COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

KEITH B. BAIR,	:	
	:	
Complainant	:	
	:	
v.	:	DOCKET NO. E-29349-D
	:	
ABF FREIGHT SYSTEM, INC.,	:	
	:	
Respondent	:	

FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
RECOMMENDATION OF HEARING PANEL
FINAL ORDER

FINDINGS OF FACT*

1. Keith B. Bair, Complainant herein, is a black male who resides at 2213 Penn Street, Harrisburg, Pennsylvania, 17110. (S.F. 1).

2. ABF Freight System, Inc., Respondent herein, operates a trucking facility in Carlisle, Pennsylvania, at which it employs more than four persons. (N.T. 2 at 22-4; R.E. 2 at 15-7).

3. Complainant, on or about June 20, 1984, filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") at Docket No. E-29349D. (S.F. 7).

4. At the time Complainant filed his complaint, at Docket No. E-29349D, he had two pending complaints with the Commission against Respondent; the first had been filed on January 24, 1984, at Docket No. E-27784D, and the second on May 21, 1984, at Docket No. E-28897D. (S.F. 3).

5. Complainant, by way of an interlocutory order, amended his complaint, at Docket No. E-29349D, on April 1, 1987. (S.F. 7).

---

*To the extent the Conclusions of Law or Opinion which follow include necessary findings of fact in addition to those in this section, such findings shall be considered to have been included herein. The following abbreviations have been utilized for reference purposes:

S.F.	-	Stipulations of Fact
N.T. 1	-	Notes of Testimony, Volume 1 (June 16, 1987)
N.T. 2	-	Notes of Testimony, Volume 2 (June 17, 1987)
C.E.	-	Complainant's Exhibit
R.E.	-	Respondent's Exhibit
J.E.	-	Joint Exhibit

6. Respondent's Carlisle trucking facility functioned as a cross-dock operation, entailing the physical movement of freight from an incoming tractor-trailer on one side of the dock to an outgoing tractor-trailer on the other. (N.T. 1 at 74-5; R.E. 2 at 17).

7. Respondent hired Complainant on March 21, 1979, as a dock worker. (S.F. 2).

8. On June 19, 1984, Complainant worked as a dock worker and tow-motor operator for Respondent's trucking facility in Carlisle, and began work at 6:00 a.m. (S.F. 5).

9. Dock workers, including Complainant, utilized a number of different tools, including two and four wheel carts and tow motors. (N.T. 1 at 72-4; R.E. 2 at 18).

10. Tow motors are motorized forklifts used for moving heavier freight and freight on skids; they have blades extending outward about five feet, operate like an automobile and are capable of attaining speeds up to fifteen miles per hour. (N.T. 1 at 74-6; R.E. 2 at 18).

11. The dock area was a dangerous place in which to work, and involved a genuine risk of physical injury. (N.T. 1 at 77-9; R.E. 2 at 19).

12. On June 19, 1984, Complainant was a member of a collective bargaining unit represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and the terms and conditions of his employment were

covered by the National Master Freight Agreement and the Pennsylvania Over-the-Road and Local Cartage Supplemental Agreement, both effective March 1, 1982, through March 31, 1985. (S.F. 11).

13. Article 44 of the collective bargaining agreement prohibited the discharge or suspension of an employee without just cause, and allowed the discharge of an employee, without a prior warning notice, for, inter alia, drunkenness, drinking alcoholic beverages, being under the influence of alcoholic beverages or narcotics, or the use or possession of narcotics (as described in the Federal Pure Food and Drug Act), barbituates, or amphetamines during a tour of duty. (J.E. 2 at 99).

14. William Stewart was hired as Respondent's terminal branch manager, for its Carlisle facility, in or around November, 1983, and remained in that position until he was terminated on or about February 28, 1985. (N.T. 1 at 22; R.E. 2 at 5, 15, 69).

15. Stewart knew that Respondent had a policy for dealing with employees who reported for or were at work under the influence of alcohol or narcotics. (R.E. 2 at 22).

16. Stewart understood Respondent's policy to require that an employee be sent for testing if there was probable cause to believe the employee was under the influence of a prohibited chemical substance. (R.E. 2 at 23-7, 74-5).

17. On June 19, 1984, Complainant was summoned into Stewart's Office by William DeVore, Respondent's operations manager, over the loudspeaker. (N.T. 1 at 34; N.T. 2 at 23, 33, 50; R.E. 2 at 42).

18. Stewart called the meeting with Complainant to discuss a three day suspension letter, for excessive absenteeism, which had been prepared and signed by Jere Bollinger, Respondent's Operations Supervisor. (N.T. 1 at 37, 163-5; R.E. 2 at 42-3; J.E. 3).

19. At the time of the meeting, Stewart was aware that Complainant had filed Commission complaints against Respondent. (R.E. 2 at 81).

20. A fact finding conference in one of the complaints was scheduled for Monday, June 25, 1984. (S.F. 9).

21. Complainant was alone with Stewart for about five or ten minutes at the beginning of the meeting. (N.T.1at 36; N.T. 2 at 34, 76; R.E. 2 at 43).

22. If Complainant had requested union representation at the beginning of the meeting, Stewart would have provided it. (R.E. 2 at 43).

23. It was Stewart's policy to always allow an employee the right to union representation when a meeting involved disciplinary action. (R.E. 2 at 43).

24. After the meeting had been in progress for about five or ten minutes, Stewart requested that DeVore join the meeting. (N.T. 2 at 34, 50, 76).

25. Stewart and Complainant were seated and calm when DeVore joined the meeting. (N.T. 2 at 39, 52-3).

26. Stewart questioned DeVore concerning whether Complainant had received permission to be absent on June 18, 1984. (N.T. 1 at 43; N.T. 2 at 35).

27. DeVore produced his records for Stewart; they gave no indication Complainant had been granted permission to take the day off. (N.T. 2 at 35-6).

28. As the meeting progressed, Complainant became more and more vocal and belligerant; he stood up, raised his voice quite loud, laughed and flailed his arms. (N.T. 1 at 44; N.T. 2 at 39; R.E. 2 at 47-50).

29. Neither Stewart nor DeVore had ever seen Complainant change moods so quickly and to such an extent. (N.T. 2 at 39, 41; R.E. 2 at 77).

30. In addition to Complainant's sudden, dramatic change in personality, Stewart observed that Complainant's eyes did not seem to focus properly. (R.E. 2 at 48, 82).

31. Stewart was aware that Complainant had a "weak" or "lazy" eye, but did not feel that condition was responsible for Complainant's failure to focus properly. (R.E. 2 at 48-50).

32. Stewart was familiar with the condition known as "lazy" eye because his wife has the same condition, although not to the same extent. (R.E. 2 at 49).

33. Stewart remained calm until after Complainant left his chair and began his outburst, at which point Stewart also began to raise his voice, although he did remain seated. (N.T. 2 at 39-40).

34. As a result of Complainant's behavior, and the condition of Complainant's eyes, Stewart formed the opinion that Complainant might be under the influence of a controlled substance. (R.E. 2 at 47).

35. Prior to Stewart's informing Complainant of this opinion, Stewart had Lenny Radle, the union shop steward, join the meeting. (N.T. 2 at 36; R.E. 2 at 47-8).

36. DeVore also believed that Complainant might be under the influence of a controlled substance. (N.T. 2 at 40-1).

37. During the course of the meeting, Stewart never indicated to Complainant that he could avoid the three day suspension, or the taking of a drug and alcohol test, if he withdrew his Commission complaints. (N.T. 2 at 42-4; R.E. 2 at 50).

38. Once Stewart informed Complainant of his opinion, he had Complainant sign a drug and alcohol test consent form, and sent Complainant to be tested. (N.T. 2 at 40-1; R.E. 2 at 47, 52).

39. At approximately 9:50 a.m. on June 19, 1984, blood and urine specimens were taken from Complainant at Carlisle Hospital, and were sent to National Medical Service, Inc. (S.F. 6).

40. The Toxicology Report of Dr. Richard Cohn, dated July 3, 1984, deals with the blood and urine specimens given by Complainant at Carlisle Hospital at 9:50 a.m. on June 19, 1984. (S.F. 10; R.E. 4).

41. Complainant's test results evidenced that, at the time of the test, he had 2 nanograms of tetrahydrocannabinol ("THC") per mililiter and 50 nanograms of tetrahydrocannabinol carboxylic acid ("THCC") per mililiter in his blood, and approximately 150 nanograms of THCC per mililiter in his urine. (R.E. 4).

42. THC and THCC are marijuana constituents, and the levels found evidenced the recent use of marijuana by Complainant. (R.E. 4, R.E. 5).

43. The levels of THC and THCC in Complainant's blood and urine were sufficient to account for the behavior exhibited by Complainant. (N.T. 2 at 101, 103).

44. Complainant was suspended from his employment with Respondent on June 19, 1984, and thereafter discharged from his employment on June 25, 1984. (S.F. 8).

45. On June 18, 1984, Bruce Raker was employed as a dock worker by Respondent at its Carlisle facility. (N.T. 1 at 124-5).

46. At about 9:00 a.m., Raker was summoned into a meeting with Stewart concerning a pending grievance Raker had filed with his union, the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America. (N.T. 1 at 125-6, N.T. 2 at 27, 45).

47. Raker requested and was granted the right to have Larry Radle, his union steward, attend the meeting. (N.T. 1 at 126).

48. William DeVore joined the meeting shortly after it began. (N.T. 2 at 26-7, 44).

49. As the meeting progressed, Raker went from being calm to being extremely defensive, went off on a tangent and began waving his arms. (N.T. 2 at 30; R.E. 2 at 61).

50. In addition to Raker's behavior, Stewart noticed that his eyes were red and his pupils were totally abnormal. (R.E. 2 at 61).

51. As a result of these observations, Stewart formed the opinion that Raker might be under the influence of a controlled substance. (R.E. 2 at 60-1).

52. DeVore also believed that Raker might be under the influence because he was familiar with Raker as an employee, and had never seen him change his mood to the extent he did during the meeting. (N.T. 2 at 31).

53. Stewart did not indicate that Raker could avoid future discipline by dropping his grievance. (R.E. 2 at 62).

54. On June 18, 1984, Raker submitted to drug and alcohol testing at the request of Stewart. (S.F. 4).

55. Raker was not the only employee to file a union grievance, and Stewart was aware of a number of these grievances while he was terminal manager. (R.E. 2 at 87).

56. Stewart never told Raker that he still intended to get him, or that he had gotten Raker's "buddy". (R.E. 2 at 66).

57. Keith Richards was hired by Respondent in 1978, and was employed by Respondent continuously until the date of the public hearing in this matter. (N.T. 2 at 6-7).

58. Around the summer of 1982, Jere Bollinger believed he smelled alcohol on Richards. (N.T. 1 at 157, 160, 168; N.T. 2 at 7).

59. Bollinger telephoned Edward Tidwell to come in to the facility. (N.T. 1 at 161, 168).

60. Tidwell was Respondent's terminal manager from 1981 until December, 1983. (N.T. 1 at 167).

61. At least one hour elapsed between Bollinger's call to Tidwell and Tidwell's arrival at Respondent's facility. (N.T. 2 at 212).

62. When Tidwell arrived at Respondent's facility, he interviewed Richards and did not believe Richards was intoxicated because his speech was not slurred, he looked normal, and he did not smell alcohol on him. (N.T. 1 at 170-2).

63. During the time Tidwell was terminal manager at Respondent's Carlisle facility, he never sent anyone for a drug and alcohol test. (N.T. 1 at 171-2).

64. At the time of the incident, Richards had never filed a Commission complaint against Respondent, and had no pending grievances. (N.T. 1 at 162; N.T. 2 at 17).

CONCLUSIONS OF LAW

1. Complainant is an individual within the meaning of the Act.

2. Respondent is a person and an employer within the meaning of the Act.

3. The Commission has jurisdiction over the parties and subject matter of this case.

4. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.

5. Complainant has the initial burden of establishing a prima facie case of unlawful retaliation under Section 5(d) of the Act.

6. Complainant may establish a prima facie case of unlawful retaliation by producing evidence which shows that:

1) He engaged in a protected activity under Section 5(d), of which Respondent was aware;

2) Subsequent to the protected activity he was subjected to an adverse employment consequence;

3) There was a sufficient connection between the protected activity and the adverse employment consequence to raise an inference of Respondent's retaliatory motivation.

7. Complainant has proven a prima facie case of unlawful retaliation.

8. Once Complainant proves a prima facie case of unlawful retaliation, the burden shifts to Respondent to show a legitimate, non-discriminatory reason for its actions through the production of admissible evidence.

9. Respondent has established a legitimate, non-discriminatory reason for its actions.

10. Where Respondent establishes a legitimate, non-discriminatory reason for its actions, Complainant may prevail if he shows the reason is pretextual, by a preponderance of the evidence.

11. Where evidence of a Respondent's reasons for its conduct is received, so that Respondent has done everything that would have been required of it had Complainant properly made out a prima facie case, it does not matter whether Complainant did so; the trier of fact must decide whether Complainant carried his ultimate burden of proving unlawful discrimination.

12. Complainant has failed to prove, by a preponderance of the evidence, that Respondent's legitimate, non-discriminatory reason is pretextual, and has failed to carry his ultimate burden of proof.

OPINION

I. HISTORY OF THE CASE

This matter arises on a complaint filed by Keith B. Bair ("Complainant") with the Pennsylvania Human Relations Commission ("Commission") against ABF Freight System, Inc. ("Respondent"), on or about June 20, 1984. The complaint was subsequently amended, by way of an interlocutory order, on April 1, 1987. Complainant alleged that Respondent violated the Pennsylvania Human Relations Act ("Act"), Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq., by suspending him, requiring him to take a drug and alcohol blood test, and terminating him because of his race, black, and/or in retaliation for his having filed two previous complaints with the Commission against Respondent.

Commission staff conducted an investigation into the allegations of the complaint, and determined that no probable cause existed to credit the allegations contained therein. Complainant filed a timely request for a preliminary hearing, which was granted by the Commission. A preliminary hearing was held and on August 26, 1985, the Commission determined that probable cause did exist to credit the allegations of unlawful retaliation. The Commission endeavored to eliminate the practices complained about by conference, conciliation and persuasion. These endeavors were unsuccessful, and the case was set for a de novo public

hearing under Section 9(d) of the Act. The hearing was held on June 16 and 17, 1987, in Harrisburg, Pennsylvania, before Commissioners Alvin E. Echols, Jr., Chairperson of the Hearing Panel, Russell Howell and Raquel Otero de Yiengst.

II. DISCUSSION

In this case, as with all cases of alleged discrimination under the Act, Complainant has the initial burden of establishing a prima facie case. Carrying this burden creates an inference of unlawful discrimination. Respondent has the duty to rebut this inference by producing admissible evidence of a legitimate, non-discriminatory reason for its actions. If Respondent succeeds, Complainant may still prevail if he can show the reason offered by Respondent is, in reality, a pretext for unlawful discrimination. General Electric Corp. v. Com., Human Relations Commission, 469 Pa. 292, 365 A.2d 649 (1976); Consumers Motor Mart v. Com., Pennsylvania Human Relations Commission, ____ Pa. Cmwlth. ____, 529 A.2d 571 (1987). Where evidence of a Respondent's reasons for its conduct is received, so that Respondent has done everything that would have been required of it had Complainant properly made out a prima facie case, it does not matter whether Complainant did so. The issue then becomes whether Complainant carried his ultimate burden of proving unlawful discrimination. Montour School District v. Com., Pennsylvania Human Relations Commission, ____ Pa. Cmwlth. ____, 530 A.2d 957 (1987).

In his complaint, Complainant alleged several different grounds of unlawful discrimination. By the time of the public hearing, however, the only ground still alleged was that Respondent retaliated against Complainant because Complainant had filed two Commission complaints against Respondent. N.T. 1 at 81-2; Complainant's Brief at 3. The retaliation allegedly consisted of Complainant being required to undergo a drug and alcohol blood test, which resulted in his termination. Id. If proven, such retaliation would violate Section 5(d) of the Act, 43 P.S. §955(d). Section 5(d) makes it unlawful to:

> discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.

Complainant may establish a prima facie case of unlawful retaliation, under Section 5(d), by proof that:

1) He engaged in a protected activity under Section 5(d), of which Respondent was aware;
2) Subsequent to the protected activity he was subjected to an adverse employment consequence;
3) There was a sufficient connection between the protected activity and the adverse employment consequence to raise an inference of Respondent's retaliatory motivation.

See Brown v. Biglin, 454 F.Supp. 394, 22 FEP Cases 228 (E.D. Pa. 1978); Consumers Motor Mart, ____ Pa. Cmwlth. _____, 529 A.2d 571 (1987); Kowalski v. Adams, P.H.R.C. Docket No. E-26679 (March 5, 1987).

It is undisputed that Complainant filed two Commission complaints against Respondent prior to June 19, 1984, the date on which the alleged retaliation occurred. Section 5(d) of the Act provides that filing Commission complaints is a protected activity. It is also undisputed that Respondent, and specifically William Stewart, knew about the complaints prior to that date. Stewart was Respondent's terminal manager at its Carlisle, Pennsylvania, facility, at which Complainant was employed. More importantly, he was the one who required Complainant to undergo the drug and alcohol blood test, and he is the one Complainant alleges was responsible for the unlawful retaliation.

There can also be no genuine dispute that the requirement Complainant undergo a drug and alcohol blood test constituted on adverse employment consequence. Although Respondent argues that Complainant would not have suffered any adverse consequences had the test proven negative, this argument misses the point. The requirement of a blood test carried the definite potential for adverse consequences, which would not have existed had Complainant not been required to take the test. Furthermore, absent the requirement that he take the test, he would not have been terminated, since Respondent admits the termination was based solely on the test results. Respondent's Brief at 17.

At this point, it is important to note that the resolution of this case does not involve the validity of Respondent's drug testing policy. Complainant is not now contesting the right of Respondent to test him, under nonretaliatory circumstances. Complainant's Brief at 9, 12-13. The issue, as it is currently before the Commission, is simply whether the testing requirement was imposed on Complainant out of a desire to retaliate for his protected activity under Section 5(d) of the Act. Section 5(d) prohibits retaliation in any manner because of participation in protected activity. Requiring a blood test, and its resultant consequences, out of a retaliatory motive is unquestionably unlawful under this standard. Requiring the test for any other motive, however, would not meet this standard and would not be unlawful under Section 5(d).

The third and final element of Complainant's prima facie case involves a determination of whether Complainant has established a sufficient connection between his filing of Commission complaints, and Respondent's requirement that he take a blood test, to raise an inference of Respondent's retaliatory motivation. As previously stated, Respondent was aware of the complaints on June 19, 1984, the date of the alleged retaliation. The complaints were still pending, and a Commission fact finding conference was scheduled in one of them for June 25, 1984. This was only six days after imposition of the testing requirement, which constituted the alleged retaliation, and places it during a period of time when Respondent would have a strong motive to chill Complainant's pursuit of his complaints.

In addition, Complainant testified that, shortly before he was required to take the blood test, Stewart demanded he drop his Commission complaints. He testified that he refused, and only then was he required to take the test. (N.T. 1 at 40-4). This evidence, while subject to rebuttal and involving a determination of Complainant's credibility, raises a sufficient inference of a retaliatory motive to make out the third element of Complainant's prima facie case.

Once Complainant establishes his prima facie case, the burden shifts to Respondent to rebut the inference of retaliatory intent with evidence of a legitimate, non-discriminatory reason for its actions. Respondent did so by presenting evidence that Stewart was not motivated by a desire to retaliate, but by a concern that Complainant might be under the influence of a controlled substance in violation of Respondent's drug and alcohol policy. Stewart testified that his concern was based on Complainant's demeanor and appearance. He also testified directly as to his intent, stating that he was not motivated by the Commission complaints to require the blood test. R.E. 2 at 59.

Faced with this evidence, Complainant presented a number of arguments aimed at establishing its pretextual nature. The main argument involves Complainant's testimony that Stewart demanded Complainant drop his Commission complaints, and that when Complainant refused, Stewart sent him for the drug and alcohol blood test. The test was required during a meeting between Complainant and Stewart.

Stewart had called the meeting to discuss a three day suspension, which was to be imposed on Complainant for excessive absenteeism. Complainant testified that the incriminating demand was made at the beginning of the meeting, when they were alone, so that no one witnessed the alleged statement except Complainant and Stewart.

It is undisputed that Stewart and Complainant were alone for between 5 and 10 minutes before William DeVore, Respondent's operations manager, joined the meeting. Stewart testified, however, that he never said anything about Complainant being able to avoid the requirement of a blood test, if he withdrew his Commission complaints. He was unable to remember saying anything about the Commission complaints at all, R.E. 2 at 51, and denied being motivated by those complaints in reaching his decision to require the blood test.

This testimony raises a straightforward issue of credibility as to whether Stewart made the incriminating statements attributed to him. The Commission, as the finder of fact, has resolved this issue in favor of Respondent. In both his original and amended complaints, Complainant alleged that Stewart said Complainant was having a problem with absenteeism. He further alleged that it was after his objection to this statement that Stewart required the blood test. Although his complaint was otherwise quite detailed, he made no allegation concerning the incriminating statement

testified to at hearing, or about any similar statement or reference. It seems unusual that such an important allegation would be left out, and raises at least an inference that it was a later fabrication to help his case.

Unlike Complainant, who had an obvious interest in presenting testimony favorable to his case, Stewart had little if any interest in presenting testimony favorable to Respondent. At the time Stewart testified, he had been terminated by Respondent. R.E. 2 at 5, 9. His termination directly resulted in his being unemployed for about five months, and he testified that he was bitter over the termination. Id. at 5, 91. Respondent had to present Stewart's testimony by way of deposition, taken in North Carolina, because he refused to return to Pennsylvania for the public hearing. Id. at 5. Even in North Carolina, Stewart had to be deposed involuntarily, while under subpoena. Id. at 4-5. He was hardly a friendly witness for Respondent, and could easily have agreed with Complainant as to his motivations, if such were the truth.

Complainant also set forth several other arguments aimed at establishing pretext. Complainant testified that he was denied union representation at the beginning of the meeting with Stewart on June 19. Stewart contradicted this allegation, however, testifying that it was his practice to always allow union representation when requested regarding

disciplinary action, and that Complainant would have been granted such representation had he requested it at the start of the meeting. Additionally, Complainant was given representation prior to being accused of being under the influence, or being required to take the blood test.

To rebut Respondent's argument that Stewart had probable cause to believe Complainant was under the influence, Complainant presented evidence that he did not appear or behave out of the ordinary on the day in question. While there was evidence that he appeared normal at some point prior to the meeting, the issue is whether probable cause existed at the time Stewart formed his opinion and required the blood test. If Complainant did not appear as if he might be under the influence of a prohibited substance, that fact would support his claim of retaliation by undermining Stewart's stated reason for the test. Again, this issue resolves into a question of credibility. Stewart testified he felt Complainant might be under the influence of a controlled substance. He based this opinion on an abrupt change in Complainant's behavior from calm to quite loud and belligerant. He testified that Complainant stood up and began flailing his arms. He testified he had never seen Complainant change moods so quickly and to such an extent. He also felt that Complainant's eyes did not focus properly.

As previously stated, Respondent's operations manager, William DeVore, was present for most of the meeting. DeVore corroborated Stewart's account of Complainant's behavior. Although he did not mention anything about the condition of Complainant's eyes, he testified that he, like Stewart, felt Complainant might be under the influence as a result of Complainant's sudden and dramatic mood swing and change in demeanor.

The only other person in a position to judge Complainant's condition, at the time Stewart determined he might be under the influence, was Lenny Radle. Radle was the union steward summoned to join the meeting prior to Stewart's telling Complainant he felt Complainant was under the influence, or requiring him to agree to the blood test. Although Radle's testimony might have been of great assistance in determining Complainant's apparent condition, none was presented by either side. This omission leaves no basis on which the Commission can determine whose testimony Radle would have corroborated, if any. It is Complainant's burden, however, to show that Respondent's proffered evidence of a legitimate, non-discriminatory reason is pretextual, by a preponderance of the evidence. Consumer's Motor Mart, 529 A.2d 571, 573. Based on the evidence that was presented, the Commission finds that a preponderance does not exist, in Complainant's favor, on the issue of his appearance and demeanor.

In addition to the evidence Complainant presented concerning his drug testing incident, he also presented evidence of two comparisons. This was done to establish differential treatment by Respondent of employees who engage in protected activity and those who do not. If proven, such treatment would strengthen the inference of retaliation in his case, and could help rebut Respondent's argument that retaliation played no part in the selection of Complainant for the test.

The first comparison involves Bruce Raker, a co-worker of Complainant's who, during a meeting with Stewart to discuss a pending grievance, was required to take a drug and alcohol blood test on June 18, 1984. Respondent argues that pursuing a union grievance is not protected activity under the Act, and the Raker incident is therefore not an apt comparison. While there is no evidence the grievance involved any activity protected by the Act, evidence that only employees who assert their rights, by filing charges of any sort against the company, are required to take a blood test raises an inference of a retaliatory motive and would be corroborative of Complainant's charge.

A major flaw in Complainant's argument, however, is that Raker is the only employee alleged to have been retaliated against for filing a union grievance. Other employees filed grievances against Respondent, and Stewart was aware of a number of them while he was terminal manager. There is no evidence Respondent retaliated against any of them. This

prevents an inference of any systematic intent by Respondent to retaliate against employees, in general, for exercising their right to file claims against Respondent.

Raker did testify that Stewart asked whether he, or Lenny Radle, wanted to tear up the grievance. N.T. 1 at 126. Radle, the union steward, was present at the meeting on behalf of Raker. Raker testified that both of them refused, that Stewart got upset over their refusal, and that shortly thereafter, Stewart required him to submit to a drug and alcohol blood test. N.T. 1 at 127-8.

Although Stewart did not remember everything that was said about the grievance during the meeting, he denied saying anything to the effect that Raker could avoid future discipline by dropping his grievance. He also denied that the drug and alcohol test was conditioned on Raker failing to drop his grievance. R.E. 2 at 62. He testified that, like Complainant, Raker was sent for the test because he felt Raker might be under the influence of a controlled substance.

In support of his conclusion, Stewart testified that Raker's demeanor became more and more defensive as the meeting progressed, he began to go off on a tangent, his eyes were red and his pupils were totally abnormal. William DeVore, who entered the meeting shortly after it began, corroborated Stewart's testimony. He testified that Raker went from being calm to much more animated, standing in front of Stewart's desk and waving his arms. While DeVore testified

that Stewart would often get loud himself with employees, DeVore said he had never seen Raker's personality change to such an extent. Based on his observation of Raker's change in demeanor, and his familiarity with Raker's moods as an employee, DeVore also felt that he might be under the influence.

As with the evidence submitted concerning Stewart's meeting with Complainant, a gap exists because of the absence of testimony from Radle. By Raker's own testimony, Radle was present throughout Raker's meeting with Stewart. Radle could have directly corroborated Raker's version of events, both as to what was said, and as to Raker's appearance and demeanor at the time Stewart determined Raker might be under the influence. Again, the Commission has no way of knowing what Radle might have said, and must make do with the evidence that was presented.

Based on this evidence, the Commission finds that Complainant has failed to prove Respondent retaliated against Raker for filing a union grievance. Complainant attempted to make a further connection between the two drug tests by introducing evidence that, several days after Raker's drug test, Stewart had a conversation with Raker in which Stewart said he was not through with him, and that he got his "buddy." N.T. 1 at 138-9. Raker was somewhat uncertain in his recollection of this statement, however, and while Stewart admitted having a conversation with him after the test, he denied making the statement in question.

Complainant's second comparison involves an employee named Keith Richards. Richards allegedly reported for work under the influence of alcohol but was not taken for a blood test. Richards testified that on the day in question, he had drunk a maximum of four beers about six hours before the start of his shift. Jere Bollinger, Respondent's dock supervisor, testified he smelled alcohol on Richards and felt he should be sent for an alcohol blood test. He telephoned Edward Tidwell, who at the time was Respondent's terminal manager, to come in to the terminal. When Tidwell arrived, he spoke with Richards, and based on that conversation determined that Richards was not under the influence and did not require a blood test.

At the time of this incident, Richards had not filed a Commission complaint. He also did not have any pending grievances. While this raises an inference of discrimination, based on his lack of protected activity or grievance filing, there are a number of circumstances that rebut the inference in Complainant's case. First, the Richards incident occurred around the summer of 1982, about two years before Complainant's drug and alcohol blood test was required. The incident was, therefore, relatively remote in time from Complainant's. Second, the incident involved a different supervisor. Tidwell never sent anyone for a blood test, during his entire three year tenure as terminal manager.

Third, and most important, there was no evidence that Richards appeared or acted intoxicated in either Bollinger's or Tidwell's presence. Bollinger testified that the only unusual thing he noticed about Richards was the smell of alcohol. Bruce Raker, who saw Richards while Richards was waiting for Tidwell to arrive at the terminal, testified that, like Bollinger, the only reason he thought Richards might be intoxicated was because of smell. Tidwell testified that, when he interviewed Richards after arriving at Respondent's facility, he did not feel he was impaired, because his speech was not slurred and he looked normal. Unlike Bollinger and Raker, however, Tidwell testified that he did not smell alcohol on Richards.

It is, of course, Tidwell's impression of Richards that is important. Tidwell was the one who determined that Richards need not be sent for an alcohol blood test. To be a valid, supporting comparison to Complainant's situation, there must be some proof that Tidwell believed Richards might be intoxicated, yet failed to send him for a test because he had not engaged in protected activity under the Act, or filed any pending union grievances. There is no evidence that Richards gave Tidwell any impression of being intoxicated, through either appearance or demeanor.

As to the issue of smell, there was no evidence presented that Richards smelled of alcohol at the time Tidwell interviewed him. Bollinger's and Raker's testimony each concerned an earlier point in time, before Tidwell

arrived at the trucking facility. Richards never denied that he had a few drinks earlier in the day, well before his shift began. Tidwell testified that Richards explained Bollinger may have smelled liquor on him earlier because he might have spilled some on himself while he was drinking earlier in the day. N.T. 1 at 171. Combined with Richards normal appearance and demeanor, Tidwell could reasonably have concluded Richards was not under the influence while at work, and did not need to be tested.

III. CONCLUSION

Based on the evidence presented, and the credibility of the witnesses, the Commission finds that Complainant has established a prima facie case of unlawful retaliation under Section 5(d) of the Act. Respondent, in turn, has presented evidence of a legitimate, non-discriminatory reason for its action in requiring Complainant to undergo a drug and alcohol blood test on June 19, 1984. The Commission finds Complainant has failed to prove, by a preponderance of the evidence, that Respondent's reason is pretextual, either directly through evidence of Respondent's specific motivation in requiring the blood test, or indirectly through evidence of a pattern and practice of retaliation against employees who engage in protected activity under the Act, or otherwise assert their rights against Respondent. As a result, the complaint in this matter must be dismissed.

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

KEITH B. BAIR,	:	
	:	
Complainant	:	
	:	
v.	:	DOCKET NO. E-29349-D
	:	
ABF FREIGHT SYSTEM, INC.,	:	
	:	
Respondent	:	

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above-captioned matter, the Hearing Panel finds that Respondent did not discriminate against Complainant in violation of the Pennsylvania Human Relations Act, and recommends that the attached Findings of Fact, Conclusions of Law, Opinion and Final Order be finally adopted and issued by the full Pennsylvania Human Relations Commission.

BY: Alvin E. Echols, Jr.
ALVIN E. ECHOLS, JR.
Panel Chairperson

Russell Howell
RUSSELL HOWELL
Hearing Commissioner

Raquel Otero de Yiengst
RAQUEL OTERO de YIENGST
Hearing Commissioner

PENNSYLVANIA HUMAN RELATIONS COMMISSION

KEITH B. BAIR,	:	
	:	
Complainant	:	
	:	
v.	:	DOCKET NO. E-29349-D
	:	
ABF FREIGHT SYSTEM, INC.,	:	
	:	
Respondent	:	

FINAL ORDER

AND NOW, this 4th day of May, 1988, upon review of the entire record in this matter, including the transcript of testimony, exhibits, briefs, and pleadings, the Pennsylvania Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendations of the Hearing Panel and, therefore,

O R D E R S:

That the complaint in this matter be, and the same hereby is, dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Thomas L. McGill Jr.
THOMAS L. McGILL, JR.
Chairperson

ATTEST:

John P. Wisniewski
JOHN P. WISNIEWSKI
Secretary