STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

March 2, 2015

CHRO No. 1010206 - Commission on Human Rights and Opportunities ex rel. John Kitchens, Complainant, v. Specialty Transportation, Inc., Respondent

Memorandum of Decision

Procedural Background

On December 1, 2009, John Kitchens ("the complainant" or "Kitchens") filed an affidavit of illegal discriminatory practice, ("affidavit" or "complaint") with the Commission on Human Rights and Opportunities ("commission" or "CHRO") asking that the commission investigate the complaint and secure for the complainant his rights and any remedy to which he is entitled. The affidavit, inter alia, alleged that Specialty Transportation, Inc. ("the respondent"), violated Conn. Gen. Stat. section 46a-58(a) (enforcing the substantive provisions of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621, et seq. ("ADEA")) and section 46a-60(a)(1) (specifically, age discrimination), when it terminated the complainant's employment.[1]

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[1] Section 46a-58(a) – "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness or physical disability."

46a-60(a)(1) –"It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, gender identity or expression, marital

On March 21, 2011, a commission representative, pursuant to section 46a-84, certified that, after preliminary investigation, she had "determined that there was reasonable cause for believing that an unfair practice was committed as alleged in the complaint." The complaint was then sent to the Office of Public Hearings ("OPH") for a de novo contested case proceeding.

On March 22, 2011, the required Notice of Contested Case Proceeding and Hearing Conference, was issued and the case was assigned to human rights referee Jon P. Fitzgerald. Subsequently, on January 25, 2012, the case was reassigned to the undersigned human rights referee ("presiding referee").

All statutory and procedural prerequisites having been satisfied, the complaint is properly before this tribunal for hearing and decision. The public hearing occurred over six days (in June, July, and October 2013. Attorney Margaret Nurse-Goodison appeared on behalf of the commission. Attorney Margaret Rattigan appeared on behalf of the respondent. Thereafter, the parties filed post-hearing briefs, proposed findings of facts, and reply briefs on or about April and June 2014, respectively. Then the record was closed.

For the following reasons, after a thorough consideration of the evidence presented and an assessment of the credibility of the witnesses, the undersigned concludes that there has been insufficient evidence adduced to establish that the respondent's decision to terminate the complainant was motivated by a discriminatory animus. The complaint is dismissed.

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status, national origin, ancestry, present or past history or mental disability, intellectual disability, learning or physical disability, including, but not limited to, blindness[.]"

Finding of Facts

1. The complainant was born on September 1, 1924. He began working for the respondent as a school bus driver for the respondent in 2008, at the age of 83. Kitchens was the respondent's oldest driver.

2. Fred Till ("Till"), the respondent's director of operations, interviewed and hired Kitchens. Till terminated the complainant's employment on September 25, 2009. Till stopped working for the respondent on or about June 2011.[2]

3. To prove that he was qualified to drive a school bus, in 2008 the complainant gave the respondent, inter alia, a copy of his commercial driver license ("CDL"). The CDL contains date of birth information, as does all drivers licenses issued by the state of Connecticut Department of Motor Vehicles ("DMV"). The respondent, therefore, was aware of the complainant's date of birth and age prior to hiring him in the spring of 2008.

4. Like most drivers, Kitchens was laid off for the summer months of 2008. The respondent called Kitchens and asked if he was planning to return to work in the fall of 2008. He did return and worked the entire school year from on or about September 2008 until June 2009. He was laid off for the summer months of 2009. He did not have any accidents while working for the respondent.

[2] Till was not called to testify at the public hearing although he (1) unilaterally made the final decision to terminate the employment of the complainant; (2) instructed Rivera to observe whether Kitchens operated his bus safely; (3) ended his professional association and involvement with the respondent on or about June 2011; and (4) was on both the commission's and the respondent's respective witness lists. The testimony elicited regarding Till's purported knowledge, actions, statements, and motivations from the spring of 2008 to the fall of 2009, therefore, consisted of uncorroborated and/or unreliable hearsay from witnesses all having varied levels of personal or financial interest in the outcome of this dispute and/or whose credibility was called into question for a variety of reasons.

5. The respondent called Kitchens and asked if he was planning to return to work in the fall of 2009. He did return to work in late August 2009.

6. In September of 2009, Till requested that Jose Rivera, a safety instructor certified by the DMV ("Rivera"), who worked in the bus yard where Kitchens reported for duty, to ride with and observe Kitchens operate a school bus. Rivera rode with and observed Kitchens on two occasions in September 2009. Rivera concluded from his observation that the complainant was distracted by student activity in the bus.

7. Twice during the first observation trip, Rivera admonished the complainant for turning his head to the inside of the bus, instead of using the interior overhead mirror to monitor student activity because turning one's head increased the risk of an accident. Rivera told the complainant if he failed to do as instructed, Rivera would stop the bus and not let Kitchens finish the bus route. The complainant successfully completed the route. After the first observation trip, Rivera recommended that a second observation trip occur.

8. During the second observation trip, Rivera saw that the complainant repeated the error of turning his head to see what was happening inside the bus, instead of using the overhead mirror. Kitchens made the mistake only once on this trip. He successfully completed the second run.

9. After both trips, Rivera reported to Till his observations and conclusion that the complainant was distracted while driving. Till possessed this information when he decided to terminate Kitchens. Till was solely responsible for the decision to terminate the complainant.

10. On September 29, 2009, Michael Turner, respondent's Operations Manager ("Turner"), gave the complainant a "Vacation Shutdown, New Claim for Unemployment Benefits Form UC-62V" stating that "unsafe driving" was the reason why Kitchens had been terminated. No other explanation for the termination was included on the form. Turner completed the form based on unspecified information that Till provided to him after Till decided to terminate Kitchens' employment.

11. Rivera lied to a commission investigator when he was asked if he had used his cell phone, in violation of company policy, during one of the September 2009 observation trips.

12. The complainant lied about his accident history on both the job application that he filed with the respondent in 2008 and on the affidavit that he filed under oath with the commission in December 2009. The affidavit states, in pertinent part, that "he has read the foregoing complaint and knows the content thereof; that the same is true of his own knowledge...."

13. There is no evidence in the record that the respondent failed to terminate drivers that it knew or should have known were unsafe drivers.

14. The evidence presented regarding 22 drivers, employed by the respondent between 2008 and 2012, reveals that all but one of the drivers who were involved in accidents, were involved in accidents that resulted only in minor vehicle damage.[3] In 21 of these

[3] These included the following - Adorno, Blake, Borrero, Burns, Christian, Collins, Crossman, Daniels, Garcia, Govan, Hernandez, Infantas, Jones, Morales, Ortiz, Peralta, Perez, Pierce, Rivers, Rodriguez, Torres, and Viscusi.

cases, when the respondent determined the driver to be at fault, it warned or otherwise disciplined and retrained those drivers.[4]

15. When these minor accidents occurred, there is no evidence that students safety was at risk.

16. On April 20, 2010, the respondent received a telephone call from an off duty police officer who reported that he witnessed Pierce operate her mini-bus containing passengers in a dangerous manner. C-188. Respondent spoke to Pierce about the incident, but did not terminate her at that time. C-188. On or about June 2010, Pierce was terminated shortly after the respondent received a second report of her driving in an unsafe manner. Tr. 474-476.

17. On July 7, 2011, Perez was issued an warning, after it was determined that he failed to obey a stop sign after the respondent received a complaint from the public and checked the school bus GPS. C-134. On May 2, 2011, Perez received a ticket from a DMV sergeant while driving an empty school bus on I-84 west bound. He was cited for texting while driving, distracted driving and failure to operate in the proper lane. C-135. On July 7, 2011, Perez was issued a warning for using his cell phone to call the dispatcher instead of using the two-way radio. C-134. On July 15, 2011, Perez was also warned for failing to answer his radio. C-136.

18. On January 20, 2011, the respondent received a report from CREC that Ortiz drove her van in an unsafe manner. C-126. Ortiz was involved in two accidents that caused minor

[4] The one driver who was involved in a major accident, that resulted in serious injuries and one fatality, in 2010, never returned to work for STI after the accident.

damage – one in 2009 (rear ended another bus, C-194) and another in 2010 (backed into a car at gas station, C-125).

19. Viscusi, in July 2010, received a warning after leaving a special needs passenger on a bus that she returned to the bus yard. C-172. Viscusi failed to follow the procedures in place that require the bus to be inspected before returning to and entering the bus yard. Subsequently, in November 2010, Viscusi was suspended for two and one-half days for a minor accident. C-173.

20. Borrero, licensed to drive vans, not school buses (no CDL), C-102 , was involved in 3 accidents –

    a. October 22, 2007: Connecticut Uniform Police Accident Report bumped CT Transit bus (2005 New Flyer), no damage to either vehicle observed, no ticket issued, only verbal warning for "following closely." C-100.

    b. September 28, 2009 : No details provided in report . C-97. Notes that it is an at-fault accident, description contains only location and comment "rear ended vehicle." For same accident ticket issued by Bristol Police for "foll. too close" and "distracted driving," C- 98; and

    c. March 29, 2010: No details provided in report. C-97. Notes that "not at-fault" accident, description contains only location and comment "rear ended vehicle." C-97.

21. After the respondent received a complaint that Jones had cut off another vehicle on December 20, 2010, it checked the bus GPS, and determined that Jones failed to obey a stop sign. An employee warning form, dated December 22, 2010, was issued to Jones,

but there is no indication who specifically did so. Jones refused to sign the warning. There is an illegible witness signature on the form. C-115.

22. In November 2010, Peralta was issued a warning for driving in passing lane after a written complaint was received. C-130. In January 2011, Peralta received warning for using cell phone while driving after complaint was received by the respondent. C-129.

Analysis

The commission argues both that there is direct and circumstantial evidence to support a finding that the respondent's decision to terminate the complainant was based on a discriminatory animus in violation of section 46a-60(a)(1) based on age.

Direct Evidence

The direct evidence of discriminatory animus consists of testimony by the complainant and Rivera, respectively. In light of the complainant's admission that he lied about his accident history on both the job application that he filed with the respondent and the affidavit that he filed, under oath, with the commission, in December 2009, the undersigned cannot rely on his representations regarding alleged discriminatory comments by Till.

The only other direct evidence proffered that Till made age related comments is the testimony elicited from Jose Rivera. This testimony is vague, at best. That testimony, in pertinent part, is:

> Q: [B]etween 2008 and 2009, did you ever hear Mr. Fred Till make any comments about Mr. Kitchen's age? T. 967.

A: He did once but I wasn't sure if that was between him and me, what age he is and all that. T. 968.

Q: What was [the] comment that was made? T. 968.

A: About his age, that he was -- he was getting to that age, that's all he said.

Q: Mr. Till said that Mr. Kitchens was getting to that age? T. 968

A: That's what he said, that's all I heard. T.968.

Q: What age was that? T. 968

A: He didn't say what age, he just said at that age. T.968.

Q: [D]o you remember when that comment was made? T. 968.

A: I don't know if it was before or after or during the conversation that we had about taking him out. I don't know that timeframe. T. 968. ...

Q: But the comment was made before Mr. Kitchens' termination? T. 969.

A: I don't know if it was before or after the comment was made but I didn't pay attention to it. T. 969. ...

Q: So you did the evaluation [of Mr. Kitchens] after the comment was made?

A: During the time, I don't know what timeframe, if it was before or after, but I did evaluation when Mr. Till -- the comments, we talked about it, it was said and I walked out of the office.

Other than recalling that Till used the word "age," Rivera did not recall specifics, except that whatever Till uttered was stated as he and Rivera exited Till's office. T. 973. This testimony does not constitute evidence sufficient to support a finding that Till possessed a discriminatory animus based on age.

Circumstantial Evidence

Having concluded that the direct evidence is insufficient to support an inference of discrimination, the undersigned next examines the record to determine whether there is sufficient circumstantial evidence to sustain a finding that the respondent violated section 46a-60(a)(1).

Complainant's Prima Facie Case of Disparate Treatment

The commission correctly argues that it is disparate treatment based on age in violation of section 46a-60(a)(1) when a younger driver is not terminated for actions reasonably equivalent to the alleged distracted driving for which the respondent terminated the complainant. C-brief 41-42 (citing U.S. Postal Svc. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) and MacDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 283, n. 11 (1976). However, the commission misquotes MacDonald.

The quote is not, as stated in both the commission's brief (pp. 41-42) and its reply brief (p. 17), that, "precise equivalence in culpability between employees was not the ultimate question, rather an allegation that other employees involved in acts against the employer of comparable seriousness was nevertheless retained was adequate enough for an inference of discrimination." (Emphasis added.) The actual quote is, "[o]f course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in McDonnell Douglas, an allegation that other 'employees involved in acts against (the employer) of comparable seriousness ... were nevertheless retained ...' is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for

terminating him was merely a pretext. 411 U.S. at 804." Santa Fe Trail Transportation Co., 427 U.S. at 283, n. 11 (1976) (Emphasis added).

The question for this tribunal is not whether the complainant's pleadings are sufficient to withstand a motion to dismiss, as was the case in Sante Fe. The issue, here, is does the preponderance of the evidence proffered support an inference of discrimination by the respondent.

Upon first glance, the evidence offered by the commission appears to satisfy the necessary de minimus burden on the employee to establish a prima facie case of age discrimination under the McDonnell Douglas v. Green framework. There is no dispute that the complainant (1) was 85 years old when his employment was terminated; (2) had a valid Connecticut DMV issued commercial driver license ("CDL") with the "PS" endorsement required to drive a school bus; and (3) was terminated although he had not been involved in any accidents or received any traffic citations/tickets while working for the respondent from spring 2008 to September 2009, although younger drivers who had been involved in accidents and/or who had received traffic tickets/citations were not terminated.

The commission asks this tribunal to accept the evidence it offers regarding the purported similarly situated younger drivers as evidence of disparate treatment. However, because no reliable independent assessment of the evidence (e.g., expert testimony) was presented from which this tribunal could reasonably conclude that the commission's assertion was accurate, i.e., that any of these younger drivers were, in fact, similarly situated to the complainant, the undersigned is left to undertake his own review the evidence presented to make that

determination. This tribunal is obligated to do so before concluding that the commission has satisfied each of the elements required to meet the burden necessary to establish its de minimus prima facie case and, thereby, raise the rebuttable presumption of a violation of section 46a-60(a)(1) based on age.

The commission offers as evidence disparate treatment scores of documents that include driving history, accident reports, tickets/citations, mostly contained in the respondent's personnel records, for 22 of the respondent's drivers which the commission considers to be comparators. The records reflect incidents that occurred between 2008 and 2012.

The commission indicates that the respondent classified many of these incidents to be "safety" violations and argues that the conduct of those drivers places them on par with the complainant. The commission argues that the respondent was required to deem these drivers to be "unsafe," and to treat them in the same manner that it treated the complainant.

My review of the evidence -- warnings issued by the respondent, traffic citations/tickets issued by law enforcement officials, witness complaints, etc. -- reveals that, collectively, the purported comparator drivers were (1) involved in minor, slow-speed, at-fault traffic accidents or (2) issued warnings and/or tickets for a variety of conduct, including but not limited to driving in the passing lane, inappropriate cell phone use, improper lane change, driving a respondent vehicle in an unsafe manner, distracted driving, etc. In these cases, when the respondent determined the driver to be at fault, it appears from the evidence that, as necessary, it disciplined and retrained those drivers.

Of the 22 comparators, there was evidence offered that the respondent received complaints reporting that two of its drivers drove in an unsafe manner – Pierce and Ortiz. The respondent spoke with Pierce after it received the report from an off-duty police officer on April 20, 2010. This driver was terminated in June 2010 after the respondent received a second complaint about her driving.

On January 20, 2011, the respondent received a report from CREC that Ortiz drove her van in an unsafe manner. However, there is no other evidence in the record indicating that Ortiz operated a vehicle in an unsafe manner after January 20, 2011 report was received. There is no evidence that Ortiz was or was not terminated or disciplined.

The commission also offered as evidence of a comparator the warning that the respondent issued to Jones after it received a complaint from a motorist that, on December 21, 2010, Jones had cut them off. C-115. The commission argues that the failure of the respondent to assign a qualified safety professional to ride with Jones and observe her driving, as it did in the complainant's case, constitutes disparate treatment. C-brief 48.

After receiving the complaint, the respondent reviewed data obtained from the GPS that the bus was equipped with and determined that, on December 21, 2010, Jones failed to obey a stop sign at the intersection where the caller claimed to have been cut off.[5] The data also revealed that Jones did obey the stop sign on December 20, 2010. It appears that the respondent, or its agent, on December 22, 2010, appropriately disciplined Jones; although the warning does not include the signature of the supervisor who issued it. There is an illegible witness signature on

[5] The bus that the complainant drove in 2009 was not equipped with a GPS system.

the form. There is no evidence that Till was aware of this incident. There is no evidence that Till was responsible for and failed to discipline Jones for this incident.

Recognizing that the complainant had no accidents while he drove for the respondent from spring 2008 to the date of his termination (September 25, 2009), the undersigned cannot conclude on the basis of the evidence presented that any of the drivers cited by the commission presented a risk similar to the one that the Rivera identified and reported to Till.[7] After closely examining the evidence of purported similarly situated drivers, I conclude that it does not support a finding that any of these drivers were similarly situated to the complainant. It follows, therefore, that I cannot find that the respondent treated any younger similarly situated driver less harshly than it treated the complainant.

Final Decision and Order

In light of the foregoing, I find in favor of the Respondent. It is hereby ordered, in accordance with the provisions of subdivision (4) of subsection (d) of section 46a-54-88a of the Regulations of Connecticut State Agencies, that the complaint be, and hereby is, dismissed in its entirety.

It is so ordered this 2nd day of March 2015.

Alvin R. Wilson, Jr.
Presiding Human Rights Referee

[7] Despite Rivera's admission that he lied to a commission investigator about using a cell phone while he was on the bus to observe Kitchens drive, on the whole, his testimony regarding his observation and his report to Till was credible.