In the Matter of:

FERNANDO D. WHITE,

COMPLAINANT,

v.

CARL PERRY ENTERPRISE, INC.,

RESPONDENT.

ARB CASE NO. 14-024

ALJ CASE NO. 2013-STA-013

DATE: December 10, 2015

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (Thomson Reuters 2007 & Supp. 2015), and its implementing regulations, 29 C.F.R. Part 1978 (2015). Complainant Fernando D. White filed a complaint alleging that Respondent Carl Perry Enterprise, Inc. violated the STAA by discharging him from employment. On January 9, 2014, an Administrative Law Judge dismissed the complaint. For the following reasons, we summarily affirm the ALJ's dismissal of this action.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Respondent hired White to drive commercial vehicles on or about October 18, 2011. In December 2011, White incurred a work-related injury and ceased driving on January 3, 2012. On or about February 22, 2012, Respondent directed White to take a physical examination "so their agent could keep [him] in their active files as being able to resume carrying out driving duties."[2] That same day, White spoke to Sharon Perry, Respondent's Secretary, and complained of his continuing inability to drive. On April 10, 2012, a doctor issued White a Medical Examiner's Certificate, a copy of which White provided to Respondent as part of his Annual Driver's FMCSR Compliance Review. On April 15, 2012, White filed for unemployment benefits with the State of Georgia.

White submitted a copy of his Department of Transportation Medical Card, clearing him for driving duties, to Respondent on April 17, 2012. On Monday, April 23, 2012, Respondent directed White to contact one of its dispatchers "to find out what you need to do to be able to go out Tuesday [April 24th]."[3] White never commenced any driving assignment and does not explain why he failed to do so at that time.

On May 3, 2012, White engaged in telephone conversations with Sharon Perry as well as Carl Perry, Respondent's Chief Executive Officer. White accused them of failing to provide information to the Georgia Department of Labor. That same day, the State of Georgia approved White's request for unemployment benefits in the amount of $197.00 per week for 14 weeks commencing April 15, 2012. White states that when he called Sharon Perry on May 3rd, she "verbally terminated" White for "making the STAA complaint to Carl Perry earlier that day."[4]

White contacted the Occupational Safety and Health Administration (OSHA) by phone on May 4, 2012, and alleged that he "refused to return to work until he was released by his doctor who was treating him for a work related injury," and that Respondent "attempted to force him to return to work and when he refused he was fired."[5] OSHA denied the complaint and White requested a hearing before an ALJ.

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[1] The facts for the Background section are taken from the undisputed facts and, for the purposes of determining whether summary decision is proper, they are viewed in the light most favorable to the party opposing summary decision, i.e., White.

[2] Affidavit of Fernando D. White in Response to Respondent's Motion for Summary Judgment (Affidavit) at 6.

[3] Complainant's Brief at 5.

[4] Affidavit at 11.

[5] OSHA Case Activity Worksheet at 1.

On April 11, 2013, prior to any hearing, Respondent filed a letter requesting dismissal of White's complaint. The ALJ denied Respondent's request because the request was not supported by evidence showing that Respondent was entitled to a decision as a matter of law. On August 20, 2013, Respondent filed a second letter, with documents attached, again requesting dismissal. The ALJ accepted the second letter as a Motion for Summary Decision (Motion) and instructed White to respond. White responded by submitting an affidavit with exhibits. On January 9, 2014, the ALJ issued a Decision and Order Granting Respondent's Motion for Summary Decision and Order Dismissing the Complaint (D. & O.). The ALJ concluded that White failed to create genuine issues of fact establishing (1) that his employment was terminated, and (2) that his alleged refusal to drive before he was cleared by medical personnel was a contributing factor to any alleged adverse employment action.[6] White appealed the ALJ's ruling to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under STAA.[7] The ARB reviews a grant of summary decision de novo under the same standard that ALJs must employ.[8] Under 29 C.F.R. § 18.40(d), an ALJ may "enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, 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."[9]

When reviewing the evidence the parties submitted, the ALJ must view it in the light most favorable to the non-moving party. The moving party must come forward with an initial showing that it is entitled to summary decision.[10] In ruling on a motion for summary decision,

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6 D. & O. at 7.

7 Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

8 *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 5 (ARB Sept. 26, 2012).

9 *See Siemaszko v. First Energy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (discussing summary judgment principles in federal courts). We have previously stated that 29 C.F.R. § 18.40 generally incorporates into the administrative proceedings the summary judgment procedure described in Rule 56 of the Federal Rules of Civil Procedure. *See Trammell v. New Prime, Inc*., ARB No. 07-109, ALJ No. 2007-STA-018, slip op. 4-5 (ARB Mar. 27, 2009).

10 29 C.F.R. § 18.40(d); *see, e.g., Siemaszko,* ARB No. 09-123, slip op. at 3.

neither the ALJ nor the Board weighs the evidence or determines the truth of the matters asserted.[11] Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense.

DISCUSSION

The STAA provides that an employer may not discharge or otherwise retaliate against an employee with respect to the employee's compensation, conditions, or privileges of employment because the employee engaged in STAA-protected activity.[12] The employee activities the STAA protects include: making a complaint "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order,"[13] "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, health, or security,"[14] 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 hazardous safety or security condition."[15]

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he or she engaged in STAA-protected activity; that he or she was subjected to adverse employment action; and that his or her protected activity was a contributing factor in that adverse action.[16] At the summary decision stage, failure to demonstrate that there is a genuine issue of material fact on any one of these essential elements means that a complainant cannot prevail on his retaliation claim. We find it unnecessary to reach the elements addressed by the ALJ because White failed to point to sufficient information in the record that could support a factual finding that he engaged in protected activity.

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[11] *Siemaszko*, ARB No. 09-123, slip op. at 3. *See also Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027; slip op. at 6 (ARB May 29, 2009) (citation omitted).

[12] 49 U.S.C.A. § 31105(a)(1); 29 C.F.R. § 1978.102(a).

[13] 49 U.S.C.A. § 31105(a)(1)(A).

[14] 49 U.S.C.A. § 31105(a)(1)(B)(i).

[15] 49 U.S.C.A. § 31105(a)(1)(B)(ii).

[16] *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104; ALJ Nos. 2008-STA-012, -041; slip op. at 9 (ARB Sept. 15, 2011). *See also White v. Action Expediting, Inc.*, ARB No. 13-015, ALJ No. 2011-STA-011 (ARB June 6, 2014); *Beatty v. Inman Trucking Mgmt.*, ARB No. 13-039, ALJ No. 2008-STA-020 (ARB May 13, 2014).

In response to the Motion, White submitted an affidavit which contained a list of his alleged protected activities along with the date and a description of the activities.[17] He also submitted copies of e-mail messages and transcripts of telephone conversations. None of these materials provide any evidence that White engaged in STAA-protected activity during his employment with Respondent. On February 22, 2012, White spoke to Sharon Perry about a physical examination. White contends that he reminded her that he "was still suffering from severe pain and swelling associated with [his] injuries and not fit to legally operate . . . vehicles . . . and had not been released from Doctor's care."[18] But White does not contend, and no evidence reflects, that Respondent directed him to operate a vehicle at that time, so his statements cannot be construed as a refusal to drive within the meaning of STAA's whistleblower protection provision. Nor does his statement indicate that he was complaining to Respondent about motor vehicle safety.

The evidence White submitted regarding his phone conversations on May 3, 2012, indicates that White accused Respondent of failing to provide sufficient tax information about him to the Georgia Department of Labor.[19] Sharon Perry told White that she had not contacted the Department because she was attending to Carl Perry, who was in the hospital. During one of the conversations, White stated, "Ma'am, you are violating my rights under the Surface Transportation Assistance Act."[20] But White's accusation is nothing more than a conclusive statement that fails to point to any specific evidence of unsafe conduct or violations of a motor vehicle safety or security regulation, standard, or order.[21] As such, it does not raise any genuine issue of material fact regarding whether he engaged in protected activity.

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17 Affidavit at 6.

18 *Id*.

19 Affidavit, Exhibits 6-8.

20 *Id*., Exhibit 8.

21 *Menefee, v. Tandem Transp. Corp*., ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 8 (ARB Apr. 30, 2010); *see also Coates v. Southeast Milk, Inc.*, ARB No. 05-050, ALJ No. 2004-STA-60, slip op. at 5 (ARB July 31, 2007) (evidence offered in an opposing affidavit must be of sufficient caliber or quantity to allow a rational finder of fact to find for that party).

In sum, White has failed to create a genuine issue of material fact that he engaged in STAA-protected activity during his employment with Respondent. Accordingly, we **DISMISS** White's case.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge