

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 03 February 2005**

Case No. 2004-STA-0036

*In the Matter of:*

LOUIS MURPHY,  
Complainant,

v.

ATLAS MOTOR COACHES, INC.,  
Respondent.

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

**RECOMMENDED DECISION AND ORDER**

The above-referenced matter is a complaint of discrimination under Section 31105 of the Surface Transportation Assistance Act (“STAA”) of 1982. Complainant, Louis Murphy, filed a complaint on or about October 14, 2003, alleging that Respondent, Atlas Motor Coaches, Inc., engaged in acts of retaliation against him as a result of his engaging in protected activity. The complaint was investigated by OSHA, which resulted in a finding that the evidence did not support the Complainant’s allegations that Respondent violated the referenced Act. Complainant subsequently appealed his case to the Office of Administrative Law Judges, U.S. Department of Labor.

A hearing on the matter was held in Orlando, Florida on November 16, 2004. Complainant and Respondent agreed to certain stipulations, which were read into the record and accepted by the court. Complainant submitted exhibits 1 through 3, and Respondent submitted exhibits 1 through 6, all of which were admitted into evidence without objection.<sup>1</sup> As Complainant appeared *pro se*, and Respondent was represented by its Owner and President, John Perez, the court permitted the parties to deliver closing statements at the trial in place of

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<sup>1</sup> The following will be used as citations to the record:  
CX: Claimant’s exhibits  
RX: Respondent’s exhibits  
Tr: Transcript

submitting post hearing briefs. After consideration of the entire record and the arguments of the parties, this court recommends that the complaint be dismissed.

### **CONTENTIONS**

Complainant alleges that he was fired for repeatedly reporting safety-related deficiencies on Atlas' fleet of buses. He also has alleged that Respondent blacklisted him following his termination.

Respondent argues that Complainant was not fired for his protected activity, but rather as a result of an incident involving a customer's lost cell phone. Respondent's biggest client at the time of the incident, Busch Entertainment, requested that Complainant not drive on its routes, and as such, Respondent had no work for Complainant and terminated his employment.

### **STIPULATIONS**

Respondent and Complainant stipulated to, and I find, the following facts:

1. Respondent is a person within the meaning of 49 U.S.C. § 31105.
2. Respondent is engaged in transporting passengers on the highways and maintains a place of business in Orlando, Florida.
3. Respondent hired Complainant as a driver of a commercial motor vehicle, to wit, a vehicle designed to transport more than ten passengers.
4. Complainant was employed by a commercial motor carrier and drove Respondent's vehicle over highways in commerce to transport passengers.
5. In the course of his employment, Complainant directly affected commercial motor safety.
6. During the course of his employment, Complainant made internal complaints relating to safety discrepancies, and Respondent had knowledge of these complaints.
7. Complainant was discharged on or about July 27, 2003.
8. On or about October 14, 2003, Complainant filed a timely complaint with the Occupational Safety and Health Administration, alleging that Respondent had violated 49 U.S.C. § 31105.

### **SUMMARY OF THE EVIDENCE**

Complainant was hired by Atlas on or about April 22, 2003, as a motor coach operator. Tr. 57. The majority of Respondent's business is used to transport tourist groups. Tr. 59. During the course of his employment, Complainant made numerous notations on the vehicle inspection report (VAR) of defects in various vehicles. Tr. 57-58. Complainant stated that his

inspections of the vehicles were welcomed in the early part of his employment, but as his tenure at Atlas continued, he observed that his reports of deficiencies were treated with irritation by the dispatcher. Tr. 62-63.

On July 21, 2003, Complainant telephoned the evening dispatcher at the office to report that he had a motor oil leak in his coach. Tr. 63. Complainant was returning from a trip to Busch Gardens around 7:00 p.m. Complainant was able to put in enough oil to drive the coach from Busch Gardens back to Orlando without incident. Tr. 66. When Complainant returned to the office that evening, he logged the leak on the vehicle inspection report and physically handed the report to the evening dispatcher. Tr. 67-68. Complainant also vocally mentioned the leak to the evening dispatcher, Hugh Connor. Tr. 68. Complainant then received his assignment for the next day, which required him to return to the garage at around two or three o'clock in the morning. Tr. 68. Complainant's assignment required him to drive a coach for three days in Miami, shuttling conventioners from the Miami Convention Center to hotels in the Miami area. Tr. 72. When Complainant returned to the garage the following morning at two a.m., he learned that he was assigned the same bus – bus eleven – which he had driven the previous night. Tr. 69-70.

Complainant then began his regular pre-trip inspection, and discovered that the leak was not fixed. Tr. 70. He then asked two mechanics, who were working on another bus at the time, whether they were informed by Mr. Connor about the leak, but they replied in the negative. Tr. 70. At this time, no dispatchers were on duty. Tr. 72. Complainant noted the leak on his pre-trip inspection report and then filled oil up to its proper level. Tr. 73. When Complainant was unable to contact any dispatchers about the leak, he again consulted the mechanics on duty. Tr. 75-77. The mechanics thought Complainant would be able to fulfill the obligations of the contract and still make it back. Tr. 77. Complainant was also concerned that if he waited for a dispatcher to arrive, the bus wouldn't be on-time for its contract in Miami, and he would be terminated. 75-76. Complainant ultimately left the garage and headed to Miami at around three a.m. Tr. 78. Before reaching Miami, Complainant was able to get in touch with Keith Drake, Atlas' Operations Manager, and informed him of the problem. Tr. 80. Mr. Drake told Complainant to ensure that the bus made it to Miami. Tr. 80.

On July 23, 2003, an Atlas driver named Fernando was sent from Orlando to Miami to bring Complainant some expense money. Tr. 81. Complainant then approached Fernando, explained the situation involving bus eleven and the leak, and asked if it would be possible to switch buses. Tr. 81. Fernando declined to switch. Tr. 81. On the evening of July 23, 2003, after completing his runs for the day, Complainant went through the bus, cleaning out the trash from conventioners. Tr. 92. While completing this task, Complainant discovered a cell phone tucked into the back of a seat cushion. Tr. 93. Complainant was unsure about the company lost and found policy. Tr. 93. Complainant looked through the cell phone menu, which was in Spanish, and found a listing for "me casa", which he understood as "my house." Tr. 93. Complainant then dialed that number, which was answered by a woman, Maria Diaz Curtis. Tr. 93-94, RX 1. Complainant then informed Ms. Curtis where he worked, the address and phone number of the company, and how she could retrieve the phone. Tr. 95. Ms. Curtis informed Complainant that she was an Osceola County sheriff, and explained that her son was staying at the Busch Gardens summer camp and that Atlas had transported him to the camp. Tr. 93-95.

She then called Respondent's office, and requested that Respondent try to reach Complainant and retrieve the phone. Tr. 170-171. Ms. Curtis indicated that the phone had been in her nephew's duffel bag some four or five days earlier, on a trip the nephew had taken between Sea World and Busch Gardens. She believed the phone would not have left the duffel bag unless someone had actually taken it. Tr. 171. Ms. Curtis reported her concerns to personnel at Busch Entertainment. Tr. 171.

On July 24, 2003, the third day of the three-day Miami contract, Complainant began to have problems with bus eleven. Around 10:30 a.m., Complainant noticed that the bus was becoming sluggish, and that the fan was losing power. Shortly thereafter, approximately one-half block from the Miami Convention Center, the bus ceased to function. Tr. 82. Complainant was able to put the bus in neutral and coast to the Convention Center, where he unloaded the passengers and immediately contacted an Atlas dispatcher. Tr. 82. Thereafter, a mechanic named John was sent from a local Miami bus company to look at bus eleven. Tr. 83. Complainant was instructed by Mr. Perez to assist the mechanic in any way necessary. Tr. 83. The mechanic determined that the bus was out of commission. Complainant was then told that a replacement bus and driver were coming from a local Miami bus company, and Complainant was instructed to show the new driver the route that Complainant had previously been driving. Tr. 88. This task was completed around noon. Tr. 90. Complainant was then instructed to wait with the bus while arrangements were made to have it towed. Tr. 86-87. Complainant waited with the bus until approximately four o'clock, and then he was able to ride back to Orlando on a bus driven by another Atlas driver. Tr. 87, 91.

Respondent's dispatch office first received information from Complainant regarding the lost phone shortly before he returned to Orlando on the evening of July 24, 2003. Tr. 172. Once Complainant returned to Orlando on the evening of July 24, 2003, Mr. Connor, the dispatcher, immediately asked Complainant if he had Ms. Curtis' cell phone. Tr. 96. Mr. Connor also asked Complainant if he had used the cell phone to make additional calls other than the call to the owner. Tr. 111. Complainant was then informed that Ms. Curtis had physically showed up on Atlas' premises looking for her phone. Tr. 94. Complainant handed over the phone to Mr. Connor, and then left for a previously negotiated three days off. Tr. 96.

In the days following July 24, 2003, Respondent was informed by Busch Entertainment that it would prefer if Mr. Murphy did not drive the coaches for any of their contracts. Tr. 171. At this particular time of the year (July-August), Respondent's contracts with Busch Entertainment comprised approximately 90 percent of Respondent's business. Tr. 187. Additionally, Respondent received a complaint letter from Ms. Curtis in which she relayed her impression of the incident, and informed Respondent that she would be contacting Busch to express her concerns regarding this incident. RX 1. As a result, Mr. Perez and Mr. Keith Drake, the Operations Manager, decided during this period that Complainant should not be allowed to continue his employment at Atlas. Tr. 172. Respondent testified that if his biggest client – in this case Busch Gardens – did not want a particular individual to drive for them, then he had no job for an individual who was unable to satisfy his needs. Tr. 187. On July 26 or 27, 2003, Mr. Perez requested that Mr. Drake, or one of his dispatchers, inform Complainant that he was no longer employed by Atlas. Tr. 174. On July 27, 2003, Complainant began calling the Atlas yard to see if he was assigned any work. Tr. 96. In an August 6, 2003 letter written to Mr. Perez,

Complainant wrote that he was terminated by dispatcher Mike Mitchell because of the cell phone incident. Tr. 175; RX 2. On August 8, 2003, Complainant appeared at the yard to pick up his last paycheck and turn in his uniforms. Tr. 97.

Following his termination, Complainant sent a letter to the U.S. Department of Transportation, requesting an inspection of Atlas. Tr. 177. Inspections were first done on August 5 and 6, 2003, during which some deficiencies were found.<sup>2</sup> Following this first inspection, Complainant disseminated the results of the inspection to Atlas' clients and vendors. Tr. 178. Atlas corrected the deficiencies, and following another inspection on September 10, 2003, Atlas received a satisfactory rating from the Department of Transportation. Tr. 177-178, RX 4.

After his termination from Atlas, it took Complainant approximately three or four weeks to secure a job doing deliveries for a temp agency. Tr. 112-113. At one point during his job search, Complainant applied to another bus company, where the administrator was a former employee of Mr. Perez. Tr. 120. Complainant stated that once he told the administrator his name, he was "brushed off," which gave Complainant the feeling that he was being blacklisted. Tr. 121. Complainant currently works in the security industry and is earning more than he had as a driver at Atlas. Tr. 112-113.

When another company requests information regarding a former employee, it is Respondent's policy to answer the request in writing, and to limit the response to an acknowledgement of the former employee's dates of employment at Atlas. Tr. 181. Respondent stated that it does not blacklist, and noted that it had previously assisted a former employee, who had accused a member of Atlas' staff of harassment, in finding subsequent employment. Tr. 182-183. Respondent also stated that the other drivers it employs also regularly report discrepancies to management. Tr. 179. Respondent also testified that it was pleased that the Department of Transportation inspection had occurred, as it allowed Respondent to correct existing deficiencies and to receive a satisfactory rating. Tr. 180.

## DISCUSSION

The STAA prohibits the discharge of, or discipline or discrimination against, an employee in the commercial motor transportation industry because the employee either files a complaint or initiates or testifies in a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or because the employee refuses to operate a vehicle in certain circumstances:

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

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<sup>2</sup> The evidence in the record indicates that the DOT inspection of Atlas would have occurred regardless of whether Complainant had filed a formal complaint. Mr. Perez explained that Atlas had, at the time of the inspection, only operated since late December 2001, and as of that point in time (August 2003), had not yet had an inspection. Tr. 180-181. Therefore, Atlas expected that a DOT inspection would occur at some point.

(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;

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. § 31105.

To establish a *prima facie* case of discriminatory treatment under the STAA, the complainant must prove: (1) that she was engaged in an activity protected under the STAA; (2) that she was the subject of an adverse employment action; and (3) that a causal link exists between her protected activity and the adverse action of her employer. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987).

Complainant has successfully established a *prima facie* case. By reporting vehicle deficiencies to Atlas' management, Complainant engaged in protected activity. Complainant was subsequently terminated, which qualifies as an adverse employment action. Lastly, Complainant has established a causal nexus between his protected activity and his termination. Complainant has alleged that he was terminated for engaging in protected activity, and the court notes that although Complainant engaged in protected activity throughout the course of his employment, he made repeated reports of deficiencies on bus eleven only days before he was terminated. Thus, the court finds that Complainant has sufficiently established a causal connection between his termination and his protected activity.

Once the *prima facie* case is established, the burden of production shifts to the Respondent to present evidence sufficient to rebut the inference of discrimination. To rebut this inference, the employer must articulate a legitimate, nondiscriminatory reason for its employment decision. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). A credibility assessment of the non-discriminatory reason espoused by the employer is not appropriate; rather, the Respondent must simply present evidence of any legitimate reason for the adverse employment action taken against the Complainant. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

If the Employer successfully presents evidence of a non-discriminatory reason for the adverse employment action, the Complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the employer is a mere pretext for discrimination. *Moon, supra*; See also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S.

248, 253 (1981). In proving that the asserted reason is pretextual, the employee must do more than simply show that the proffered reason was not the true reason for the adverse employment action. The employee must prove both that the asserted reason is false and that discrimination was the true reason for the adverse action. *Hicks, supra*, at 515. See e.g. *Ertel v. Giroux Brothers Transportation, Inc.*, 88-STA-24 (Sec'y Feb. 16, 1989); *Simpkins v. Rondy Co., Inc.*, ARB No. 02 097, ALJ No. 01-STA-59 (ARB Sept. 24, 2003); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987).

The court finds that Respondent has successfully produced evidence of a legitimate, nondiscriminatory reason for Complainant's termination. Respondent stated that Complainant's actions following the discovery of a lost customer cell phone on one of the coaches led to its decision to terminate Complainant's employment.<sup>3</sup> Both Complainant and Respondent testified to the occurrence of this incident, and both Complainant's and Respondent's exhibits refer to the incident. Respondent testified that it had no reason to continue Complainant's employment with the company in light of Busch's preference that Complainant not drive for any of its contracts with Atlas. This reason is not discriminatory and provides a legitimate business reason for Complainant's termination.

Given Respondent's legitimate, non-discriminatory reason for Complainant's termination, Complainant must now prove by a preponderance of the evidence that Respondent's stated reason for Complainant's termination is a mere pretext for discrimination. As noted above, Complainant must prove that the reason was false and that discrimination was the true reason for his termination. Complainant has not met this burden. In evaluating the evidence, Complainant has not shown that the given reason for his termination – the cell phone incident – is false. Complainant's own testimony regarding the incident corresponded with the testimony of Respondent. The letter written by Ms. Curtis, the owner of the phone, provides further documentation of the incident and the issues that led to Complainant's termination. Complainant also wrote in a letter that he was told by Atlas that the cell phone incident was the reason for his termination.

Additionally, Complainant has not shown that discrimination was the true reason for his termination. Complainant testified that he engaged in protected activity throughout the course of his employment – yet his termination occurred immediately after the cell phone incident. There is no evidence in the record that Complainant's protected activity during the course of his employment led to any type of discrimination or retaliation by Respondent. Although Complainant has asserted that he was assigned substandard buses after a period of reporting deficiencies, Complainant has not shown that these assignments were in retaliation for his protected activity. Furthermore, Respondent stated that it encouraged its drivers to bring any deficiencies to management's attention. Therefore, the court finds that Complainant has failed

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<sup>3</sup> The court need not assess the credibility of Respondent's decision; rather, it must only look at whether there is evidence of a legitimate reason for the termination. Therefore, the court's finding that Respondent has presented a legitimate reason for terminating Complainant sheds no light on Complainant's character and does not determine whether Respondent's decision was fair or just; it is not the court's role to make such determinations. Instead, the evidence merely proves that an incident occurred, which, in and of itself, was a legitimate, non-discriminatory reason for Complainant's termination.

to prove, by a preponderance of the evidence, that Respondent's stated reason for his termination is pretext and that the true motivation for his termination was his protected activity.

Lastly, the court finds no evidence that Respondent blacklisted Complainant following his termination from Atlas. Under the Department of Labor whistleblower statutes, blacklisting is defined as "creating list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate. *Leveille v. New York Air National Guard*, No. 94-TSC-3, slip op. at 18 19 (Sec'y Dec. 11, 1995). Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place. See *Bausemer v. Texas Utilities Electric*, Case No. 91-ERA-20, slip op. at 8 (Sec'y Oct. 31, 1995) (an employer's letters to contractors requesting notice of any discrimination cases filed against them did not constitute blacklisting of complainant). Complainant cites one incident in which he assumed to have been blacklisted as the result of a connection between Mr. Perez and an administrator from another bus company who accepted Complainant's application for an available driver position. The court does not find that Complainant's impressions, based on one limited incident, establish that any blacklisting took place.

### **ORDER**

It is hereby RECOMMENDED that the COMPLAINANT'S complaint be DISMISSED.

**SO ORDERED**

**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.**