**U.S. Department of Labor**

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**Issue Date: 06 February 2008**

Case No.: **2006-STA-00036**

*In the Matter of:*

**RICK JACKSON,**
**Complainant,**

**v.**

**SMEDEMA TRUCKING, INC.,**
**Respondent.**

*Before:* WILLIAM S. COLWELL
Associate Chief Judge

## RECOMMENDED DECISION AND ORDER

*Granting Respondent's Motion for Summary Decision*

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 ("Act" or "STAA"), 49 U.S.C. § 31105, and the implementing regulations promulgated at 29 C.F.R. § 1978. Section 405 of the STAA protects a covered employee from discharge, discipline, or discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters.

This case concerns Complainant's allegation that he was discharged from employment with another company because Respondent, one of Complainant's former employers, engaged in "blacklisting" activity in retaliation for Complainant having engaged in protected activity with regard to Respondent. It is before me on Respondent's motion for summary decision.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Complainant was initially terminated by Respondent on March 28, 2005. Complainant filed a complaint ("first complaint") over this discharge alleging that Respondent illegally discharged him in retaliation for making safety complaints. Smedema Aff. (Nov. 1, 2006) Ex. 1; Jackson Dep. (Nov. 3, 2005) at 153-154. Complainant was reinstated by Respondent on April 4, 2005, as part of a settlement of

the first complaint. Smedema Aff. (Nov. 1, 2006) Ex. 2; Jackson Dep. (Nov. 3, 2005) at 154.

Complainant was terminated again by the Respondent on April 14, 2005, for falsifying his driver logs. Smedema Aff. (Nov. 1, 2006) Ex. 3. Complainant then filed another complaint ("second complaint") alleging that this discharge was in retaliation for the filing of the first complaint. Smedema Affidavit (Nov. 1, 2006) Ex. 4. These allegations were investigated and dismissed by the Occupational Safety and Health Administration, United States Department of Labor ("OSHA"). Smedema Affidavit (Nov. 1, 2006) Ex. 5. Complainant appealed these findings to the Office of Administrative Law Judges, United States Department of Labor ("OALJ"). Corcoran Affidavit (Nov. 1, 2006) Ex. B. Respondent moved for summary decision in that matter on February 16, 2006, and Administrative Law Judge ("ALJ") Phalen granted Summary Decision to Respondent and dismissed the case in a Decision and Order dated October 16, 2006. *Jackson v. Smedema Trucking, Inc.*, 2005-STA-44 (ALJ Oct. 16, 2006); Corcoran Affidavit (Nov. 1, 2006) Ex. C.

While Respondent's motion for summary decision was pending in the case before Judge Phalen, Complainant filed a third complaint ("instant complaint") against Respondent on April 24, 2006, alleging that Respondent and its attorney had contacted Complainant's then current employer, SNE Transportation, Inc. ("SNE"), and provided information to SNE that caused SNE to terminate Complainant's employment. Corcoran Affidavit (Nov. 1, 2006) Ex. D & Ex. E. On June 6, 2006, OSHA issued its determination that the "blacklisting" complaint was without merit. Corcoran Aff. (Nov. 1, 2006) Ex. H. On June 17, 2006, Complainant appealed OSHA's findings with regard to the "blacklisting" complaint to the OALJ for hearing.

On June 21, 2006, this case was assigned to me, and on June 27 and 28, 2006, I held preliminary conference calls with the parties to discuss scheduling for the case. The parties agreed to the following schedule for discovery and the handling of dispositive motions:

- Completion of all discovery by October 10, 2006;
- Filing of any dispositive motions by November 1, 2006;
- Filing of any response briefs by November 17, 2006; and,
- Filing of any reply briefs by December 1, 2006.

On July 5, 2006, I issued a Notice of Hearing and Pre-Hearing Order memorializing that agreed-upon schedule, setting the hearing for February 13, 2007, and providing the text of the applicable summary decision rules along with a plain explanation of the summary decision process and its consequences.

The discovery period closed on October 10, 2006. On November 1, 2006, Respondent submitted a Motion for Summary Judgment. On November 3, 2006, Complainant filed a response requesting denial of Respondent's motion and a forty-five

day extension in which to respond to that motion because his response was due on the same day in another case pending before me (2006-STA-00037).

On November 15, 2006, I issued an Order explaining that Complainant was not entitled to his requested extension because he had voluntarily acceded to identical briefing schedules for both cases during each case's pre-hearing conference. I did, however, grant Complainant a ten-day extension in consideration of his *pro se* status. In that order, I set Complainant's new response deadline as November 27, 2006, and set Respondent's new reply deadline as December 11, 2006. On November 27, 2006, Complainant submitted a letter in response to Respondent's motion, and on November 30, 2006, Respondent submitted a reply to that response.

## EVIDENTIARY MATERIALS

### *Respondent's Supporting Materials*

In support of its motion for summary decision, Respondent has submitted two affidavits with exhibits, as well as complete transcripts of two depositions of Complainant, one taken November 3, 2005, and one taken September 15, 2006.

The first affidavit is the November 1, 2006, affidavit of Randall J. Smedema, the president of Respondent. This affidavit states, *inter alia*, that "[a]s far as I have been able to determine, neither I, nor has anyone from my company, ever contacted SNE Transportation regarding Rick Jackson." Smedema Aff. (Nov. 1, 2006) ¶ 7. This affidavit is accompanied by the following attached exhibits: (1) OSHA letter of April 1, 2005, notifying Respondent of Complainant's first complaint against it; (2) Settlement Agreement settling Complainant's first complaint; (3) Respondent's letter of April 14, 2005, terminating Complainant; (4) OSHA letter of May 9, 2005, notifying Respondent of Complainant's second complaint against it; and, (5) OSHA letter of June 3, 2005, including its findings with regard to Complainant's second complaint.

The second affidavit is the November 1, 2006, affidavit of Edward A. Corcoran, the attorney of record for Respondent in this case. This affidavit states, *inter alia*, that "[a]s far as the Affiant has been able to determine, neither the Affiant nor anyone in his office has had any contact with SNE Transportation regarding Rick Jackson." Corcoran Aff. (Nov. 1, 2006) ¶ 13. This affidavit is accompanied by the following attached exhibits: (A) excerpts from the November 3, 2005, deposition of Complainant; (B) Complainant's appeal of OSHA's dismissal of his second complaint; (C) October 16, 2006, Recommended Decision and Order of ALJ Phalen granting Respondent's Motion for Summary Decision in the appeal of Complainant's second complaint; (D) OSHA letter of April 25, 2006, notifying Respondent of Complainant's third complaint against it; (E) Complainant's statement to OSHA in relation to his third complaint; (F) Respondent's responses to discovery requests made by Complainant during the case before ALJ Phalen; (G) excerpts from the September 15, 2006, deposition of Complainant; (H) OSHA's findings with regard to Complainant's third complaint against

Respondent; (I) Complainant's appeal of OSHA's findings on his third complaint to the OALJ; and, (J) Complainant's September 13, 2006, request for an order postponing his scheduled deposition in this case.

### *Complainant's Supporting Materials*

Complainant has submitted no affidavits or other materials in support of his opposition to Respondent's motion for summary decision despite my explanation of the importance of such materials in my July 5, 2006, Notice of Hearing and Pre-hearing Order. The Order explained, *inter alia*:

> In deciding a motion for summary decision, the judge will consider all evidence in the light most favorable to the non-moving party, but the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings to carry the burden of establishing there is a factual issue in the case…Rather, the non-moving party must set forth specific facts on each issue upon which he would bear the ultimate burden of proof…Consequently, it is very important that the nonmoving party submit affidavits that specifically set forth the facts of the case, along with any additional supporting materials, because the judge will rely heavily on such documents in determining whether there is a genuine issue of material fact to be resolved in the case.

Notice of Hearing and Pre-Hearing Order at 4 (July 5, 2005).

## DISCUSSION

### *Standards for Summary Decision*

Motions for summary decision in proceedings before an administrative law judge in the Department of Labor are governed by the rules set out in 29 C.F.R. §§ 18.40 and 18.41. Under those sections, an administrative law judge may grant a party's motion for summary decision when "there is no genuine issue as to any material fact and that party is entitled to summary decision." 29 C.F.R. § 18.40(d). This standard is essentially the same as the standard applicable in granting summary judgment under Federal Rule of Civil Procedure 56. *Hasan v. Burns and Roe Enterprises*, ARB No. 00-080, ALJ No. 2000-ERA-6, at 6 (ARB Jan. 30, 2001).

If the moving party can establish that there is no genuine issue of material fact and that he/she is entitled to decision as a matter of law, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Seetharaman v. General Electric. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21, at 4 (ARB May 28, 2004). The non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings to carry this burden,

but instead must set forth specific facts on each issue upon which he/she would bear the ultimate burden of proof. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)). If the non-moving party fails to meet this burden as to any of the required elements of his/her case, all other factual issues become immaterial, and there can be no genuine issue of material fact. *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). In deciding a motion for summary decision, all evidence must be considered in the light most favorable to the non-moving party. *Pafford v. Herman*, 148 F.3d 658, 665 (7th Cir. 1998); *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 1999-STA-21, at 2 (ARB Nov. 30, 1999).

The Seventh Circuit, under whose jurisdiction this case falls, has held that "all *pro se* litigants . . . are entitled to notice of the consequences of failing to respond to a summary judgment motion." *Timms v Frank*, 953 F2d 281, 285 (7th Cir. 1992). The notice must include both the text of Federal Rule of Civil Procedure 56(e) and "a short and plain statement in ordinary English" explaining the consequences of not offering supporting affidavits or documentary evidence in response to such a motion. *Id*.

Because the standard for summary decision is essentially the same as the standard applicable in granting summary judgment under Federal Rule of Civil Procedure 56, the Seventh Circuit's requirement is probably applicable in a case before the Office of Administrative Law Judges involving a *pro se* litigant, as in this matter. Consequently, I included in the July 5, 2006, Notice of Hearing and Pre-Hearing Order a notice modeled on the Seventh Circuit's requirements, including both the text of the applicable rules and a plain explanation of the process and its consequences.

*Applicable Legal Standards*

The employee protection provisions of the Surface Transportation Assistance Act provide, in relevant part:

> (a) Prohibitions.
>
> > (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because:
> >
> > > (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 vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; . . .

49 U.S.C. § 31105(a).

In a whistleblower case arising under the STAA, a prima facie case requires a showing by the complainant of the following three elements: (1) the complainant engaged in protected activity of which the respondent was aware; (2) the complainant suffered an adverse employment action; and, (3) a casual connection exists between the protected activity and the adverse employment action. *Roadway Express v. U.S. Dept. of Labor*, 495 F.3d 477, 481-82 (7th Cir. 2007); *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12 (1st Cir. 1998); *Coxen v. United Parcel Service*, ARB No. 04-093, ALJ No. 2003-STA-13 (ARB Feb. 28, 2006); *Flener v. H.K. Cupp, Inc*., 1990-STA-42, at 2 (Sec'y Oct. 10, 1991).[1] In order to prevail on summary decision, the respondent must demonstrate that no genuine issue of material fact exists as to any one of these three elements and that it is entitled to judgment as a matter of law on that element. *See* 29 C.F.R. § 18.40(d). If the respondent carries that burden and the complainant cannot put forth any specific facts that would establish a genuine issue of material fact on that essential element in his/her prima facie case, the other elements fall away, and the respondent is entitled to summary decision as a matter of law. *See Seetharaman*, ARB No. 03-029, ALJ No. 2002-CAA-21, at 4 (citing *Celotex Corp*., 477 U.S. at 322-23).

*Application to This Case*

Under 49 U.S.C. § 31105 (a)(1)(A), an employee has engaged in protected activity if he/she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. *Yellow Freight System, Inc. v. Martin*, 954. F.2d 353, 356-57 (6th Cir. 1992); *see also Lajoie v. Environmental Management Systems, Inc.*, 1990-STA-31 (Sec'y Oct. 27, 1992). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. *Nix v. Nehi-R.C. Bottling Co.*, 1984-STA-1, at 8-9 (Sec'y July 4, 1984).

In this case, Complainant cites his appeal to the OALJ of his second complaint against Respondent as his protected activity. Respondent has not disputed the fact that Complainant appealed his second complaint to the OALJ or that it was aware of this proceeding. Since the regulation describes "[beginning] a proceeding related to a violation of a commercial vehicle safety regulation, standard, or order" as protected activity, it is clear that Complainant did engage in protected activity of which Respondent was aware by filing a complaint with OSHA and then beginning an appeal proceeding before the OALJ. *See* 49 U.S.C. § 31105(a). This satisfies the first of the three general issues in a whistleblower case.

[1] The Secretary of Labor noted in *Flener* that "[w]hile a *pro se* complainant may be held to a lesser standard than legal counsel with regard to matters of procedure, the burden of proving the elements necessary to sustain a claim of discrimination is no less." *Flener*, 1990-STA-42, at 3 n.2 (citation omitted); *see Young v. Schlumberger Oil Field Services*, ARB No. 00-075, ALJ No. 2000-STA-28, at 10 (ARB Feb. 28, 2003) (noting that *pro se* complainants are held to the same burden of proving the elements of a discrimination case).

On the second issue, which is whether Respondent has taken adverse employment action against Complainant, Complainant has alleged that either an employee of Respondent, Respondent's attorney, or an employee of Respondent's attorney contacted SNE with information about his work history and/or some of his allegedly protected past activity and that this contact led to his termination by SNE. Corcoran Aff. (Nov. 1, 2006) Ex. D, E; Jackson Dep. (Sept. 15, 2006) at 13. Taking steps to prevent an employee from obtaining or retaining subsequent employment is known as "blacklisting."[2]

In support of its request for summary decision on this issue, Respondent has provided affidavits from both the president of Respondent and Respondent's attorney of record attesting that, to the best of their knowledge, no such contact was made by either of them or their employees. Smedema Aff. (Nov. 1, 2006) ¶ 7; Corcoran Aff. (Nov. 1, 2006) ¶ 13. Additionally, Respondent has provided evidence – in the form of Complainant's deposition testimony – that Complainant was discharged from SNE for falsifying his job application, which was discovered after Complainant provided a conflicting account of his work history to a doctor he was seeing about a work-related injury. Jackson Dep. (Sept. 15, 2006) at 30-38; *see id*. at Ex. 2. Complainant admits that he did, in fact, falsify his work history as alleged, which undermines his theory that this reason for his termination was merely a pretext. *Id*. at 30-38. In addition, Complainant also admitted in his deposition that, in a filing before a different adjudicatory body, he had argued that he was discharged from SNE because they did not want to pay him properly for his work-related injury and not because of any blacklisting contact made by Respondent. *Id*. at 38-42; *see id*. at Ex. 3, 4.

In contrast, Complainant has submitted no affidavits or supporting materials of any kind. He has stated generally that someone made some kind of blacklisting contact to SNE related to either his employment history or his allegedly protected past activity, but he has not set out specific facts to support his case. Corcoran Aff. (Nov. 1, 2006) Ex. D, E; Jackson Dep. (Sept. 15, 2006) at 13, 55-61. He has not identified which employee or employees of SNE, Respondent, or Respondent's attorney were involved in making or receiving that alleged contact, nor has he specified exactly what the content of that alleged communication was. In his deposition, he admitted that he had no evidence to support his contention that a blacklisting contact was made. Jackson Dep. (Sept. 15, 2006) at 13, 20, 60-61.

The failure of Complainant to produce any evidence showing a specific act of blacklisting by Respondent or Respondent's counsel is strikingly similar to the situation in *Howard v. Tennessee Valley Authority*, 1990-ERA-24 (Sec'y July 3, 1991), ***aff'd sub nom***., *Howard v. U.S. Dept. of Labor*, 959 F.2d 234 (6th Cir. 1992). In *Howard*, the Secretary affirmed the granting of summary decision where the complainant failed to put

[2] According to the ARB, "[b]lacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment." *Pickett v. Tennessee Valley Authority*, ARB Nos. 02-056, 02-059, ALJ No. 2001-CAA-18, at 9 (ARB Nov. 28, 2003) (citing *Barlow v. U.S*., 51 Fed.Cl. 380, 395 (2002)).

forth specific facts to support his allegation that the respondent engaged in blacklisting, despite the opportunity provided to develop evidence during discovery. *Id*. at 3-4. In the instant case, the discovery period was set with Complainant's participation and approval during the conference calls held June 26 and 27, 2006. By October 10, 2006, deadline, Complainant had conducted no discovery of SNE, Respondent, or Respondent's counsel. Corcoran Aff. (Nov. 1, 2006) ¶ 12. Complainant has failed to establish that a material fact exists as to any adverse action by Respondent or Respondent's counsel such that a hearing is required. *See Howard*, 1990-ERA-24, at 3; *see also Pickett*, ARB Nos. 02-056, 02-059, ALJ No. 2001-CAA-18, at 9 ("blacklisting requires an objection action – there must be evidence that a specific act of blacklisting occurred").[3] A mere "gut feeling" on of the complainant is insufficient to establish that blacklisting occurred absent some factual proof. *Murphy v. Atlas Motor Coaches, Inc*., ARB No. 05-055, ALJ No. 2004-STA-36 (ARB July 31, 2006).

Respondent has carried its burden of establishing that no issue of material fact exists as to the element of adverse action in Complainant's case and that it is entitled to decision on this issue as a matter of law. Complainant has failed to carry his burden of setting out specific facts related to this element adequate to create a genuine issue of material fact.[4] Because Complainant has failed to meet his burden as to this required element of his case, all other factual issues are immaterial, and there can be no genuine issue of material fact. *Seetharaman*, ARB No. 03-029, ALJ No. 2002-CAA-21, at 4 (citing *Celotex*, 477 U.S. at 322-23). Thus, Respondent is entitled to summary decision in this case.

## RECOMMENDED ORDER

It is hereby ORDERED that Respondent's Motion for Summary Decision be GRANTED and Complainant's claim be DISMISSED.

A

WILLIAM S. COLWELL
Associate Chief Judge

[3] As clarified by the ARB in *Pickett*, "[s]ubjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place." ARB Nos. 02-056, 02-059, ALJ No. 2001-CAA-18, at 9. (citation omitted).

[4] As noted *supra*, a *pro se* complainant must be held to the same burden of proving the elements of his/her case. *Flener*, 1990-STA-42, at 3 n.2 (citation omitted); *see Young*, ARB No. 00-075, ALJ No. 2000-STA-28, at 10. The adjudicative latitude afforded to *pro se* complainants does not extent to frivolous claims. *Saporito v. Florida Power & Light Co*., 1994-ERA-35, at 6 (ARB July 19, 1996). Regardless of Complainant's pro se status, the instant case should be dismissed because Complainant has failed to set forth facts which, if proven, could support his claim for entitlement. *Grizzard v. Tennessee Valley Authority*, 1990-ERA-52, at 4 n.4 (Sec'y Sept. 26, 1992).

WSC:MAWV/RG
Washington, D.C.

**NOTICE OF REVIEW**: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.