In the Matter of:

RICK JACKSON,	**ARB CASE NO. 07-011**
COMPLAINANT,	**ALJ CASE NO. 2005-STA-044**
v.	
	ARB CASE NO. 08-052
SMEDEMA TRUCKING, INC.,	
	ALJ CASE NO. 2006-STA-036
RESPONDENT.	**DATE: September 30, 2008**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Rick Jackson, *pro se*, Janesville, Wisconsin

For the Respondent:
Edward A. Corcoran, *Esq., Brennan, Steil & Basting, S.C.*, Madison, Wisconsin

ORDER OF CONSOLIDATION AND FINAL DECISION AND ORDER

Rick Jackson complains that Smedema Trucking violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended 49 U.S.C.A. § 31105 (West 2005)[1] and its implementing regulations, 29 C.F.R. Part 1978 (2007), when it discharged him for complaining about violations of Department of Transportation (DOT)

[1] The STAA has been amended since Jackson filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Even if the amendments were applicable to this complaint, they would not affect our decision.

maximum driving times and for filing a previous complaint against Smedema. An Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) on October 16, 2006, granting summary decision (judgment) to Smedema on the ground that Jackson failed to produce a genuine issue of material fact that Smedema violated the STAA (*Jackson I*, ARB No. 07-011). We affirm. While his first case was pending, Jackson filed another complaint against Smedema alleging that Smedema blacklisted him in violation of the STAA. A second ALJ again granted summary decision to Smedema on February 6, 2008 (*Jackson II*, ARB No. 08-052). We again affirm.

BACKGROUND

The following undisputed facts appear in the record. Smedema hired Jackson on March 16, 2005. Shortly after his hire, Smedema terminated Jackson on March 28, 2005. Jackson filed a complaint alleging he was retaliated against for making safety complaints. As part of a settlement agreement resolving the termination, Smedema reinstated Jackson on April 4, 2005. An audit of Jackson's driving records up to that point revealed several serious violations, including log falsification. Department of Labor Occupational Safety and Health Administration (OSHA) Order (*Jackson I*) at 2. Upon his return to work, Smedema warned Jackson about the previous violations and had him sign a notice confirming the warning. Deposition (Dep.) (*Jackson I*) Exhibit (Ex.) 7. On April 13, 2005, Smedema informed Jackson that they were pulling him from the Chicago run due to performance concerns and his inability to complete trips in a timely fashion. R. D. & O. (*Jackson I*) at 2. When disputing the perception of his timeliness, Jackson admitted he intentionally falsified logs "to show that the constant dispatch back and forth from Chicago was illegal" and to provide evidence that can be used against Smedema. R. D. & O. (*Jackson I*) at 3; Complainant's Exhibit (CX)-3; Dep. (*Jackson I*) at 184. On April 14, 2005, Smedema terminated Jackson a second time for intentionally falsifying logs.

On May 9, 2005, Jackson filed a complaint with OSHA (*Jackson I*). In that complaint, Jackson alleged that his April 14th termination was retaliation for complaining about violations of DOT's maximum driving times and for filing an earlier complaint against Smedema. OSHA Order (*Jackson I*) at 1-2. Following an investigation, OSHA denied Jackson's complaint on June 3, 2005. Jackson filed objections and requested a hearing before an ALJ. Smedema filed a motion for summary decision with supporting evidence. Jackson filed a reply with supporting evidence. The ALJ issued an R. D. & O. (*Jackson I*) in favor of Smedema.

While the second case was still pending, Jackson filed another OSHA complaint (*Jackson II*) against Smedema. In that complaint, Jackson alleged that Smedema or its attorney contacted his then current employer, SNE Transportation, whom he had worked for since November 9, 2005, and provided information that resulted in his November 30, 2005 termination from SNE. R. D. & O. (*Jackson II*) at 2. OSHA investigated and dismissed the complaint on June 6, 2006. OSHA Order (*Jackson II*) at 3. Jackson again filed objections. The ALJ assigned to the case, by way of pre-hearing order, set a discovery and pleadings timeline. July 5, 2006 Pre-Hearing Order at 2. After the discovery deadline passed, Smedema moved for summary decision. Jackson replied requesting additional time for discovery. The ALJ denied the extension for discovery, but granted Jackson additional time to file a response to the motion for summary

decision. Nov. 15, 2006 Order Den. Mot. for Add'l Disc. & Ext. of Time. On November 27, 2006, Jackson responded to the motion for summary decision without addressing the merits and without providing supporting evidence. The ALJ granted summary decision to Smedema.

DISCUSSION

In view of the commonality of much of the evidence, and in the interest of judicial and administrative economy, we consolidate Jackson's appeals in his two complaints (*Jackson I* and *II*) for the purpose of review and decision. *Harvey v. Home Depot*, ARB Nos. 04-114, 115, ALJ Nos. 2004-SOX-020, -036, slip op. at 8 (ARB June 2, 2006); *Agosto v. Consol. Edison Co. Inc.*, ARB Nos. 98-007, 152; ALJ Nos. 1996-ERA-002, 1997-ERA-054, slip op. at 2 (ARB July 27, 1999).

The Secretary of Labor has delegated to the Administrative Review Board (ARB or Board) the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part § 1978. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct.17, 2002). This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).

We review an ALJ's recommended grant of summary decision de novo. *King v. BP Prod. N. Am., Inc.*, ARB No. 05-149, ALJ No. 2005-CAA-005, slip op. at 4 (ARB July 22, 2008). Under 29 C.F.R. § 18.40(d), "[t]he administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Moreover, "a party opposing the motion may not rest upon the mere allegations or denials of such pleading." *Id.* at § 18.40(c).

To prevail on a claim of unlawful discrimination under the STAA's whistleblower protection provisions, the complainant must allege and later prove by a preponderance of the evidence that he is an employee and the respondent is an employer; that he engaged in protected activity; that his employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against him regarding pay, terms, or privileges of employment; and that the protected activity was the reason for the adverse action. *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. at 12-13 (ARB May 24, 2007); *Eash v. Roadway Express*, ARB No. 04-063, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005); *Forrest v. Dallas & Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-053, slip op. at 3-4 (ARB July 29, 2005); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. Nat'l Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004). If the complainant fails to allege and prove one of these requisite elements, his entire claim must fail. *Cf. Forrest*, slip op. at 4.

The employee activities the STAA protects include: (1) making a complaint or initiating a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order," 49 U.S.C.A. § 31105(a)(1)(A); (2) "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial

motor vehicle safety or health," 49 U.S.C.A. § 31105(a)(1)(B)(i); or "refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition," 49 U.S.C.A. § 31105(a)(1)(B)(ii). The STAA further provides a cause of action on behalf of an employee when his former employer blacklists him for having engaged in protected activity. *Ramirez v. Frito-Lay, Inc.*, ARB No. 06-025, ALJ No. 2005-STA-037, slip op. at 5 (ARB Nov. 30, 2006); *Murphy v. Atlas Motor Coaches, Inc.*, ARB No. 05-055, ALJ No. 2004-STA-036, slip op. at 5 (ARB July 31, 2006). We have said, "[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." *Murphy*, slip op. at 5.

Jackson I

It is not disputed that Jackson was an employee and Smedema was an employer covered under the STAA. The ALJ noted that there was a showing of protected activity for purposes of summary decision where Jackson had previously filed a complaint against Smedema. R. D. & O. (*Jackson I*) at 8; § 31105(a)(1)(A). There was no refusal to drive, therefore, as the ALJ concluded, any protected activity would have to fall under § 31105(a)(1)(B). R. D. & O. (*Jackson I*) at 6 n.9.

Smedema presented evidence that Jackson was terminated because he falsified logs in violation of DOT regulations. 49 C.F.R. § 395.8 (2005). The ALJ found that Jackson failed to put forth evidence which, giving all favorable inferences to Jackson, raised a genuine issue of material fact that Smedema terminated Jackson because Jackson filed a complaint against Smedema. We agree with the ALJ. Upon reinstatement from his first termination, Jackson signed a written warning listing his previous log violations including log falsification. R. D. & O. (*Jackson I*) at 9-10; CX-3; Dep. (*Jackson I*) at 154-55; Dep. (*Jackson I*), Ex. n.7. Jackson expressly admitted that he intentionally falsified the logs to provide a "smoking gun" against Smedema in subsequent audits and that he had done this to "half a dozen" or more employers. Dep. (*Jackson I*) at 184.

The ALJ further rejected Jackson's claim that Smedema's purported reason for terminating him was pretextual. We again agree with the ALJ. Jackson offered, as evidence of pretext, a response that no other employee had been fired for log falsification and that Jackson was not fired on the spot but instead was fired the next day, April 14. CX-3 at 2. Jackson's evidence, however, fails to raise a genuine issue of material fact. The fact that Smedema did not terminate Jackson on the spot but instead waited until the next day to terminate him does not provide probative evidence of pretext. Furthermore, Jackson has offered no evidence of similarly situated drivers cited for intentionally falsifying their logs to provide evidence against the company. Smedema's Driver Handbook indicates that intentional or willful misconduct may result in immediate dismissal. Respondent's Exhibit (RX)-3, No.3, at 14. Based on the foregoing, we affirm the ALJ's grant of summary decision in favor of Smedema (*Jackson I*).

Jackson II

In the *Jackson II* OSHA complaint against Smedema, Jackson alleges that Smedema or its attorney contacted SNE Transportation providing information that resulted in his termination from SNE. OSHA investigated and dismissed the complaint finding that Smedema did not blacklist Jackson and that the more likely reason for his subsequent termination from SNE Transportation is the discovery of Jackson's admitted falsification of his SNE employment application. OSHA Order (*Jackson II*) at 3.

The ALJ assigned to *Jackson II* issued a pre-hearing order on July 5, 2006, setting an extended discovery and hearing timetable due to Jackson's heavy litigation schedule. July 5, 2006 Pre-Hearing Order at 2. He set the discovery deadline for October 10, 2006. After the discovery deadline passed, Smedema moved for summary decision providing affidavits stating that neither Smedema nor its attorney contacted SNE and providing evidence suggesting that SNE fired Jackson for falsifying his job application. R. D. & O. (*Jackson II*) at 7.

On November 3, 2006, Jackson replied to the summary decision motion arguing that Smedema had not complied with Federal Rule of Civil Procedure 56(e) in moving for summary decision where it failed to supply an entire deposition in addition to the portions of the deposition relied upon in the motion and relied upon facts not in the record. Nov. 3, 2006 Resp. to Mot. for Summ. Dec. Jackson further requested a forty-five day extension to file his response to the motion for summary decision. Smedema responded, objecting to the extension and the request for the entire transcript. The ALJ denied requests for additional discovery and denied the request for an extension of forty-five days to file his response. Nov. 15, 2006 Order Den. Mot. for Add'l Disc. & Ext. of Time. The ALJ, however, did give Jackson an additional ten days to respond to the motion. On November 27, Jackson filed a one-page response rehashing his November 3 objections but failing to respond to the merits of the motion for summary decision on the blacklisting claim. The ALJ thus granted summary decision. R. D. & O. (*Jackson II*) at 8.

In his brief to the Board, Jackson raises the Fed. R. Civ. P. 56(e) claim alleging Smedema did not complete his discovery request. Brief (*Jackson II*) at 1-2. As a matter of procedure, we note that ALJ Rules 29 C.F.R. §§ 18.40 and 18.41 provide the applicable standard for summary decision. Further, as to discovery motions, the Board has held that ALJs have wide discretion to limit the scope of discovery and will be reversed only when such evidentiary rulings are arbitrary or an abuse of discretion. *Robinson v. Martin Marietta Servs., Inc.*, ARB No. 96-075, ALJ No. 1994-TSC-007, slip op. at 4 (ARB Sept. 23, 1996). The ALJ refused the request for additional discovery, noting that both parties agreed to the extended discovery timetable. We conclude that the ALJ did not abuse his discretion in refusing additional discovery.

In the two-page brief to the Board, Jackson again fails to put forth any evidence or even discuss the merits of his blacklisting claim against SNE Transportation. In response to the motion for summary decision, Jackson has only offered his mere speculation that someone from Smedema contacted SNE. R. D. & O. (*Jackson II*) at 7. We therefore affirm the ALJ's grant of summary decision in *Jackson II*.

Sanctions

In both *Jackson I* and *II*, Smedema asked the ALJ for Fed. R. Civ. P. Rule 11 sanctions where Jackson filed a claim of retaliation but admitted that he intentionally falsified driving logs to provide evidence of a DOT violation and that he had done this several times before. Jackson also admitted filing roughly forty complaints against various employers in the last five years. Dep. (*Jackson I*) at 60; Mot. for Summ. Dec. (*Jackson I*) at 12. Both ALJs ultimately concluded that Jackson's claims were without merit and that Jackson appeared to be abusing the legal system, but that an ALJ does not have the power to award monetary sanctions.[2] We too conclude that an ALJ, absent statutory authority, does not have authority to award monetary sanctions. *Windhauser v. Trane*, ARB No. 05-127, ALJ No. 2005-SOX-017, slip op. at 3-4 (ARB Oct. 31, 2007) (vacating monetary sanctions).

CONCLUSION

Accordingly, we **AFFIRM** both of the R. D. & Os. granting summary decision in favor of Smedema, and **DENY** Jackson's complaints. We further **DENY** Smedema's motions for sanctions.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[2] The ALJ in *Jackson II* attempted to certify the issue of Rule 11 sanctions to the Western District Court of Wisconsin. *Jackson v. Smedema Trucking, Inc.*, 536 F. Supp. 2d 1009 (W.D. Wis. 2008). The district court refused to award Rule 11 sanctions for procedural reasons.