



**In the Matter of:**

**FERNANDO WHITE,**

**ARB CASE NO. 10-096**

**COMPLAINANT,**

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

**v.**

**DATE: August 30, 2011**

**GRESH TRANSPORT, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*, Joanne Royce, *Administrative Appeals Judge***

**FINAL DECISION AND ORDER**

This case arises under the whistleblower protection provisions of the Surface Transportation Assistance Act (Act) of 1982 (STAA), as amended and re-codified, 49 U.S.C.A. § 31105 and implementing regulations at 29 C.F.R. § 18.1 *et seq.* (2010) and 29 C.F.R. § 1978.100, *et seq.* (2010). The STAA whistleblower provisions prohibit discriminatory actions taken against an employee partly or entirely because the employee engaged in STAA-protected whistleblower activity.

White alleges Gresh Transport, Inc. (Gresh Transport) violated the STAA's employee protection provisions, when Gresh discharged him after he refused to drive an unsafe truck and complained about safety issues.<sup>1</sup> On April 27, 2010, the Administrative Law Judge (ALJ) issued a recommended summary decision and order granting White's Motion for Summary Decision against Gresh. We affirm the ALJ's R. D. & O.

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<sup>1</sup> *White v. Gresh Transp., Inc.*, ALJ No. 2006-STA-048, slip op. at 1 (Apr. 27, 2010)(R. D. & O.)

## PROCEDURAL HISTORY

White's May 19, 2006 OSHA complaint against Gresh also named Federal Freight Systems, Inc. and United Freight, Inc., as respondents (collectively "FFS"). After OSHA dismissed the complaint, White requested a hearing before the Office of Administrative Law Judges (OALJ).<sup>2</sup> On November 17, 2006, FFS filed a motion for summary decision. On December 14, 2006, the ALJ granted FFS's Summary Decision Motion, holding that White was judicially estopped from pursuing his complaint against the Respondents because he did not disclose his STAA claim arising in his 2005 bankruptcy proceedings.<sup>3</sup>

On appeal, the Board affirmed the ALJ's holding that White was judicially estopped from recovering monetary damages.<sup>4</sup> The Board, however, rejected FFS's Motion with respect to the entire dismissal of White's claim and remanded the case for hearing pursuant to White's request for reinstatement.<sup>5</sup>

On December 30, 2008, White sought reconsideration of his request for money damages. The Board denied the motion for reconsideration.<sup>6</sup>

Upon remand, White filed a motion for summary decision against Gresh, the only remaining respondent.<sup>7</sup> Gresh did not respond.<sup>8</sup> On April 27, 2010, the ALJ issued a R. D. & O. granting White's Motion for Summary Decision against the Respondent.<sup>9</sup> The ALJ additionally awarded White attorney's fees.<sup>10</sup> We now review the R. D. & O as well as the award of attorney's fees.

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<sup>2</sup> *White v. Gresh Transp., Inc.*, ALJ No. 2006-STA-048; slip op. at 5. (Dec. 14, 2006).

<sup>3</sup> *Id.* at 5.

<sup>4</sup> *White v. Gresh Transp., Inc.*, ARB No. 07-035 (Nov. 20, 2008).

<sup>5</sup> *Id.*

<sup>6</sup> *White v. Gresh Transp., Inc.*, ARB No. 07-035, ALJ No. 2006-STA-048 (ARB Mar. 30, 2009).

<sup>7</sup> On August 28, 2009, upon the Complainant's motion, the ALJ dismissed Federal Freight, Inc. and United Freight, Inc., as respondents in the case because of a pending bankruptcy proceeding.

<sup>8</sup> The record suggests that Gresh has never appeared in this matter.

<sup>9</sup> *White v. Gresh Transp., Inc.*, ALJ No. 2006-STA-048 (Apr. 27, 2010).

<sup>10</sup> *White v. Gresh Transp., Inc.*, ALJ No. 2006-STA-048 (Aug. 4, 2010).

## BACKGROUND

White alleged the following facts to Gresh filed no response. Gresh Transport, Inc., hired White as a commercial truck driver on December 28, 2005.<sup>11</sup> Curtis Gresham was White's immediate supervisor while White worked for Gresh Transport, Inc., but he received dispatch and hauling assignments from FFS dispatchers.<sup>12</sup> The Respondent assigned White truck-tractor unit number 602 (Truck 602), through FFS, pursuant to a lease contract.<sup>13</sup> The Complainant performed an initial vehicle inspection, completed a standard vehicle inspection report, and distributed copies to Gresham and FFS.<sup>14</sup> White alleges his inspection report for Truck 602 noted the following defects: defective panel/dash lamps; inoperable horn; air leak in break systems; lack of warning devices (flares or reflective triangle) for stopped vehicles; defective coupling device; defective door lache [sic] and locks; defective tires; missing battery cover; poor wheel alignment; exhaust leak beneath sleeper birth; and faulty air compressor.<sup>15</sup> After the Complainant notified Gresham of the defects, Gresham arranged to repair only the exhaust leak, panel lights, and one of the two defective tires.<sup>16</sup> The Complainant continued to keep daily inspection reports for Truck 602, during his employment with the Respondent, detailing the uncorrected defects and orally complaining on a daily basis to Gresham about correcting the defects.<sup>17</sup>

On or about January 16, 2006, while waiting near a truck stop and awaiting his next dispatch, White allegedly called Gresham and told him that the drive across the United States exacerbated the air leak such that he did not have enough air pressure to operate his breaks properly.<sup>18</sup> He also informed the Respondent that the tire condition had worsened with significant bald spots on one tire and substantial tread loss on another.<sup>19</sup> On January 19, 2006, FFS dispatched White to Commerce City, California, to

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<sup>11</sup> R. D. & O. at 1.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

pick up a load.<sup>20</sup> On January 20, 2006, White learned he had to deliver the load to Providence, Rhode Island.<sup>21</sup> Because of the Providence dispatch, White called Gresham and reiterated the issues with the air leak in the break system.<sup>22</sup> Gresham allegedly said he did not have enough money to repair the truck, and, if White wanted his job, he would have to drive the truck to earn the money needed for the repairs.<sup>23</sup> Additionally, Gresham said he would try to repair the truck after White reached Providence, as Gresham felt White would have sufficient funds to afford the repairs after that point.<sup>24</sup>

While driving to Providence, White noticed many of the truck defects worsening.<sup>25</sup> White claims during this entire trip, he telephoned Gresham and complained about the defects. He alleges Gresham repeatedly told him to drive despite issues with the truck to raise money to pay for the repairs.<sup>26</sup> After reaching Providence, White received another FFS dispatch sending him to Billerica, Massachusetts.<sup>27</sup> White alleges he complained to Gresham about the condition of the truck again before his departure to Billerica.<sup>28</sup> Gresham allegedly refused to repair the truck in Massachusetts or any other northeastern state because he felt repair costs in those areas were too expensive.<sup>29</sup>

The Complainant alleges he drove to Massachusetts but stopped driving in Littleton when Gresham told him repairs would not be made in Littleton, and that Gresham would fire White and dock his pay if he did not continue to drive.<sup>30</sup> At that point the Complainant called the Massachusetts State Police, Commercial Enforcement

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 3.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Office and told the responding officer about the truck defects.<sup>31</sup> White requested an inspection and alleges the officer declined because the truck was on private property.<sup>32</sup>

Shortly after White called the officer, an FFS maintenance official (Richard) called White.<sup>33</sup> The Complainant explained the truck's defects and Gresham's refusal to repair them.<sup>34</sup> The Complainant alleges Richard asked him to continue with the delivery.<sup>35</sup> The Complainant refused to do so until the truck complied with DOT regulations.<sup>36</sup> Allegedly, the FFS President and the Safety Director called the Complainant and tried to persuade him to continue his delivery, but the Complainant again refused until repairs were made.<sup>37</sup>

On January 27, 2006, a repair vendor repaired the air leak in a manner that led to icing problems in the air lines and compromised the brakes.<sup>38</sup> The Complainant claims the vendor declined to repair the other defects.<sup>39</sup>

On the morning of January 29, 2006, White met with three (3) police officers who told him that Gresham wanted him out of the truck.<sup>40</sup> Gresham allegedly told the officers that he terminated White's employment because he refused to deliver a load.<sup>41</sup> White filed his OSHA complaint. OSHA issued a preliminary determination denying the complaint to which the Complainant objected and requested a hearing before the OALJ.<sup>42</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 4.

<sup>42</sup> *Id.*

On December 14, 2006, the ALJ issued a summary decision finding White was judicially estopped from pursuing his complaint because he did not disclose his STAA claim in his bankruptcy proceedings filed earlier in 2005.<sup>43</sup> The Board affirmed the ALJ's order as to the estoppel related to money damages but remanded the case for hearing on White's request for reinstatement.

On February 11, 2010, the Complainant filed a Motion for Summary Decision.<sup>44</sup> In response, the ALJ issued a recommended summary decision and order granting Complainant's Motion for Summary Decision, and a Recommended Order awarding attorney's fees.<sup>45</sup>

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA.<sup>46</sup> The Board automatically reviews STAA decisions issued on or before August 31, 2010.<sup>47</sup> The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."<sup>48</sup>

An ALJ's recommended decision granting summary decision is subject to de novo review.<sup>49</sup> The standard for granting summary decision in our cases arises from 29 C.F.R. § 18.40 and is essentially the same standard governing summary judgment in the federal courts.<sup>50</sup> 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."<sup>51</sup> The

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<sup>43</sup> *White v. Gresh Transp., Inc.*, ALJ No. 2006-STA-048; slip op. at 5. (Dec. 14, 2006).

<sup>44</sup> *White v. Gresh Transp., Inc.*, ARB No. 07-035 (Nov. 20, 2008).

<sup>45</sup> *White v. Gresh Transp., Inc.*, ALJ No. 2006-STA-048 (Aug. 4, 2010).

<sup>46</sup> 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).

<sup>47</sup> 29 C.F.R. § 1978.109(c)(1).

<sup>48</sup> 29 C.F.R. § 1978.109(c).

<sup>49</sup> *Hardy v. Mail Contractors of Am.*, ARB No. 03-007, ALJ No. 2002-STA-022, slip op. at 2 (ARB Jan. 30, 2004).

<sup>50</sup> Fed. R. Civ. P. 56.

<sup>51</sup> 29 C.F.R. § 18.40(c).

determination of whether facts are material is based on the substantive law upon which each claim is based.<sup>52</sup> 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.”<sup>53</sup>

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 moving party is entitled to judgment as a matter of law.<sup>54</sup> When a motion for summary decision is made, the party opposing the motion may not rest upon mere allegations or denials of such pleading.<sup>55</sup> Rather, the response must set forth specific facts showing that there is a genuine issue of fact for determination at a hearing.<sup>56</sup>

### LEGAL STANDARD

Covered employers violate the STAA when they fire an employee partly or entirely based on the fact that the employee engaged in whistleblower activity the STAA protects.<sup>57</sup> To prevail on a claim of unlawful discrimination under the STAA’s whistleblower protection provisions, the complainant must prove by a preponderance of the evidence that he is a covered employee who engaged in protected activity; that the employer discharged or disciplined him, or discriminated against him regarding pay, terms, or privileges of employment; and that the protected activity was a contributing factor in the adverse action.<sup>58</sup>

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<sup>52</sup> See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

<sup>53</sup> *Bobreski v. U.S. EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

<sup>54</sup> *Lee v. Schneider Nat’l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002).

<sup>55</sup> 29 C.F.R. § 18.40(c).

<sup>56</sup> *Id.*

<sup>57</sup> 49 U.S.C.A. § 31105.

<sup>58</sup> See *Israel v. Unimark Truck Transp.*, ARB No. 08-095, 2007-STA-043 (ARB Aug. 8, 2011).

## DISCUSSION

### *Summary Decision as a Matter of Law*

The Complainant argues it is undisputed that he filed complaints with Gresh Transport, Inc., and appropriate law enforcement officials relating to violations of commercial vehicle safety regulations. White also argues it is undisputed that he refused to drive in violation of safety regulations when he was in Littleton, Massachusetts. Additionally, he asserts it is undisputed that Gresham, acting on behalf of Gresh Transport, Inc., told the Complainant he was fired because he refused to drive Truck 602. As such, the Complainant believes this matter is properly resolved by a summary decision.

The ALJ found that White proved by a preponderance of evidence that Gresh violated 49 U.S.C.A. § 31105(a)(1)(A) and (B) of the STAA when it discharged the Complainant. In support of his decision, the ALJ notes the Complainant presented direct evidence that the Respondent discharged the Complainant because he refused to drive an unsafe vehicle which, if driven, would have violated commercial motor safety regulations. More specifically, Gresham allegedly informed White in Littleton, Massachusetts, that he was fired for failing to deliver a load to Dothan. Additionally, the ALJ found the Complainant presented indirect evidence that his internal and external complaints about the truck's safety led to his dismissal. The ALJ concluded, in sum, the Respondent's knowledge of White's complaints, the proximity of his discharge in relation to the complaints, and the lack of contradictory evidence justified summary decision in White's favor. White's factual assertions were uncontested and provide substantial evidence for the ALJ's findings of fact. White's uncontested facts also support each element of a STAA whistleblower claim. Therefore, we affirm the ALJ's entry of summary decision in White's favor and against Gresh as well as the remedy the ALJ ordered.

### *Money Damages*

As to the issue of money damages, the ARB previously determined in this case that White was not entitled to money damages because he failed to disclose the STAA claim during his bankruptcy proceedings. White even notes the ARB's former holding on the issues of monetary damages in his Motion for Summary Decision and also limited his request for relief to: (1) reinstatement, (2) leave to file a petition for attorney's fees, and (3) removal from his personnel records of all information pertaining to his wrongful and discriminatory discharge to be deleted from his personnel records. The ALJ granted all requests for relief after awarding White summary decision.

In his brief in support of the ALJ's R. D. & O., however, White argues that the Board incorrectly applied the doctrine of judicial estoppel and he is still entitled to a reconsideration of monetary damages. We see no basis in this case for revisiting the previous ruling on money damages and, therefore, deny White's request.



**CONCLUSION**

Accordingly, we **AFFIRM** the ALJ's grant of Summary Decision to Complainant and **AFFIRM** the ALJ's decision requiring reinstatement and awarding attorney's fees.

**SO ORDERED.**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**