

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and BLENDE BENJAMIN,
Complainant

v.

Docket No. 06 BEM 02798

FIRST STUDENT, INC.,
Respondent

Appearances: Ezenwa L. Nwogu, Esq., for Complainant
Paul Hodnett, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 15, 2006, Blenden Benjamin (“Complainant”), filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging that First Student, Inc., (“Respondent”) discriminated against him on the basis of race/color when it suspended him from employment on the basis of failing to provide a sufficient urine sample for a random drug test.

The MCAD issued a probable cause finding and certified the case for public hearing on September 24, 2008.

A public hearing was conducted on February 2 and 10, 2009. The parties introduced sixteen (16) joint exhibits into evidence. Complainant introduced four (4) additional exhibits and Respondent introduced three (3) additional exhibits. The Complainant testified on his own behalf as did Richard Lynch, Frantz Mendes, and

Bourmy Lamour. Testifying for Respondent were Andrew Towne, Jean-Remy Jean, Ann Humphries, and Robert Kelley

To the extent the parties' proposed findings are not in accord with or are irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with or is irrelevant to my findings, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant has been employed for approximately nineteen years as a bus driver by Respondent and its predecessors.
2. On July 1, 2003, Respondent became the vendor school bus company for the City of Boston public schools.
3. As a school bus driver, Complainant is required to have a commercial driver's license and is subject to pre-employment, post-accident, reasonable suspicion, random, and follow-up drug and alcohol testing pursuant to the United States Department of Transportation (DOT) Federal Motor Carrier Safety Regulations.
4. School bus drivers who work for Respondent in the City of Boston are represented by the United Steelworkers, Local 8751. Respondent and the United Steelworkers were parties to a collective bargaining agreement for the period, July 1, 2003 to June 30, 2008.
5. In 2006, Respondent contracted with Compliance Network of New England ("CNNE"), a certified DOT drug and alcohol testing company, to perform drug and alcohol screenings of Respondent's school bus drivers. CNNE employed

- Andrew Towne as a certified collector/tester authorized to collect urine specimens pursuant to a DOT drug testing regulations.
6. On October 12, 2006, Towne arrived at the Readville bus yard with names of drivers who were to be randomly drug tested that day. The list of drivers was computer generated at the CNNE main office. Towne met with Ann Humphries, the Readville terminal manager, who is black, to go over the list of names. At the time, Humphries had been terminal manager at the Readville yard for several years. She had approximately 200 drivers assigned to the yard of which approximately 65% were Haitian.
 7. After meeting with Humphries, Towne met with Jean-Remy Jean, the morning dispatcher at the Readville yard. Jean is black and of Haitian descent. Towne gave Jean the list of drivers who were to be tested and forms pertaining to their selection. Joint Exhibit 2.
 8. Jean used a private radio channel to call the drivers who were randomly selected for testing, including Complainant. Jean told the drivers to see him immediately after returning from their morning runs.
 9. Complainant, who started his morning bus shift at about 5:45 a.m. on October 12, 2006, arrived back in the bus yard at approximately 9:45 a.m. He parked his bus, went to the bathroom and urinated, and proceeded to the dispatch office to meet with dispatcher Jean.
 10. Jean informed Complainant that he was required to submit to urine testing as part of Respondent's random drug test program. He told Complainant to report

11. Pursuant to DOT regulations, Respondent's random alcohol and drug testing process requires that drivers provide a minimum of 45 ml of urine from the same stream of urine. The specimen is split into two bottles, each bottle is capped and sealed, and the driver initials the sealed bottle caps. Respondent Exhibit 1.
12. If an individual cannot provide the required specimen, the individual is instructed to drink up to 40 ounces of fluid over a 3 hour period without leaving the collection site. If the required specimen is not provided within the 3-hour period, the individual must be examined by an approved physician, who determines if the inability to provide the required urine specimen is due to a medical condition. If the physician determines that there is no medical reason for failing to produce a sufficient sample of urine, the random drug test result is considered a refusal to test and is recorded as a positive test pursuant to 49 CFR 40.191(5). Joint Exhibits 7 and 13; Respondent's Exhibits 1 and 2.
13. Complainant proceeded to the mobile testing van for drug testing approximately twenty-five minutes after arriving back in the bus yard. He informed Towne that he had just gone to the bathroom and would not be able to provide a specimen. Towne told him that he would have to try under the DOT regulations. After going through preliminary identification procedures with Complainant, Towne provided Complainant with a specimen container to take into the bathroom.
14. Complainant came out a short time later and handed Towne an empty container and said, "I told you I would not be able to go – I just went." Towne told

Complainant that he would have three hours to provide a specimen, instructed him to drink up to 40 ounces of fluid of his choice, and told Complainant not to leave the property until he provided a urine specimen. Towne provided Complainant with a copy of a “shy bladder” form on which he wrote that Complainant would have from 10:40 hrs to 13:40 hrs to provide the specimen. Respondent’s Exhibit 2. I do not credit Complainant’s testimony that Towne told him, “You need to give this sample now. If not, I’ll lock you in the bathroom until you do it.” Complainant’s testimony that Towne threatened to lock him in the bathroom was not credible and is contradicted by the fact that the bathroom in the mobile van locks from the inside, not the outside. I also disbelieve Complainant’s assertions that he was never informed that he could drink more fluid in order to produce an acceptable sample and that he was never warned that he only had three hours to provide the sample.

15. Towne noted in the remarks section of the CCF form that Complainant had provided a “QNS” (quantity not sufficient) of urine at 10:40 hrs in the amount of 0 ml. Joint Exhibit 3.
16. Complainant left the mobile van and proceeded to the dispatcher’s office. Towne continued with his other collections.
17. At approximately 11:20 a.m. Towne went inside the dispatch office and informed dispatcher Jean that he had six drivers who had provided an insufficient quantity of urine.
18. Complainant returned to the testing van at approximately 11:50 a.m. and Towne went through the preliminary procedures again. When Complainant came out of

the bathroom, he produced a container with 34 ml of urine. Towne made a notation on the CCF form that Complainant again provided a “QNS” (quantity not sufficient) of urine at 11:56 hrs in the amount of 34 ml. Towne instructed Complainant to go back and drink more fluids. The urine was discarded per DOT regulations which prohibit the combining of samples.

19. Towne spoke with Ann Humphries at 12:55 p.m. and told her that Complainant was getting close to his time limit. Towne also spoke with Complainant and told him that he should make another attempt to provide a sample because his time limit was getting close.
20. Humphries went to make sure that Complainant had enough water. Humphries advised Complainant to drink enough water so he could provide a sufficient sample before his time ran out. She treated Complainant as she treated other drivers who were having difficulty providing a sufficient quantity of urine. I do not credit Complainant’s testimony that Humphries yelled at him and treated him like he was guilty. Humphries did not threaten or pressure Complainant regarding his drug test. I do not credit the testimony of Union Steward Richard Lynch that Humphries pressured Complainant to produce a urine sample in time to perform his afternoon bus run. Instead, I credit the testimony of Humphries that she had standby drivers available to cover routes on October 12, 2006.
21. Complainant came into the mobile van at 13:35 p.m. Towne informed him that he had five minutes left. Complainant again attempted to provide a specimen but only provided 30 ml of urine. Towne wrote on the CCF form that Complainant had “shy bladder” @ 13:40 hrs = 30 ml.”

22. Respondent informed Complainant in writing that because he failed to produce a sufficient urine sample within the time allowed, he was subject to removal from service and a medical evaluation to determine the reason. Joint Exhibit 5.
Complainant was placed on a medical leave of absence effective October 12, 2006. Joint Exhibit 11.
23. Complainant was sent to Dr. Brian Morris, MD to determine whether he had a medical condition that prevented him from providing a sufficient urine sample. Dr. Morris determined Complainant did not suffer from a medical condition that prevented him from providing a sufficient quantity of urine. Complainant acknowledged in his testimony that he did not have a medical condition limiting his production of urine.
24. Dr. Patrick Leong, MD, the medical review officer for CNNE, deemed Complainant's inability to provide 45 ml of urine on October 12, 2006 to be a "refusal" to submit to a drug test under DOT regulations since Complainant's medical exam did not reveal a medical condition that prevented him from submitting a sufficient sample. Joint Exhibit 4.
25. On October 25, 2006, James Wolfgang, Respondent's Human Resource Director, called Complainant and told him that his failure to provide a sufficient quantity of urine without a medical explanation was considered a refusal and a positive test under DOT regulations. Wolfgang told Complainant that he would have to enter a substance abuse rehabilitation program or be terminated.
26. United Steelworkers, Local 8751 and Respondent have agreed to a Drug and Alcohol Screening policy which permits Boston school bus drivers who test

positive to return to work after successfully completing a recognized substance abuse rehabilitation program. Joint Exhibit 1. Pursuant to the policy, on October 27, 2006, Complainant and Union President Frantz Mendes executed a document “under duress and threat of termination” acknowledging that Complainant was removed from service, placed on an unpaid leave of absence, and required to undergo, at Complainant’s expense, a substance evaluation by Substance Abuse Professional Robert Kelley, participate in follow-up procedures, and take a minimum of fifteen additional random drug tests for a period of five years. Joint Exhibit 6 and 7.

27. Kelley met with Complainant on November 3 and 5, 2006, issued a report concluding that Complainant did not have a substance abuse disorder, but required Complainant to submit to up to six unannounced follow-up urinalysis tests over a year-long period and authorized Complainant to take a “return to duty” test on or after November 6, 2006. Joint Exhibit 8.
28. Complainant took a return to duty drug test on November 7, 2006 and was cleared to return to work after November 9, 2006. Complainant returned to work on November 17, 2006. Joint Exhibit 12.
29. For the nineteen days that Complainant was out of work between October 12, 2006 and November 17, 2006, he received \$722.00 in gross pay pursuant to the sickness and accident insurance provided under his Union contract. Joint Exhibit 16.
30. Following Complainant’s return to duty on November 17, 2006, he had six follow-up drug tests and a random test on February 28, 2008. Joint Exhibit 14.

III. CONCLUSIONS OF LAW

M.G.L. c. 151B, s. 4(1) prohibits discrimination in the terms and conditions of employment based on race and/or color and national origin. In order to prevail on his claims of discrimination, Complainant must show that he was treated differently from non-minority fellow employees. Absent direct evidence, Complainant must establish that: (1) he is a member of a protected class; (2) he was performing his position in a satisfactory manner; (3) he suffered an adverse employment action; and (4) similarly-situated, qualified person(s) not of his protected class were not treated in a like manner in circumstances that give rise to an inference of race discrimination. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) (elements of *prima facie* case vary depending on facts).

If Complainant successfully establishes a *prima facie* case, the burden then shifts to the second stage of proof in which the Respondent must articulate a legitimate, nondiscriminatory reason for its action. See Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If the Respondent asserts such a reason, Complainant bears the burden to persuade the factfinder, by a preponderance of evidence, that the Respondent's articulated justification is not the real reason, but a pretext that permits a finding of unlawful discrimination. See Abramian, 432 Mass. at 117-118. Complainant must ultimately prove by a preponderance of the evidence that the Respondent was motivated by discriminatory animus. See Lipchitz v. Raytheon, 434 Mass. 493 (2001). Complainant may meet this burden of proof by circumstantial evidence such as the

inference of discriminatory animus that may be drawn from proof that one or more of the reasons advanced by the Respondent is false. See id. at 504.

Turning to the elements of the *prima facie* case, the evidence establishes that Complainant is a member of protected classes by virtue of his race, color, and national origin, i.e., black Haitian, although the fact that 65% of Respondent's school bus drivers are black Haitians calls into question Complainant's assertion of minority status with respect to this employer. Both sides agree that Complainant performed his job as a bus driver in a satisfactory manner and there is no dispute that Complainant suffered an adverse employment action when removed from service and placed on medical leave.

Notwithstanding the foregoing factors, Complainant fails to establish a *prima facie* case because he has provided no credible evidence that similarly-situated, qualified persons not of his protected class were treated more favorably in regard to the random drug testing program. Complainant made the bald assertion that white drivers were subjected to less rigorous scrutiny when subjected to random drug testing, but he provided no credible evidence to support this assertion. Complainant's credibility in these and other matters is undermined by unconvincing claims of being threatened with incarceration inside a bathroom despite its being locked from the inside, of being subjected to drug testing every two weeks following his return to service in November of 2006 despite the lack of any evidence supporting this claim, and of being unfairly pressured by Anne Humphries to finish his urine test and get back on the road even though she, too, is black and had enough standby drivers to take his place. In short, the evidence does not support Complainant's contention that he was harassed and intimidated during the testing process and that other similarly-situated, qualified persons not of his

protected class were treated more favorably in circumstances that give rise to an inference of race discrimination.

Even if Complainant were able to establish a *prima facie* case of discrimination, Respondent has articulated a legitimate, nondiscriminatory reason for placing Complainant on a medical leave of absence, *viz.*, Complainant's failure to satisfactorily complete a DOT random drug test. Pursuant to federal DOT regulations set forth in 49 CFR 40.191 (5), the failure to produce a sufficient specimen of urine for testing, if not medically explained, is considered a refusal to submit to a drug test and a violation of DOT regulations. Having been deemed non-compliant with DOT regulations, Complainant was prohibited by federal law from performing any DOT safety-sensitive duties prior to completing an evaluation by a substance abuse professional and other federally-mandated steps such as taking a return-to-duty drug test and being subject to follow-up drug testing. See 49 CFR 40. 305 (a) and 307 (d). It is noteworthy that Respondent made numerous efforts to persuade Complainant to participate in the evaluation program and paid him sickness and accident insurance while he was out on medical leave. These steps demonstrate that Respondent did what it could to assist Complainant, consistent with the mandates of federal law.

The lack of discriminatory animus on the part of Respondent does not detract from the humiliation, frustration, and adverse financial impact experienced by Complainant, who credibly established that he does not use drugs or alcohol. The federal testing process targeted Complainant as a potential drug abuser merely for failing to produce a sufficient quantity of urine on the morning of October 12, 2006. Such an outcome is undeniably harsh. It was, however, unavoidable given the lack of discretion

under federal law to delay the start of the test, to extend the length of the test, or to combine several insufficient urine samples into a single larger one. See 49 CFR 40.61 (b); 40.65 (a) (3); 40.193. Since there is no credible evidence that the DOT regulations were applied in a disparate manner, there is no basis for a finding of discrimination.

Based on the foregoing, I conclude that Respondent's administration of the random drug testing on October 12, 2006 did not violate Chapter 151B.

IV. ORDER

The case is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 30th day of June, 2009.

Betty E. Waxman, Hearing Officer

