In the Matter of:

FERNANDO DEMECO WHITE,	**ARB CASE NO. 06-063**
COMPLAINANT,	**ALJ CASE NO. 2005-STA-065**
v.	**DATE: May 30, 2008**

J.B. HUNT TRANSPORT, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD:

Appearances:

For the Complainant:
Fernando Demeco White*, pro se, Lithonia, Georgia*

For the Respondent:
Brett A. Mendell, Esq., *Hawkins & Parnell, LLP, Atlanta Georgia*

FINAL DECISION AND ORDER

This case arises under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982 (STAA)[1] and its implementing

[1] 49 U.S.C.A. § 31105 (West 2008). The STAA has been amended since White filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide here whether the amendments are applicable to this complaint because even if the amendments applied to this complaint, they are not implicated by the summary judgment issue presented here and thus, would not affect our decision.

regulations.[2] Fernando Demeco White filed a complaint alleging that his former employer, J.B. Hunt Transport, Inc., violated the STAA by blacklisting him. On February 22, 2006, an Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) granting Hunt's Motion for Summary Judgment and denying White's complaint. We affirm the R. D. & O. and deny the complaint.

BACKGROUND

Hunt discharged White from employment on August 28, 2002. On or about September 19, 2002, White filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Hunt violated the STAA by discharging him. On January 25, 2005, we issued a Final Decision and Order approving a Mutual General Release, Settlement Agreement, and Covenant Not to Sue (Settlement Agreement) entered into by Hunt and White.[3] The Settlement Agreement indicates that "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."[4]

On June 21, 2005, White filed a new complaint, which is the subject of this case. In this complaint, White alleges that Hunt breached the Settlement Agreement and blacklisted him "by changing [his] work record … to reflect company policy violations…"[5] OSHA investigated the complaint and found that the alteration of White's work record was the result of an unintended computer error, and therefore was not retaliatory.[6] White requested a hearing before an ALJ, and the ALJ scheduled a hearing.

Prior to the hearing date, Hunt filed a Motion for Summary Judgment and Brief in Support Thereof (Motion), with attachments. According to Hunt, it is entitled to summary decision because the Secretary of Labor does not have jurisdiction over White's new complaint, and because there is no causal connection between the record alteration and any STAA-protected activity. In response to the Motion, White submitted a Brief in Opposition to Respondent's Motion for Summary Decision (Response), with

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[2] 29 C.F.R. Part 1978 (2007).

[3] *White v. J.B. Hunt Transport, Inc.*, ARB No. 04-118, ALJ No. 2003-STA-44 (ARB Jan. 25, 2005).

[4] *See* Settlement Agreement, ¶ 13.

[5] Complaint at 1.

[6] Secretary's Findings at 2.

attachments. White's attachments include copies of employment records from DAC Services dated May 12, 2004 and April 12, 2005.[7]

On February 22, 2006, the ALJ granted Hunt's Motion. The ALJ held that White failed to produce "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."[8] This case is now before us pursuant to the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (Board) her authority to issue final agency decisions under STAA.[9] We review a decision granting summary decision de novo. That is, the standard the ALJ applies, also governs our review.[10] The standard for granting summary decision under the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges is similar to that found in Federal Rule of Civil Procedure 56, which governs summary judgment in the federal courts. Accordingly, summary decision is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.[11] The determination of whether facts are material is based on the substantive law upon which each claim is based.[12] A genuine issue of a material fact is one, the resolution of which "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[13]

We view the evidence in the light most favorable to the non-moving party, and then determine whether there are any genuine issues of material fact and whether the ALJ

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[7] Response, Exhibits F and I.

[8] R. D. & O. at 3.

[9] Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(c)(1).

[10] 29 C.F.R. § 18.40 (2006).

[11] Fed. R. Civ. P. 56(c); 29 C.F.R. § 18.40(d); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[12] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[13] *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

correctly applied the relevant law.[14] To prevail on its motion for summary decision, Hunt must show that White failed to make a showing sufficient to establish the existence of an element essential to his STAA case, and on which he bears the burden of proof at trial.[15]

Furthermore, a party opposing a motion for summary decision may not rest upon the mere allegations or denials of its pleadings but must set forth specific facts which could support a finding that there is a genuine issue of fact for hearing.[16]

DISCUSSION

1. The Board Has Jurisdiction to Decide This Case.

Hunt first argues that we do not have jurisdiction to consider White's complaint because "the alleged violation stems from a previously resolved dispute."[17] According to Hunt, the release of the information contained in the DAC report "stems from [White's] September 13, 2002 complaint that was resolved by an ALJ-approved Settlement Agreement," and pursuant to that agreement, "the parties gave each other full release for all STAA violations."[18]

Hunt is correct that we do not have jurisdiction to determine whether Hunt has breached the Settlement Agreement. The STAA indicates that "[i]f a person fails to comply with an order issued under subsection (b) of this section [which references settlements], the Secretary [of Labor] shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred."[19] Thus the federal district courts, not this Board, have jurisdiction to consider actions based on alleged settlement breaches.[20]

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14 *Anderson*, 477 U.S. at 255.

15 *Celotex,* 477 U.S. at 322.

16 29 C.F.R. § 18.40(c); *see Anderson*, 477 U.S. at 252.

17 Motion at 5 (emphasis omitted).

18 *Id.* at 5-6.

19 49 U.S.C.A. § 31105(d).

20 *See, e.g., Taylor v. Greyhound Lines*, ARB No. 06-137, ALJ No. 2006-STA-19, slip op. at 4 (ARB Apr. 30, 2007) (also noting that the Secretary has not delegated to the Board her authority to bring actions in district court to enforce STAA settlements).

But the gravamen of White's current complaint is not that Hunt breached the Settlement Agreement. White alleges that Hunt committed a new STAA violation after he entered into the agreement. White could not release Hunt from liability for STAA claims that arose after approval of the Settlement Agreement,[21] and the terms of the agreement indicate that he did not intend to do so.[22]

Hunt further argues that we do not have jurisdiction because "the alleged conduct does not violate the [STAA]." But White alleges that Hunt blacklisted him. The STAA provides a cause of action on behalf of an employee when his former employer blacklists him for having engaged in protected activity.[23] Because we view the evidence in the light most favorable to the non-moving party, we will assume, for purposes of summary decision, that the alteration of White's employment record constitutes blacklisting.[24]

In sum, we conclude that we have jurisdiction to consider White's complaint.

2. White Failed to Create a Genuine Issue of Material Fact That Hunt Intentionally Blacklisted Him.

To prevail on his complaint, White must prove by a preponderance of the evidence that he engaged in activity protected by the STAA, that Hunt was aware of the protected activity, that he suffered an adverse action (i.e., discharge, discipline, or discrimination), and that Hunt took the adverse action because of his protected activity.[25]

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[21] *See, e.g., Floyd v. Bavarian Motor Transp.*, ARB No. 04-106, ALJ No. 2003-STA-52, slip op. at 2 (ARB July 22, 2004) (release of claims pursuant to a settlement agreement is interpreted as limiting the complainant's right to sue on matters "arising only out of facts, or any set of facts, occurring before the date of the settlement agreement").

[22] *See* Settlement Agreement, ¶ 2 ("It is the specific intent and purpose of J.B. Hunt and White to release and discharge each other from any and all claims and causes of action of any kind or nature whatsoever, which may exist or might be claimed to exist at or prior to the date hereof …").

[23] *See, e.g., Ramirez v. Frito-Lay, Inc.*, ARB No. 06-025, ALJ No. 2005-STA-37, slip op. at 5 (ARB Nov. 30, 2006); *Murphy*, slip op. at 4; *Anderson v. Jaro Transp. Servs.*, ARB No. 05-011, ALJ Nos. 2004-STA-2 and 3, slip op. at 6 (ARB Nov. 30, 2005).

[24] We have held that "[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." *See, e.g., Murphy v. Atlas Motor Coaches, Inc.*, ARB No. 05-055, ALJ No. 2004-STA-36, slip op. at 5 (ARB July 31, 2006).

[25] *Ridgley v. C. J. Dannemiller*, ARB No. 05-063, ALJ No. 2004-STA-053, slip op. at 5 (ARB May 24, 2007).

Because STAA-protected activity must be the reason for the adverse action, intentional retaliation is an essential element of White's case.

White engaged in protected activity by filing a STAA complaint in September, 2002, and he alleges that he suffered an adverse action because Hunt blacklisted him. But to prevail on summary decision, Hunt need only demonstrate a complete failure of proof concerning an essential element of White's case. In moving for summary decision, Hunt produced evidence that it did not intentionally retaliate against White.

Hunt submitted an affidavit from Susan Dietz, its Director of Compliance, in which she describes the change to White's employment report as the result of new computer software that was installed on Hunt's company network on or about December 1, 2004. Dietz states that Hunt was not aware of the change "until Complainant contacted the Company's legal counsel in April regarding the same."[26] She also testifies that Hunt "immediately corrected the information it provided to USIS for its DAC Report."[27]

Because Hunt submitted admissible evidence that it did not intentionally retaliate against White, the burden shifted to White to produce enough evidence to create a triable issue of fact regarding Hunt's intent to blacklist him. He failed to do so.

White submitted copies of his DAC Services employment records from May 12, 2004 and April 12, 2005. Under the category "Work Record," the 2004 record includes the word "Satisfactory," while the 2005 record includes the words "Company Policy Violation."[28] Although this evidence shows a change in his work record, White submitted no evidence demonstrating that Hunt intentionally disseminated any information that caused the change.

Because White failed to adduce evidence countering Hunt's affidavit and pleadings, he has raised no genuine issue of material fact regarding an essential element of his claim: that Hunt subjected him to an adverse employment action because he engaged in STAA-protected activity. Therefore, all other facts alleged by White are immaterial, and Hunt is entitled to summary decision.

CONCLUSION

White has not presented sufficient evidence to create a genuine issue of fact that Hunt intentionally retaliated against him because he engaged in STAA-protected activity, an essential element of his case. Hunt is therefore entitled to summary decision.

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[26] Affidavit of Susan Dietz, ¶ 4.

[27] *Id.*, ¶ 5.

[28] Response, Exhibits F and I.

Accordingly, we **AFFIRM** the R. D. & O. granting Hunt's Motion and **DENY** White's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge