In the Matter of:

FERNANDO D. WHITE, **ARB CASE NO. 10-043**

COMPLAINANT, **ALJ CASE NO. 2009-STA-063**

v. **DATE: October 26, 2011**

EXPERT MOVING & DELIVERY, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

For the Respondent:
Felix Mbe, *pro se,* Lilburn, Georgia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Lisa Edwards Wilson, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

Fernando D. White filed a complaint against Expert Moving and Delivery, Inc. (Expert), under the whistleblower protection provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended, and its implementing regulations.[1] He

[1] 49 U.S.C.A. § 31105 (Thomson/West 2011); 29 C.F.R. Part 1978 (2011).

alleged that Expert fired him in reprisal for refusing to operate an unsafe truck. The Department of Labor's Occupational Safety and Health Administration (OSHA) dismissed the complaint, and White requested a hearing before an Administrative Law Judge (ALJ). Prior to the scheduled hearing, White and Expert filed motions for summary decision pursuant to 29 C.F.R. § 18.40(a).[2] Expert moved to dismiss the case, and White moved for partial summary decision or, in the alternative, to continue proceedings pending discovery. The ALJ cancelled the hearing, granted Expert's motion, and dismissed the complaint pursuant to a Recommended Order Dismissing Complaint with Prejudice issued December 3, 2009. The case is now before the Administrative Review Board (ARB) for automatic review under the STAA.[3] We vacate the ALJ's recommended decision and remand the case to the ALJ for further consideration consistent with this Decision and Remand Order.

BACKGROUND

We derive the following background information from White's complaint and the documents the parties submitted in support of and in opposition to their respective motions. White began driving for Expert as a commercial truck driver on May 13, 2008. On September 19, 2008, White departed for Gramercy, Louisiana, to pick up a load bound for the New York area. Over that day and on September 20 and 21, White and Felix Mbe, White's supervisor and owner of the company, exchanged a series of e-mail messages[4] about a problem that White encountered with the truck's operation.[5] The

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[2] 29 C.F.R. § 18.40 provides:

> (a) Any party may, at least twenty (20) days before the date fixed for any hearing, move with or without supporting affidavits for a summary decision on all or any part of the proceeding. Any other party may, within ten (10) days after service of the motion, serve opposing affidavits or countermove for summary decision. The administrative law judge may set the matter for argument and/or call for submission of briefs.

[3] 29 C.F.R. § 1978.109(c)(1). The automatic review provision has since been replaced by 29 C.F.R. § 1978.100(a) (2011), requiring appeal by a party aggrieved by the ALJ's decision and order.

[4] Communication by way of electronic mail and mobile telephone with Mbe was standard operating procedure for White while on the road. Complainant's Affidavit at 8.

[5] Exhibit L, Complainant's Motion for Partial Summary Judgment.

evening of September 19 White e-mailed Mbe informing him that the truck's signal and hazard lights were not working properly. White requested that Mbe send road service. Mbe responded with instructions that White return the vehicle during daylight hours on September 20. In response, White informed Mbe that he would not drive during daylight without properly working signal lights.

About noon on September 20, Mbe informed White that road service was on the way, and requested the address and contact information for the truck stop where White was located. Upon receiving the requested information, Mbe instructed White to lock the truck where it was and return home. Mbe stated that he would retrieve the truck.

Mid-afternoon on September 20, Mbe informed White that road service would not be available until noon the next day and advised White to rent a car to drive home given White's need to return for a pending court appearance. In response to White's subsequent e-mail questioning Mbe's instructions, Mbe repeated his instructions, advised White that he would fix the truck "next week," and further instructed White to lock everything belonging to Expert inside the truck and "head home." That evening White e-mailed Mbe informing him that he had been unable to secure a rental car, and that he would stay with the truck until the next morning when he anticipated that the police would impound the vehicle.

The morning of September 21, White e-mailed Mbe inquiring whether his failure to follow Mbe's "drive-in-daylight directive caused me to loss [sic] this job, yes or no?" White also informed Mbe that he would catch a ride with the police when they arrived to a location where he could secure transpiration home. In a second e-mail White asked Mbe: "If I am no longer employed by you just let me know and I can go on with my life." Having received no response to his e-mails, White again e-mailed Mbe stating: "I have no choice but to take your no response as Yes at this point, I'm sure the court would agree." Mbe did not respond to this e-mail either.

Mbe departed for the truck stop to retrieve the truck the evening of September 21, and arrived about 10:30 a.m. on Sunday. White was not with the truck, which Mbe then drove back to Georgia.

White filed his STAA complaint with OSHA on September 26, 2008, claiming that Mbe fired him on September 20, 2008, because he refused to drive a vehicle he believed to be unsafe.[6] On July 1, 2009, OSHA dismissed his complaint. White timely objected and requested a hearing before an ALJ. Following submissions by both parties

[6] The complaint is a one-page form that alleged that Expert fired White for refusing to drive a vehicle in violation of federal highway regulations and left him in Louisiana to find his own way home.

of motions for summary decision, the ALJ granted Expert's motion and dismissed White's complaint.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the STAA.[7] The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge.[8] An ALJ's recommended decision granting summary decision is subject to de novo review.[9]

DISCUSSION

The ARB standard for granting summary decision[10] is essentially the same as that governing summary judgment in the federal courts.[11] Summary decision is appropriate 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 a party is entitled to summary decision."[12] The determination of whether facts are material is based on the substantive law upon which each claim is based. A genuine issue of material fact arises when the resolution of the fact "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[13] Thus, to avoid summary decision, White does not have to show that he will ultimately prevail on the merits of his

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[7] Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

[8] 29 C.F.R. § 1978.109(c).

[9] *White v. Gresh Transp., Inc.*, ARB No. 10-096, ALJ No. 2006-STA-048, slip at 6 (ARB Aug. 30, 2011).

[10] 29 C.F.R. § 18.40.

[11] Fed. R. Civ. P. 56.

[12] 29 C.F.R. § 18.40(c).

[13] *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 4 (ARB Apr. 30, 2010).

complaint; rather, he need only demonstrate the existence of a factual dispute regarding a required element of his complaint that could affect the outcome of the case.[14]

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who "refuses 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;" or who "refuses 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."[15]

To prevail on a STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity; that the employer discharged, disciplined, or discriminated against him regarding his pay or terms or privileges of employment; and that the employee's protected activity was a contributing factor in the adverse employment action.[16] Once the employee has established that the protected activity was a contributing factor in the employer's decision to take adverse action, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.[17]

In this case, the ALJ stated that in evaluating Expert's motion to dismiss, the evidence would be construed in the light most favorable to White. The ALJ nevertheless concluded that White failed to establish that Expert terminated his employment prior to White's filing of his complaint, and thus dismissed White's complaint because he failed to establish that the Respondent took any adverse action against him within 180 days preceding White's filing on September 26, 2008 of his complaint. The ALJ added, "In that the Complainant . . . has failed to establish a prima facie case, the Respondent's evidentiary submissions are considered only to the extent that the Respondent contests

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[14] *Vinnett v. Mitsubishi Power Sys.*, ARB No. 08-104, ALJ No. 2006-ERA-029, slip op at 7 (ARB July 27, 2010).

[15] 49 U.S.C.A. § 31105(a)(1).

[16] *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011); *Riess v. NuCor Corp*., ARB No. 08-137, ALJ No. 2008-STA-011, slip op. at 4 (ARB Nov. 30, 2010).

[17] *Bailey v. Koch Foods*, ARB No. 10-001, ALJ No. 2008-STA-061, slip op. at 4. (ARB, Sept. 30, 2011).

that the Complainant suffered an adverse employment action until after December 18, 2008."[18]

Reviewing the evidentiary record as a whole, we conclude that there is a genuine issue of material fact regarding whether Expert fired White prior to White's filing of his complaint with OSHA. The ALJ decided in favor of Expert based on Mbe's affidavit and two documents - a Bank of America payroll reminder and a copy of a policy change request to Expert's trucking insurance carrier. The bank reminder statement dated December 15, 2008, lists two employees, White and Megne Emilie, and notes that paychecks for the employees' direct deposit on December 19, 2008, must be approved and the money must be available by 8:00 p.m. on December 17 for the pay period December 8-14, 2008. The insurance policy change form dated January 16, 2009, requests that the carrier delete White's name and add Calvin R. Espeut's. While these documents tend to show that White remained on Expert's payroll and insurance for several months after September 21, 2008, they do not prove that Expert actually paid any wages to White nor do they necessarily establish that Expert did not terminate White's employment prior to the filing of his STAA complaint with OSHA.

The ALJ also relied on Mbe's affidavit stating that White's employment was not terminated as White asserted, to which White countered with the exchange of e-mails between them over the weekend of September 20-21, 2008, and a document showing that the Georgia Department of Labor granted White unemployment benefits as of September 28, 2008.[19]

The documents on which White relies do not necessarily prove that Expert terminated White's employment prior to the filing of his OSHA complaint. At the same time, they do not establish that Expert did not fire White as alleged. The e-mails indicate that Mbe wanted White to drive the truck with faulty signal lights, and that White was concerned about whether he had a job after insisting that the truck be fixed before he drove. Because of his concern, White sent three e-mails early on Sunday inquiring about his job status, which Mbe admitted receiving but to which he did not respond.

Based upon Mbe's lack of any response, either then or afterwards, it was most reasonable on White's part to conclude that Expert no longer employed him. Moreover, the fact that White immediately sought and obtained unemployment benefits would appear to substantiate his assertion that his employment was terminated. However, and more to the point for purposes of assessing whether the ALJ's dismissal was appropriate, these e-mails, plus the documents that both parties submitted and their conflicting assertions about each other's actions on September 20-21, 2008, raise a genuine dispute

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[18] Order at 8.

[19] Exhibit L, Complainant's Motion for Partial Summary Judgment.

about the motivation and intent of both parties regarding White's employment, and whether he was or was not terminated from employment prior to the filing of this action. Such conflicting evidence precludes summary decision and requires an evidentiary hearing to resolve.[20]

The ALJ also erred in his analysis regarding White's burden of proof under STAA. The ALJ referred to White's failure to establish a prima facie case and stated that White had to prove a causal connection between his protected activity and the adverse action. However, on August 3, 2007, Congress amended the STAA to include the legal burdens of proof under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[21] As a result, the burden of proof required of a complainant has been lessened to the requirement that he must merely prove, by a preponderance of the evidence, that protected activity was a "contributing factor" in the adverse action taken against him.[22] The imposition by the ALJ of the pre-amendment, burden-of-proof standard thus constitutes additional grounds for finding reversible error.[23]

Therefore, on remand, the ALJ shall afford the parties a full evidentiary hearing after permitting them to engage in appropriate discovery[24] and determine whether White established that he engaged in activity the STAA protects, that Expert took adverse action against him, and that White's protected activity was a contributing factor in Expert's action.

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[20] *Vannoy v. Celanese Corp*., ARB No. 11-044, ALJ No. 2010-CAA-004, slip op. at 15-16 (ARB Sept. 28, 2011).

[21] Pursuant to the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (Aug. 3, 2007), STAA was recodified at 49 U.S.C.A. § 31105, with the burdens of proof standard amended to incorporate the AIR 21 standards set forth at 49 U.S.C.A. § 42121(b) (Thomson/West 2007). *See* 49 U.S.C.A. § 31105(b)(1). *Salata v. City Concrete*, ARB No. 08-101, ALJ No. 2008-STA-012, slip op. at 8 (ARB Sept. 15, 2011).

[22] *Bailey*, ARB No. 10-001, slip op. at 4. *See* 75 Fed. Reg. 53550 (Aug. 31, 2010); *see Reiss*, ARB No. 08-137, slip op at 4 (ALJ directed on remand to apply the STAA currently in effect).

[23] *See Williams v. Am. Airlines,* ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 9 (ARB Dec. 29, 2010) (ALJ's failure to afford respondent an opportunity to be heard on issue of adverse action was reversible error).

[24] *See* 29 C.F.R. §§ 18.13 (discovery methods), 18.14 (scope of discovery), 18.18 (written interrogatories to parties), and 18.22 (depositions).

CONCLUSION

The evidence of record demonstrates a genuine issue of material fact with regard to whether Expert terminated White's employment prior to the filing of his claim with OSHA, thus precluding the grant of summary dismissal. Should the ALJ find on remand after further evidentiary development and allowance for such additional discovery as may be required[25] that Expert terminated White's employment, White's burden of proof to sustain his claim of unlawful retaliation is that of the August 3, 2007 amendments to STAA, i.e., that his protected activity was a contributing factor in his discharge. Accordingly, we **VACATE** the ALJ's grant of summary decision and **REMAND** this case for further proceedings consistent with this Decision and Order of Remand.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

[25] On appeal White raised issues concerning Expert's alleged failure to comply with White's discovery requests. In light of our disposition of this case on appeal, we find it unnecessary to rule on the issues raised by White pertaining to his discovery efforts, and leave to the ALJ on remand resolution of these discovery matters.