity and the adverse action.<sup>11</sup> The causal link required for a showing under the pre-2007 standard requires evidence that the “protected activity was a ‘motivating factor’ in the employer’s decision to take adverse action.”<sup>12</sup> “Evidence of each of these elements raises an inference that the employer violated the STAA.” Under the pre-2007 standard, “[o]nly if the complainant makes out this prima facie showing does the burden shift to the employer to articulate a nondiscriminatory reason for the adverse action.”<sup>13</sup>

*The ALJ’s factual findings*

In this pre-2007 case, Smith had to prove by a preponderance of the evidence that his protected activity of reporting the truck accident to LCE on November 8, 2005, was a motivating factor in CRST’s refusal to hire him on November 15, six days after LCE had fired him. The ALJ found this temporal proximity, plus the interaction between LCE owner Crystle Morgan and CRST recruiter Milton Parks,<sup>14</sup> sufficient to raise an inference of a nexus between the protected activity and CRST’s refusal to hire Smith.<sup>15</sup>

The ALJ then shifted the burden of production to CRST to produce a legitimate, non-discriminatory reason for refusing to hire Smith. Carl Rochford, CRST’s safety director, who was deposed on May 24, 2011, testified that he reviewed the files of drivers that CRST recruiters recommended and used the drivers’ records to decide whether to hire. Recruiter Mike Hardin asked him to review Smith’s qualifications. Rochford stated that CRST would not hire drivers who had an unreported accident, and Smith’s file contained a personnel notice from Morgan that he had failed to report the November accident. Such a failure was an “automatic” disqualification for CRST drivers.

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<sup>11</sup> *Coates v. Southeast Milk, Inc.*, ARB No. 05-050, ALJ No. 2004-STA-060, slip op. at 6 (ARB July 31, 2007).

<sup>12</sup> *Smith v. Lake City Enters., Inc.*, ARB Nos. 08-091, 09-033; ALJ No. 2006-STA-032, slip op. at 4 (ARB Sept. 28, 2010).

<sup>13</sup> *Id.*

<sup>14</sup> After Morgan fired Smith on November 8, she called Parks at CRST and told him that she “needed to reseat” Smith’s truck since he had given her an “ultimatum” and told her to find another driver because the truck had a faulty trailer. Parks then told Morgan that Smith had called him prior to the November 7 accident and said he was going to take the truck/trailer to DOT and have it inspected.

<sup>15</sup> D. & O. at 16.

The ALJ credited CRST's documentary evidence that it either discharged or refused to hire 16 other drivers because of unreported accidents. He then found that Rochford's assertions, buttressed by Craig Smith's testimony that unreported accidents "from a policy and practice standpoint at CRST have always been a disqualifying event," rebutted the inference of causation and showed that CRST's adverse action was unrelated to Smith's protected activity.<sup>16</sup> The ALJ also considered whether CRST employees with knowledge of Smith's protected activity influenced Rochford's failure to hire him and whether they intended that he would take this adverse action. Based on Rochford's testimony, the ALJ found that when Rochford decided against hiring Smith, Parks had not informed him about Smith's protected activity, and he decided to disqualify Smith based only on Morgan's notice of an unreported accident. When asked whether he knew that Smith was involved in negotiating with Parks about driving for CRST, Rochford replied, "I don't recall."<sup>17</sup>

In January 2006 Rochford began investigating Smith's complaint. Asked if he had spoken to Parks as part of the investigation, Rochford replied, "No, I cannot say that I did or not. I don't recall that." The ALJ concluded Rochford's "uncertainty" about whether he had talked with Parks related only to the OSHA investigation and not to his decision to disqualify Smith based on the unreported accident.

Even assuming that Parks influenced Rochford in some way, the ALJ found that Parks had no discriminatory motive to prevent CRST from hiring Smith. Parks was directly aware of Smith's protected activity, and called Morgan on November 22, 2005, to ask if she would have a "problem" with Smith being on CRST's dispatch board. She testified that she said "no" and in fact suggested that he be put on her board because he knew the territory and those routes would be profitable for him if he became an owner-operator, which is what Smith wanted. Parks recommended that Rochford hire Smith for CRST as a driver for an owner-operator.

Similarly, the ALJ found no specific intent on Morgan's part to prevent CRST from hiring Smith. He credited her deposition testimony that CRST called her several times to send Smith's "Green Form—Notice of Personnel Action," which she did. Morgan stated that she knew the form related that Smith "quit the owner and had an unreported accident," but did not know what effect Smith's unreported accident would have on CRST's decision whether to hire him.<sup>18</sup> Smith himself testified that he had no knowledge of any conversations between Morgan and CRST.<sup>19</sup>

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<sup>16</sup> D. & O. at 17. See CX 40 (the parties stipulated that the exhibits and transcript from *Smith v. Lake City Enters., Inc.*, ARB No. 11-087, ALJ No. 2006-STA-032 (ARB Nov. 20, 2012), would be used without further authentication.

<sup>17</sup> D. & O. at 18. Rochford deposition at 12-15, 18-19, 25-28.

<sup>18</sup> CX 51 at 86-87, 90-91.

<sup>19</sup> D. & O. at 19.

The ALJ concluded that Smith failed to show that Rochford spoke with either Parks or Morgan about Smith's protected activity or that their knowledge of such activity influenced Rochford's decision not to hire Smith. Thus, the ALJ concluded that CRST had a legitimate, non-discriminatory reason for not hiring Smith and that the six-day temporal proximity between his report to Morgan and CRST's refusal to hire was insufficient to establish that Smith's protected activity of reporting the accident was the "likely" reason for CRST's refusal to hire.<sup>20</sup> D. & O. at 23.

*Smith's arguments on appeal*

Smith contends on appeal that the ALJ erred in concluding that (1) Smith failed to show that his protected activity was a motivating factor in CRST's refusal to hire; (2) Smith failed to show that Parks influenced CRST's hiring decision; (3) LCE's false claim about Smith's unreported accident was the only reason CRST did not hire Smith; and (4) Smith's only evidence of causation was temporal proximity, which was insufficient to prove that Smith's protected activity was the likely reason for CRST's hiring decision. Smith also asserts that CRST failed to present any evidence of a good-faith investigation into LCE's notice of an unreported accident.<sup>21</sup>

Initially, Smith does not challenge the ALJ's finding that temporal proximity established an inference of causation that CRST successfully rebutted. Thus, the sole issue on remand is causation. The dilemma facing Smith is establishing that his protected activity—of telling Parks sometime prior to his accident on November 7 that he wanted to take his truck for a DOL inspection—was a motivating factor in Rochford's decision on November 15 not to hire him. The disconnect is that after Morgan told Parks on November 8 that CRST needed to "reseat" Smith's truck because he had "given LCE an ultimatum and told us to find another driver because we had faulty equipment," Parks then told Morgan about Smith's intent to have the trailer inspected, which Smith had expressed to Parks before Smith's November 7 accident.

In support of causation, Smith first argues that the ALJ erred in concluding that Smith failed to show that his protected activity was a motivating factor in CRST's refusal to hire him and to show that Parks influenced CRST's hiring decision. Smith claims that CRST "infused itself" in the employment relationship between LCE and Smith, Parks told LCE's Morgan about Smith's threat to have the trailer inspected, and Parks "influenced" CRST's refusal to hire because CRST knew of LCE's firing "all along."<sup>22</sup>

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<sup>20</sup> Id. at 23.

<sup>21</sup> Complainant's Brief at 22-25. Smith argued that CRST did not act in good faith because its reason for refusing to hire was baseless since Smith did not actually fail to report his accident to Morgan, which his complaint against LCE proved. The ALJ cited the "honest belief" rule that as long as an employer honestly believed in the reason for its adverse action, an employee cannot establish pretext even if the reason is found to be "mistaken, foolish, trivial, or baseless." *Smith v. Chrysler Corp.*, 155 F.3d, 799, 806 (6th Cir. 1998).

<sup>22</sup> Complainant's Brief at 16.

As stated above, prior to the 2007 STAA amendments, a complainant had to prove that his protected activity was a motivating factor in the employer's adverse action. The 2007 amendments replaced this restrictive standard with "contributing factor," which eased the complainant's burden of proof.<sup>23</sup> Smith filed his complaint in November 2005 prior to the amendments. Thus, Smith must prove that his inspection remark to Parks was a motivating factor in Rochford's decision not to hire him. We cannot apply the less restrictive burden of proof to this pre-2007 case.<sup>24</sup> Substantial evidence supports the ALJ's findings that Rochford lacked any knowledge of protected activity and that neither Morgan nor Hardin influenced his decision not to hire Smith. Therefore, we agree with the ALJ's decision that Smith failed to meet the higher burden.

Smith also argues that the ALJ erroneously concluded that LCE's false claim about Smith's unreported accident was the only reason that CRST did not hire him.<sup>25</sup> Contrary to Smith's arguments, nothing in the record shows that Rochford, Parks, or Hardin knew of the outcome of Smith's complaint against LCE—that the unreported accident was false—when Rochford decided against hiring Smith. In fact, Rochford was unaware that Smith had filed a complaint until January 2006 when OSHA notified CRST. The ALJ credited the testimony of Rochford and Craig Smith that a driver with an unreported accident on his record was automatically disqualified from CRST employment; this testimony was supported by documented evidence that CRST had discharged or refused to hire 16 similarly-situated drivers.

Finally, Smith challenges the ALJ's conclusion that temporal proximity was insufficient to prove that Smith's protected activity was the likely reason for CRST's adverse hiring decision. Smith argues that the temporal proximity combined with CRST's deviation from normal practice, inconsistency with written policies, and a shifting explanation for not hiring Smith are sufficient to establish a causative nexus between his protected activity and CRST's refusal to hire him.<sup>26</sup>

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<sup>23</sup> Under the AIR 21 standard currently applicable to STAA cases, complainants must show that a protected activity was a "contributing factor" to the adverse action described in the complaint. 49 U.S.C.A. § 42121(b)(2)(B)(i); *see also* 75 Fed. Reg. 53,545, 53,550.

<sup>24</sup> *Reiss v. Nucor Corp.-Vulcraft-Texas, Inc.* ARB No. 08-137, ALJ No. 2008-STA-011, slip op. at 4 (ARB Nov. 30, 2010).

<sup>25</sup> Smith later submitted a notice of additional authority, *Yazdian v. ConMed Endoscopic Techs., Inc.*, 793 F.3d 634, 654 (6th Cir. 2015), claiming that CRST's failure to investigate whether LCE's notice of his unreported accident was true shows pretext. Nothing in that case supports the premise that a potential employer must investigate the reason behind its decision not to hire. The ALJ credited the testimony of Carl Rochford and Craig Smith that unreported accidents were an automatic disqualification at CRST, D. & O. at 16-17, and nothing in this case suggests that CRST had a duty to determine the veracity of the personnel notice.

<sup>26</sup> Complainant's Brief at 17-22.

Although temporal proximity may support an inference of retaliation at the prima facie stage of proving causation, the inference is not necessarily dispositive.<sup>27</sup> Here, the ALJ found the short time frame between Smith's discharge at LCE and CRST's refusal to hire him sufficient to raise the rebuttable presumption of causation. However, substantial evidence supports the ALJ's determination that Rochford's reason for refusing to hire Smith was legitimate and non-discriminatory, based on his testimony that Smith had "some unreported accident damage" according to the personnel notice that Morgan sent alleging Smith's unreported accident. The ALJ also relied on (1) the testimony of Craig Smith, an operations vice-president for a CRST subsidiary, who stated that unreported accidents, from a policy and practice standpoint, have always been a "disqualifying event" and (2) the documentary evidence that CRST had either discharged or refused to hire 16 other drivers with unreported accidents.<sup>28</sup>

### CONCLUSION

We have considered Smith's other arguments and find them unpersuasive. They amount to fervent assertions of why the ALJ should have decided that Smith's protected activity of reporting the faulty trailer to Parks, prior to his accident, was a motivating factor for CRST's refusal to hire him. The substantial evidence of record supports the

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<sup>27</sup> *Jackson v. Arrow Critical Supply Solutions, Inc.*, ARB No. 08-109, ALJ No. 2007-STA-042, slip op. at 7 n.5 (ARB Sept. 24, 2010) (temporal proximity is not dispositive at the merits stage, when a complainant is required to prove each element by a preponderance of the evidence); *Luckie v. United Parcel Serv., Inc.*, ARB Nos. 05-026, -054; ALJ No. 2003-STA-039, slip op. at 6-7 (ARB June 29, 2007) ("To establish a prima facie case of unlawful discrimination under the whistleblower statutes, a complainant need only present evidence sufficient to raise an inference, a rebuttable presumption, of discrimination.") (citations omitted).

<sup>28</sup> CX 44 at 10-13, CX 48.




ALJ's conclusion that Smith's protected activity, while working at LCE, was not a motivating factor in CRST's subsequent refusal to hire him. Accordingly, we **AFFIRM** the ALJ's order dismissing Smith's complaint.

**SO ORDERED.**



**PAUL M. IGASAKI**  
Chief Administrative Appeals Judge



**E. COOPER BROWN**  
Administrative Appeals Judge



**JOANNE ROYCE**  
Administrative Appeals Judge