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Issue Date: 22 February 2006

Case No: 2005-STA-00065

In the Matter of

FERNANDO DEMECO WHITE,
Complainant,

v.

J.B. HUNT TRANSPORT, INC.,
Respondent.

Before: **LARRY W. PRICE**
Administrative Law Judge

RECOMMENDED DECISION AND ORDER GRANTING SUMMARY DECISION

This case arises under the "whistleblower" protection of Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter STAA), 49 U.S.C. § 31105, and the regulations at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging or otherwise discriminating against employees who engage in certain protected activities related to their terms or conditions of employment.

On January 25, 2005, the Administrative Review Board issued a Final Decision and Order Approving Settlement in ALJ Case No. 2003-STA-44 involving the same Parties. On May 12, 2005, Complainant filed the current complaint alleging Respondent had breeched the agreement by unlawfully backlisting him by changing his work record to reflect company policy violations instead of satisfactory performance. OSHA dismissed the complaint since a settlement agreement was reached at the ALJ level and further action was out of OSHA's jurisdiction. Complainant timely appealed OSHA's decision and a hearing was scheduled in Atlanta, Georgia.

On December 8, 2005, Respondent filed a Motion for Summary Decision. By Order dated December 28, 2005, the Court granted Complainant's request for a 45 day extension to respond to the Motion for Summary Decision. On February 2, 2006, Complainant filed his Brief

in Opposition to Respondent's Motion for Summary Decision. On February 16, 2006, Respondent filed a Reply.[1]

FACTS

The following facts are not in dispute:

1. Complainant filed a previous whistleblower complaint against Respondent, ALJ Case No. 2003-STA-44. The Parties reached a settlement and executed a settlement agreement on May 13, 2004. The Court issued a Decision and Order Approving Settlement and Dismissing Complaint on June 10, 2004. On January 25, 2005, the Administrative Review Board issued a Final Decision and Order Approving Settlement in ARB Case No. 04-118.
2. Paragraph 13 of the Settlement Agreement provided "J.B. Hunt agrees to follow its standard procedure with respect to any inquiry or its required reporting with regard to White's employment with J.B. Hunt. This standard information is attached hereto in Exhibit "A"." Exhibit A indicates that Complainant's work record was satisfactory. (Respondent Ex. A).
3. On or about December 1, 2004, Respondent installed new computer software on its network. After installation, the network apparently uploaded its archived data rather than its most current data regarding Complainant. Thus the April 2005 DAC Report contained company data entered before the Parties entered the Settlement Agreement. Respondent did not realize the problem until Complainant contacted the company's legal counsel in April 2005 regarding the same. (Respondent Ex. B).
4. On April 12, 2005, Complainant received a copy of the DAC Report. Under "work record" the DAC Report indicated "company policy violation." (Complainant Ex. I).
5. On or about April 12, 2005, Respondent corrected the information in the DAC report. Respondent authorized its legal counsel to inform Complainant that it would provide a corrected DAC Report to any employer that pulled the DAC Report between December 1, 2004 and April 12, 2005. Respondent also offered to contact such prospective employers and confirm Complainant's prior employment with the company and that the previous DAC Report was erroneous. Complainant rejected this offer. (Respondent Ex. B).
6. Respondent did not intend to transmit the offending information to the USIS, the company that prepares the DAC Report. (Respondent Ex. B).

DISCUSSION OF LAW AND FACTS

Any party may move with or without supporting affidavits for summary decision on all or part of the proceeding. 29 C.F.R. § 18.40(a) (2004). Summary judgment is granted for either party if the administrative law judge finds "the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and that a party

[1] To the extent Complainant has asked for summary decision, the decision on Respondent's motion renders his motion moot. That portion of Respondent's motion alleging lack of jurisdiction is hereby DENIED.

is entitled to summary decision." Id. Thus, in order for a motion for summary decision to be granted, there must be no disputed material facts and the moving party must be entitled to prevail as a matter of law.

In deciding a motion for summary decision, the court must consider all the material submitted by both parties, drawing all reasonable inferences in a manner most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. Once the moving party has met its burden of production, the non-moving party must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. Lincoln v. Reksten Mgmt., 354 F.3d 262 (4th Cir. 2003). However, granting a summary decision is not appropriate where the information submitted is insufficient to determine if material facts are at issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

I find Respondent's motion for summary decision should be granted because the undisputed facts demonstrate that Complainant is unable to prove all the necessary elements under the Acts. To receive protection under the Acts, a complainant must establish by a preponderance of the evidence that: (1) he engaged in protected activity; (2) his employer was aware of the protected activity; (3) his employer took some adverse employment action against him; and (4) circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. See Jenkins v. United States Envtl. Prot. Agency, ARB No. 98-146, ALJ No. 88-SWD-2 (ARB Feb. 28, 2003); 29 C.F.R. § 1980.104(b).

In order to prevail on its motion for summary decision, Respondent has the initial burden of showing that undisputed facts establish that one or more of the aforementioned elements is not established. If Respondent succeeds, Complainant may rebut this showing by setting forth specific facts establishing that there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

As part of his case Complainant must establish that adverse action was taken because of his protected activity. Yellow Freight Sys., Inc. v. Reich, 27 F.3d 1133, 1138 (6th Cir. 1994). To constitute blacklisting, there must be evidence of improper motivation. Garn v. Toledo Edison Co., 88-ERA-21 (Sec'y May 18, 1995). Through the affidavit of Susan Dietz, Respondent has shown that the negative information in the DAC Report submitted contrary to the Settlement Agreement was the result of an unintended computer error. Upon learning of the error, Respondent immediately corrected the DAC Report and offered to provide the corrected information to any prospective employer.

Despite having almost two months to respond, Complainant has not produced any evidence disputing Respondent's explanation for the release of the negative information or otherwise demonstrating that the release of the DAC Report was in retaliation for previous protected activity. Consequently, Complainant has not demonstrated any disputed issue of

material fact exists concerning Respondent's motivation for the release of the DAC Report. The undisputed facts show the negative information in the DAC Report was the result of an unintended computer error.

RECOMMENDED ORDER

The complaint of Fernando Demeco White is **DENIED**.

So **ORDERED**.

A

LARRY W. PRICE
Administrative Law Judge

LWP/lpr
Newport News, Virginia

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).