



**In the Matter of:**

**FERNANDO DEMECO WHITE,**

**ARB CASE NO. 07-035**

**COMPLAINANT**

**ALJ CASE NO. 2006-STA-048**

**v.**

**DATE: November 20, 2008**

**GRESH TRANSPORT, INC.,  
FEDERAL FREIGHT SYSTEMS, INC.,  
and UNITED FREIGHT, INC.,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD:**

**Appearances:**

***For the Complainant:***

**Fernando Demeco White, *pro se*, Lithonia, Georgia**

***For the Respondent:***

**Anderson B. Scott, Esq., *Fisher & Philips LLP*, Atlanta, Georgia**

**ORDER OF REMAND**

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

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<sup>1</sup> 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.<sup>2</sup> Fernando Demeco White filed a complaint alleging that Gresh Transport, Inc., Federal Freight Systems, Inc., and United Freight, Inc. (Respondents) violated the STAA by discharging him from employment. The Respondents filed a Motion for Summary Decision, requesting dismissal of the complaint. An Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) granting the Motion. For the following reasons, we affirm in part and reverse in part, and remand the case to the ALJ.

## BACKGROUND

White, a driver employed by the Respondents, refused to drive one of their vehicles from Littleton, Massachusetts to Dothan, Alabama on January 27, 2006. According to White, the condition of the vehicle, in addition to adverse weather conditions, precluded him from completing a delivery. The Respondents discharged White on January 29, 2006, and White filed a complaint with the Occupational Safety and Health Administration (OSHA) on May 19, 2006, alleging that his discharge violated the STAA.

OSHA investigated the complaint and issued its findings on August 23, 2006. According to its findings, a mechanic and a Massachusetts state trooper inspected the vehicle on January 27, 2006, and neither found the vehicle to be unsafe to drive. OSHA also found that there were no adverse weather conditions in Littleton, Massachusetts between January 25 and 29, 2006, as White alleged. OSHA noted that White had a doctor's appointment in the Littleton area around January 29, and had expressed a desire to stay in the area. OSHA denied White's complaint, and White requested a hearing before an ALJ.

The ALJ scheduled a hearing on White's complaint. Prior to the hearing date, the Respondents filed a Motion for Summary Decision (Motion), with attachments. According to the Respondents, White filed for bankruptcy in 2005 and, when he reopened his bankruptcy case in July 2006, he failed to disclose this STAA case before the Labor Department to the bankruptcy court. They argue that, because of this failure to disclose, White is judicially estopped from asserting a STAA claim against them. White submitted a Response to Respondent's Motion for Summary Decision (Response to the Motion), with attachments. According to White, he was not required to disclose this STAA case to the bankruptcy court, therefore the doctrine of judicial estoppel is inapplicable.

The ALJ issued his R. D. & O. on December 14, 2006, granting the Respondent's Motion. The ALJ held that White's STAA claim should be dismissed, pursuant to the doctrine of judicial estoppel, because he failed to disclose it to the bankruptcy court. 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).

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<sup>2</sup> 29 C.F.R. Part 1978 (2007).

## 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.<sup>3</sup> We review a decision granting summary decision de novo. That is, the standard the ALJ applies, also governs our review.<sup>4</sup> 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.<sup>5</sup>

## DISCUSSION

White filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Georgia on February 22, 2005. That bankruptcy case was reopened on July 21, 2006. After reopening the bankruptcy case, White informed the bankruptcy court of the STAA claim he filed in *White v. Naturally Fresh*, 2006-STA-006, but not the claim he had filed against the Respondents on May 19, 2006.

The Respondents argue in their Motion that, when White filed for bankruptcy, the bankruptcy code required him to file a list of creditors and a schedule of assets and liabilities with the bankruptcy court. They state that the schedule should have apprised the bankruptcy court of White's legal and equitable matters, such as this STAA case, and that White had an ongoing duty to amend his bankruptcy filings if there were any changes to the information he provided.<sup>6</sup>

The Respondents are correct in their assertion that White was required to disclose the STAA claim that is the subject of this case to the bankruptcy court when he reopened

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<sup>3</sup> Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(c)(1).

<sup>4</sup> 29 C.F.R. § 18.40 (2008).

<sup>5</sup> 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).

<sup>6</sup> Motion at 6.

his Chapter 7 case. The bankruptcy code indicates that debtors seeking bankruptcy protection are required to disclose all assets, including potential assets, to the bankruptcy court.<sup>7</sup> This duty to disclose “is a continuing one that does not end once the forms are submitted to the bankruptcy court; rather, a debtor must amend his financial statements if circumstances change.”<sup>8</sup>

In his Response to the Motion, White states that he had no obligation to disclose this STAA matter because it arose after he filed his initial petition.<sup>9</sup> But this STAA matter was pending while his Chapter 7 case was open. As stated above, he had a duty to list potential assets and amend his filings if there were any changes to the information he provided to the bankruptcy court.

The Respondents argue that, because White concealed this STAA claim during his bankruptcy proceedings, he is judicially estopped from asserting it before the ALJ and this Board.<sup>10</sup> Judicial estoppel is an equitable doctrine that prohibits a party from asserting a position in a legal proceeding that is inconsistent with a position the party took in a previous proceeding.<sup>11</sup> The purpose of judicial estoppel is to “protect the integrity of the judicial process ... by prohibiting parties from deliberately changing positions according to the exigencies of the moment.”<sup>12</sup>

In support of their argument that White is judicially estopped from proceeding with his STAA claim, the Respondents cite to decisions by the Eleventh Circuit Court of Appeals, including *Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003) and *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002). We conclude that, like the plaintiffs in *Barger* and *Burnes*, White is estopped from recovering any monetary damages on his STAA complaint against the Respondents, but we do not dismiss his entire STAA claim.

In *Burnes*, the plaintiff filed for bankruptcy under Chapter 13, and later converted the Chapter 13 bankruptcy into one under Chapter 7. The plaintiff failed to amend his bankruptcy filings to inform the bankruptcy court of an employment discrimination suit

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<sup>7</sup> 11 U.S.C.A. §§ 521(a)(1), 541(a)(7); *see, e.g., Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002).

<sup>8</sup> *Burnes* at 1286.

<sup>9</sup> Response to Respondent’s Motion at 6.

<sup>10</sup> Motion at 10.

<sup>11</sup> *Zedner v. U.S.*, 547 U.S. 489, 504 (2006); *Ajaka v. Brooksamerica Mortg. Corp.*, 453 F.3d 1339, 1334-35 (11th Cir. 2006); *Burnes* at 1285.

<sup>12</sup> *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001).

he had filed 6 months after the initial Chapter 13 filing. The court held that the plaintiff was required to report the discrimination case to the bankruptcy court, it invoked judicial estoppel to bar his request for monetary relief pursuant to the discrimination claim.

White had the same obligation to disclose all of his STAA claims to the bankruptcy court when he reopened his Chapter 7 case because, as stated above, his duty to disclose potential assets was a continuing one that required him to amend his financial statements if his circumstances changed. As the Eleventh Circuit noted in *Burnes*, “[a] bankruptcy court must be confident that it has the full and honest disclosure of the debtor concerning any potential assets that could increase the value of the estate for the creditors.”<sup>13</sup> We grant the Respondent’s Motion with respect to White’s claim for monetary relief because the doctrine of judicial estoppel precludes him from recovering monetary damages on this STAA claim, which he failed to disclose to the bankruptcy court.

Although the doctrine of judicial estoppel applies to White’s request for monetary damages, the cases the Respondents cited do not support their argument that White’s entire STAA case should be dismissed. Both *Barger* and *Burnes* indicate that judicial estoppel is not applicable to requests for injunctive relief, and White has made such a request in the case before us.

In *Barger*, the plaintiff filed an employment discrimination suit seeking monetary damages and reinstatement. She later filed for Chapter 7 bankruptcy without informing the bankruptcy court of her discrimination claim. The Eleventh Circuit dismissed Barger’s claim for monetary damages, but held that Barger’s request for reinstatement would have added nothing of value to the bankruptcy estate even if she had properly disclosed it. The circuit court concluded that judicial estoppel did not prohibit Barger from pursuing the remainder of her discrimination claim, and remanded the case to the district court to resolve the issue of reinstatement.<sup>14</sup>

In the Pre-Hearing Statement he submitted to the ALJ, White requested reinstatement to his former position.<sup>15</sup> The Respondents have presented no other grounds, other than judicial estoppel, for summary decision on White’s complaint. We therefore cannot grant the Motion as submitted by the Respondents, and must remand the case to the ALJ for resolution of White’s request for reinstatement.

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<sup>13</sup> *Burnes* at 1289, citing *New Hampshire* at 749-50.

<sup>14</sup> *Barger*, 348 F. 3d at 1297.

<sup>15</sup> See Pre-Hearing Statement at 13-14.

## CONCLUSION

We **GRANT** the Respondent's Motion for Summary Decision on White's request for any monetary damages that may have resulted from his termination from employment. We **DENY** the Motion with respect to dismissal of White's STAA claim and **REMAND** the case to the ALJ on the issue of reinstatement. In remanding the case, we emphasize that we have reached no conclusion regarding the merits of White's complaint.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**