

U.S. Department of Labor

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Issue Date: 11 March 2013

Case No.: 2009 STA 31

In the Matter of
THERON K. CARTER,
Complainant

v.

MARTEN TRANSPORT, LTD., and
USIS COMMERCIAL SERVICES, INC.,¹
Respondents

Appearances: Mr. Theron Carter
 Pro se (representing himself)

 Mr. Stephen A. DiTullio, Attorney
 For Marten Transport, Ltd.

 Mr. Larry D. Henry, Attorney
 For USIS Commercial Services, Inc.

Before: Richard T. Stansell-Gamm
 Administrative Law Judge

**DECISION AND ORDER ON REMAND –
DISMISSAL OF COMPLAINTS**

This action arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act (“STAA” or “Act”) of 1982, as amended and re-codified, Title 49 United States Code Section 31105, and the corresponding agency regulations, Title 29, Code of Federal Regulations (“C.F.R.”) Part 1978. Section 405 of the STAA provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of either reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate these rules or cause serious injury.

¹Now doing business as HireRight Solutions, Inc.

Procedural Background

First Complaint

From June 2 through June 14, 2005, the Complainant, Mr. Carter, was employed as a truck driver by the Respondent, Marten Transport, Ltd. (“Marten Transport”). During that employment Mr. Carter made a variety of complaints to Marten Transport regarding his assigned truck. Following his employment termination, Mr. Carter filed an employee discrimination complaint under the STAA (“First Complaint”) on June 16, 2005, alleging Marten Transport had discharged him due to activities protected under the Act. Subsequently, the Occupational Safety and Health Administration (“OSHA”), U.S. Department of Labor, (“DOL”) investigated and denied his complaint. Mr. Carter objected and requested a hearing before an administrative law judge.

On May 18, 2006, following a hearing in January 2006,² Administrative Law Judge Daniel F. Solomon issued a Recommended Decision and Order, 2005 STA 63, finding Marten Transport had violated the STAA employee protection provisions. As relief, Judge Solomon ordered reinstatement; back pay from June 14, 2005 through the date of a bona fide offer of reinstatement or comparable re-employment, which at the time of his decision equaled about \$14,296.00; compensatory damages of about \$11,000.00 for lost items, personal litigation expenses, and emotional distress; and attorney fees. Judge Solomon also directed Marten Transport to take action to have USIS Commercial Services (“USIS”),³ amend its DAC (Drive-A-Check) employment report for Mr. Carter, by deleting any unfavorable work record information and correcting the record to show continuous employment. In July 2006, Mr. Carter returned to work with Marten Transport for a few days.

On June 30, 2008, the Administrative Review Board (“ARB” and “Board”), ARB Case Nos. 06-101 and 06-159, affirmed Judge Solomon’s determination and remedies. The ARB also affirmed Judge Solomon’s supplemental order awarding attorney fees and litigation expenses.

Second Complaint

On July 8, 2008, through counsel, Mr. Carter filed another STAA employment discrimination complaint (“Second Complaint” and the current complaint before me) with OSHA, alleging that both Marten Transport and USIS engaged in blacklisting. Previously, in May 2008, Mr. Carter advised USIS of Judge Solomon’s decision and order and contested the inclusion of notations in his DAC employment history about excessive complaints and company policy violations for his employment with Marten Transport. In a June 28, 2008 response, USIS advised Mr. Carter that Marten Transport reaffirmed the annotations as accurate. Mr. Carter asserted Marten Transport’s affirmation and USIS’ failure to correct his DAC employment record represented blacklisting. He requested compensatory and punitive damages, plus litigation expenses. OSHA designated the Second Complaint as “Case No. 5-1470-08-012.”

²During this litigation, including the hearing, Mr. Carter was represented by counsel.

³During this litigation, USIS was not a named Respondent.

In mid-August 2008, the attorneys for Marten Transport and Mr. Carter engaged in a settlement proceeding. On August 19, 2008, Mr. Sherrill Benjamin, OSHA, Whistleblower Program Manager, Region V, approved a proposed settlement agreement and indicated that upon execution, OSHA would accept the agreement as a resolution of the Second Complaint, Case No. 5-1470-08-012.⁴

On August 21, 2008, after his counsel had signed the agreement the day before, Mr. Carter signed the settlement agreement with Marten Transport which indicated the parties had reached a complete agreement to settle both the First and Second Complaints. According to the settlement agreement, Mr. Carter was to receive \$24,496.00 in back pay, \$30,504.00 for emotional distress and other compensatory damages, and \$2,903.29 for other costs. Mr. Carter's counsel was also to receive \$115,715.32 in attorney fees. Marten Transport also promised to have Mr. Carter's work history corrected and Mr. Carter agreed to withdraw the Second Complaint.

On January 26, 2009, as follow-up, counsel for USIS advised Mr. Carter's attorney that as a result of the settlement agreement, the disputed items had been removed from Mr. Carter's employment record. In response, Mr. Carter's attorney indicated the claim against USIS remained pending with OSHA.

On January 27, 2009, Mr. Carter's counsel asked an OSHA investigator for the status of Mr. Carter's complaint against USIS. The attorney indicated that although Marten Transport was no longer a party to the proceedings, an STAA complaint remained against USIS.

On February 5, 2009, the OSHA investigator responded and asked counsel whether he could provide the damages Mr. Carter was seeking from USIS. She also requested a list of employers to which Mr. Carter had applied and asked when the employment data had been changed.

On February 6, 2009, counsel forwarded the OSHA response to Mr. Carter.

On February 9, 2009, at Mr. Carter's request, his attorney withdrew as counsel in the Second Complaint, OSHA Case No. 5-1470-08-012.⁵

On March 10, 2009, the OSHA Regional Administrator dismissed Mr. Carter's Second Complaint based on the settlement agreement.

⁴Respondent Marten's June 19, 2009 correspondence. Mr. Benjamin also recommended the parties forward the settlement to the ARB because it also contained a resolution of the First Complaint. Eventually, the ARB determined it no longer had authority to consider the settlement regarding the First Complaint since the Board had already issued a final decision and order.

⁵Mr. Carter's May 23, 2009 response, page 3.

Continuation of Second Complaint and Addition of Third Complaint

On April 3, 2009, Mr. Carter filed objections to OSHA's dismissal of his second STAA complaint. In addition to contesting the circumstances and validity of the settlement agreement, Mr. Carter noted that Marten Transport and USIS did not remove unfavorable statements in his DAC record. Specifically, Mr. Carter discovered in March 2009 that a prospective employer had been provided his DAC employment history in January 2009 which still included derogatory information of excessive complaints and company policy violation. Mr. Carter also alleged for the first time that the same report also contained a "deception of employment" by Marten Transport and USIS, concerning his employment with Marten Transport because they were showing a starting date of June 2005 and ending date of July 2006. These allegations represented a third STAA complaint.⁶

On July 13, 2009, having determined that Mr. Carter was bound by the August 2008 settlement agreement, Marten Transport had substantially complied with the settlement agreement, and USIS as an agent of Marten Transport had also been released from liability by the settlement agreement, I dismissed Mr. Carter's second complaint. In response, on July 27, 2009, Mr. Carter requested settlement proceedings before the ARB, which was eventually treated as an appeal.

Remand Adjudication

On July 21, 2011, after affirming a portion of my decision, the ARB remanded the case to me for further adjudication, ALJ I.⁷ Based on the settlement agreement, the Board affirmed the dismissal of claims against Marten Transport in the second complaint that were covered by the parties' agreement. However, the ARB also concluded: a) USIS was not released from liability as alleged in the second complaint by the settlement agreement, and b) Mr. Carter's allegation of additional retaliatory acts by Marten Transport and USIS subsequent to the August 21, 2008 settlement must be adjudicated. The Board further directed that I address whether USIS is a covered respondent.

Pursuant to a Revised Notice of Hearing, dated September 12, 2011, ALJ III, I opened a hearing on November 15, 2011, in Grand Rapids, Michigan, with Mr. Carter, Mr. DiTullio, and Mr. Henry. After a discussion concerning the parameters of the remand, Mr. Carter requested additional time to obtain counsel. Accordingly, I continued the proceedings for 60 days.

In a March 1, 2012 conference call, Mr. Carter advised that he needed additional time to seek counsel and the parties agreed to a hearing date of July 10, 2012.

⁶In its subsequent remand, the ARB considered these additional allegations to be new claims of discrimination associated with Mr. Carter's second complaint of continuing discrimination. ARB Case No. 99-117, slip op. at 6-7 (ARB July 21, 2011).

⁷The following notations appear in this decision to identify exhibits: CX – Complainant exhibit; ALJ – Administrative Law Judge exhibit; TRA – Transcript, July 10 – 11, 2012; and TRB – Transcript, August 30, 2012.

Pursuant to a Third Revised Notice of Hearing, dated April 20, 2012, ALJ V, I conducted a hearing in Grand Rapids, Michigan, with Mr. Carter, Mr. DiTullio, and Mr. Henry on July 10, 2012. During the course of the proceedings, Mr. Carter unfortunately became ill. The next day, I continued the proceedings because Mr. Carter was not yet able to return to the hearing.

Pursuant to a Fourth Notice of Hearing, dated August 3, 2012, I resumed the hearing on August 30, 2012 with Mr. Carter, Mr. DiTullio, and Mr. Henry. My decision and order on remand is based on the testimony presented at the hearings and the following documents admitted into evidence: CX 1 to CX 3, Marten 1, Marten 2, USIS 1A, USIS 1B, USIS 2, USIS 3A to USIS 3D, USIS 4 to USIS 7, and USIS 10.⁸

Complainant's Statement of the Case⁹

Mr. Carter has been blacklisted by the Respondents. Although he has a clean driving record, a valid CDL (commercial driver's license) and is qualified to drive hazardous material, Mr. Carter has been unable to get any work as a truck driver after submitting over 80 applications. The blacklisting all goes back to Marten Transport which didn't like what he did. They have interfered with his re-employment since his 2005 termination. Unfounded statements by persons in the Marten Transport HR (Human Resources) department and information in his DAC record have placed Mr. Carter in a worse position than before his settlement agreement.

Based on the settlement agreement, Marten Transport was under an obligation to remove derogatory information in the DAC database maintained by USIS and failed to do that. That inaction represents a purposeful interference with his re-employment efforts since the DAC employment history information is relied upon by other employers.

In 2009, Marten Transportation provided information to a new employer, Equity Transportation. He was hired by Equity Transportation and then terminated all within one hour. When Equity Transportation got his work history, they informed Mr. Carter that it didn't match the dates that he put on his application, which he filled out under penalty of perjury. In 2010, the same thing happened with another trucking company.

⁸With the submission of his closing brief, Mr. Carter attached two news articles from September and October 2012 regarding Federal Trade Commission ("FTC") charges against HireRight Solutions, Inc., concerning the accuracy of its database and the sufficiency of its consumer complaint investigations. In response, USIS' counsel objected to admission of the two articles on the basis that the type of information involved with the FTC was not similar to Mr. Carter's case, and that FTC matters were resolved through negotiations without adjudication or an admission of liability. At this stage of the proceedings, considering that the evidentiary record before me already demonstrates a problem with the USIS database, and Mr. Carter agreed that USIS processed his June 2008 dispute in accordance with the Fair Credit Reporting Act (TRB, p. 46), I decline to reopen the evidentiary record to consider ancillary actions involving the FTC and HireRight Solutions, Inc. USIS' counsel's objection is sustained. On January 14, 2013, Mr. Carter also submitted an additional magazine article regarding OSHA's enforcement of the STAA whistleblower provisions. In a January 17, 2013 conference call, I advised the parties that would I not admit the article into evidence.

⁹Opening statement, TRA, pp. 10, 22, 102-106, and October 31, 2012 closing brief.

Several trucking companies have indicated they will not hire a driver who has been previously discharged and whose application employment dates are not consistent with his reported work history.

Since Mr. Carter has been unable to work, he has lost his home in Florida and his house in Michigan has been foreclosed. His wife is also ill. Although Marten Transport is not responsible for her illness, Mr. Carter believes that it is time for Marten Transport to do the honorable thing and own up to its mistakes and accept responsibility. What has happened is wrong. Mr. Carter did nothing to make Marten Transport or USIS look bad. And, Mr. Carter holds them responsible. The evidence and facts presented at the hearing support a determination that the respondents blacklisted Mr. Carter.

Respondents' Statements of the Case

Marten Transport¹⁰

Marten Transport did not blacklist Mr. Carter by not making the modifications to the August 2008 settlement agreement which became effective on October 28, 2008, upon approval by DOL. To the contrary, as the settlement agreement was being signed in August 2008, Marten Transport made three corrections to Mr. Carter's DAC employment history as required by the settlement agreement. Specifically, Marten Transport changed Mr. Carter's employment dates to reflect continuous employment from June 2005 to July 2006, rather than two employment periods; his work history was changed to "satisfactory," rather than "excessive complaints"; and rehire eligibility was changed to "yes" from "upon review." When Marten Transport later became aware that the corrections had not taken, the company re-entered the corrected information into Mr. Carter's DAC employment history in accordance with the settlement agreement. The sole reason Mr. Carter's employment information was not permanently changed was continued computer database problems with the USIS information system.

Under these circumstances, since Marten Transport did not take any adverse action, and instead complied with the settlement agreement, Mr. Carter can not establish a *prima facie* case of employment discrimination. The USIS computer malfunction, which not was finally corrected until March 2009, is the sole reason Mr. Carter's DAC employment history for Marten Transport was not updated promptly.

Although Mr. Carter may have experienced re-employment difficulties due to the USIS continuous employment history for Marten Transport, he was aware that Marten Transport was required under the settlement agreement to submit that employment history. As a result, Mr. Carter actually created this problem by putting down two separate employment periods for Marten Transport in his employment applications.

Finally, the USIS computer malfunction was the legitimate, non-discriminatory reason Mr. Carter's DAC employment history was not updated promptly. Since Marten Transport had no control over the USIS computer, there is also no evidence of pretext.

¹⁰Opening statement, TRA, p. 22, and October 30, 2012 closing brief.

USIS¹¹

USIS is not a person as defined by the Act. Since USIS did not hire Mr. Carter, does not have truck drivers as employees, and does not engage in commercial trucking, the company is not a person that can discharge, discipline, or discriminate against, an employee. Instead, USIS is a consumer reporting agency subject to the Fair Credit Reporting Act ("FCRA"), providing information from former employers to prospective employers.

USIS did not blacklist Mr. Carter. Mr. Carter has failed to establish that the information in the USIS employment history adversely impacted his ability to get a job. Instead, considering the severe recession at the time, Mr. Carter's work history made him less qualified than other truck drivers. Mr. Carter is simply speculating that the USIS information caused him not to be hired. Such speculation is insufficient to establish black listing.

During the course of processing Mr. Carter's dispute, USIS complied with the FCRA requirements. At that time, although Mr. Carter had received a favorable initial decision, Mr. Carter and Marten Transport remained in the middle of litigation that Marten Transport was strongly contesting. As a consumer reporting agency, USIS is not permitted to decide which side is correct in such litigation. Instead, USIS is only permitted to query the company that provides the employment information for verification.

Since Mr. Carter agreed to the change in his employment record to show continuous employment, that information can not be considered blacklisting. Marten Transport changed the employment dates in compliance with the settlement agreement. In that situation, USIS can not be faulted for storing the agreed-to information in its database.

Marten Transport also made good faith efforts to make the other changes, including the removal of excessive complaints and company policy violation comments from Mr. Carter's DAC employment history. And, USIS intended that those changes would be permanently made in its database systems. During 2008 and 2009, USIS had two employment history computer systems. The first system permitted employers to update employment histories on-line. The second system was a searchable database of employment histories. Although the second system was designed to be updated by the on-line system inputs, due to a computer problem in December 2008 and January 2009, the searchable data was not being updated through the on-line program. As a result, the derogatory information Marten Transport attempted to remove on-line still remained in the searchable database. A computer programming problem, and not blacklisting, was the reason the changes did not stay in the USIS database system.

Mr. Carter provided no evidence that he suffered any harm due to Marten Transport's work history comments. He did not establish that USIS did anything that did in fact keep him from finding re-employment. Consequently, Mr. Carter's claims against USIS should be denied.

¹¹Opening statement, TRA, p. 23, and October 31, 2012 closing brief.

ISSUES ON REMAND¹²

1. Whether USIS is a "covered respondent" under the Act.
2. Whether Marten Transport blacklisted Mr. Carter after August 21, 2008 due in part to Mr. Carter's protected activities.
3. Whether USIS blacklisted Mr. Carter due in part to Mr. Carter's protected activities.

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE

Sworn Testimony

Ms. Susan K. Deetz

(TRA, pp. 33-63 and TRB, pp. 66-90)

Ms. Deetz has been employed by Marten Transport since 1995. Currently, she is the Director of Human Resources ("HR") and has held that position for 10 years.

Marten 1 is the settlement agreement between Marten Transport and Mr. Carter, which she executed on behalf of Marten Transport on August 25, 2008. Mr. Carter signed the agreement on August 21, 2008.

In her position, Ms. Deetz is familiar with the DAC system maintained by USIS, which is a commonly used tool in the trucking industry. Transportation companies use DAC to gain information and employment background on driver applicants for hire. And, when a driver leaves a company, his work history is reported to USIS to be included in that driver's DAC employment history.

On page five, in paragraph six of the settlement agreement, Marten 1, Marten Transport agreed to amend Mr. Carter's DAC report to "reflect the time listed, in particular, the period of service, eligible for rehire, and the work record." They would make those changes through the on-line website database system maintained by USIS. Marten Transport would submit the revised information to USIS and then USIS would actually make the changes. While not sure, Ms. Deetz believes the correction document may be called a rebuttal.

In the settlement, Marten Transport specifically agreed to change Mr. Carter's employment period with the company to a continuous period of June 2005 to July 2006. Prior to the change, the two separate employment periods that he actually worked for Marten Transport were listed as June 2005 to June 2005, and June 2006 to July 2006. The first period was when they first hired Mr. Carter. The second period occurred based on the decision ordering Marten Transport to rehire him.

The DAC on-line report is the USIS process that Marten Transport uses to submit work histories.

¹²As set out in the ARB's July 21, 2011 remand order.

Under the agreement, Marten Transport made two other changes. First, under the category of eligible for rehire, the entry of “upon review,” which Marten Transport puts down for all its drivers, was changed to “yes.” Second, the characterization of his work record was changed from “excessive complaints” to “satisfactory.”

To have those changes made, around August 18, 2008, before the settlement was signed, Ms. Deetz either prepared an e-mail and put the changes in the message, or made a copy of the settlement paragraph, and talked to Ms. Kristi Blum (at the time Ms. Decker), a senior HR generalist who worked in her department and was responsible for handling the on-line DAC information. Ms. Deetz told Ms. Blum to “go ahead and submit the changes.” Understanding that the parties had agreed to the settlement terms, Ms. Deetz went ahead to get the changes made even before the settlement was signed. Ms. Deetz believes Ms. Blum made the changes within a day or two.

In December 2008, Ms. Deetz became aware that the previous work record information was still in the DAC system. She did not know why the changes submitted on August 18 or 19, 2008 were not made. In response, around mid-December 2008, Ms. Deetz asked that the on-line report in regard to Mr. Carter and the settlement agreement provision terms be made again. Ms. Deetz believes Mr. Carter’s DAC report was updated at that time consistent with the settlement terms in Marten 1. In a manner similar to the August 2008 update, Ms. Deetz assumed the update in December 2008 was made.

Ms. Deetz did not personally submit the DAC changes. Ms. Deetz did not confirm if Ms. Blum followed her instructions.

Ms. Deetz doesn’t recall having any contact with, or receiving any information from, USIS in December 2008 about Mr. Carter’s DAC report.

From her perspective, Ms. Deetz believed the changes to Mr. Carter’s report had been made in mid-August 2008.

Prior to Mr. Carter being hired in 2005, Marten Transport would have checked DAC for his employment history and that information would have been placed in his personnel folder. Consequently, at the time of the hearing in January 2006 (associated with Mr. Carter’s first STAA complaint), that employment information was available to Marten Transport.

In December 2008, Marten Transport would still have had Mr. Carter’s personnel folder which would have included information from prior employment with other trucking companies. As a result, Ms. Deetz “most likely” would have known that Mr. Carter worked someplace else in 2006.

The settlement agreement change showing continuous employment with Marten Transport was made to aid him in being able to find another job in the trucking industry going forward. Under the terms of the agreement, Marten Transport would cause Mr. Carter’s employment records with USIS to be amended within 10 days of the effective date of the agreement. And, Ms. Deetz’s communication with Ms. Blum in mid-August 2008 was made to

cause his employment record with USIS to be amended. She made the same effort in December 2008.

Some time between August and December 2008, Ms. Deetz must have become aware of a technology glitch associated with the requested changes since she had to make the change again in December 2008.

From 2005 into 2008, Ms. Deetz was the Director of Human Resources at Marten Transport.

Ms. Blum principally obtained information for the DAC system from equipment and operations managers, the safety department manager, and at times, Ms. Deetz.

Ms. Deetz provided Ms. Blum the information from the settlement agreement to make the corrections to Mr. Carter's employment history. Ms. Blum inputs information regarding Mr. Carter's employment that she has received from many sources.

Ms. Deetz did not provide any information to Ms. Blum when Mr. Carter left employment in 2005.

A reinstatement will show continuous employment. A rehire will reflect a break in service.

Ms. Deetz is the custodian of personnel files and she believes Mr. Carter's file may still be maintained. She doesn't recall receiving a specific request for his personnel records from Mr. Carter's attorney. If such a request came in, she probably would have forwarded it to the legal department.

Ms. Deetz believes CX 2, Marten Transport employment history, which Mr. Carter indicates was provided to Equity Transportation, was the DAC report. CX 2 does not look like a Marten Transport work product. She had no knowledge of CX 2. Ms. Deetz observes the two work histories on CX 2. She doesn't know why that document contains two different Martin Transport work histories for Mr. Carter. Ms. Deetz did not prepare CX 2. It appears to be a DAC report. CX 2 contains other DAC reports that are different than the first one. Nevertheless, she believes the first report came from some type of database and notes the bottom of the page indicates "dol.¹³usis/csd.com." She doesn't know who sent it to Equity Transportation.

Ms. Deetz would have had access to files from Swift Transportation that may have been provided to Marten Transport. However, the driver recruitment department at Marten Transport, which reviews prior work documents and makes hiring decisions, would have obtained any such reports. Ms. Deetz did not review his Swift Transport files and did not know that he had been terminated by Swift Transportation. Additionally, when Mr. Carter returned in 2006, that was not based on a hiring decision. Instead, he was ordered to be reinstated.

¹³According to Mr. Ferguson, "dol" means "DAC on-line." See TRB pp. 91-188.

The one page in CX 2 has derogatory information for Mr. Carter indicating excessive complaints and company policy violations at Marten Transport. "That was the information we had initially supplied in 2005 to HireRight, USIS."¹⁴ The derogatory information on CX 2 is what Marten Transport initially reported to USIS. She had seen that information before in Marten Transport's personnel files for Mr. Carter. However, Ms. Deetz did not prepare that page on CX 2. She did not send that page in CX 2 to Equity Transportation.

Prospective employers have access in DAC to Marten Transport's work history for Mr. Carter. Any other person who has access to DAC could have found the adverse employment information on Mr. Carter.

Regarding Mr. Carter's personnel records at Marten Transport, everyone in the HR department, as well as particular individuals in the driver recruitment department, and some individuals in the safety department, would have access to his record.

CX 2 also contains information that Marten Transport was required to change by the settlement agreement. Specifically, the second half of the one page with the two work histories has the three corrected entries. The top half of the page contains the information from 2005. The lower half shows continuous employment from 2005 to 2006.

According to Ms. Deetz, there is a difference between the type of report an employer would see and a report a driver could call up from USIS.

After Mr. Carter left Marten Transport in June 2005, the information Ms. Blum entered into DAC did not come from Ms. Deetz. Other people within Marten Transport provided that information. In August or September 2008, due to the settlement agreement, Ms. Deetz provided the information for the three required corrections to Ms. Blum. Later, when she became aware that there was a problem with the corrections, she had Ms. Blum enter the three corrections again in December 2008. Each time, Ms. Blum made the corrections, she printed a copy of the changes and placed them in Mr. Carter's personnel folder.

Ms. Kristi K. Blum¹⁵
(TRA, p. 63-99)

Ms. Blum was last employed by Marten Transport in March 2011; she had worked with the company since April of 2003. From April 2005 through June 2010, Ms. Blum worked in the HR department as a senior generalist.

A DAC report is used by a transportation company to review a driver's previous employment. Then, at the end of his employment, the company reports his work record, which may include his accident history.

¹⁴TRB, p. 82.

¹⁵Formerly, Ms. Kristi K. Decker. TRB, p. 90.

As part of her responsibilities, Ms. Blum prepared work records, and assisted in suggesting rehire eligibility. She also made updates in the DAC system.

Probably through e-mail, Ms. Deetz contacted Ms. Blum about modifications to Mr. Carter's DAC report. Ms. Deetz showed her a copy of the settlement agreement and asked Ms. Blum to adjust Mr. Carter's employment dates, his work record, and his rehire eligibility.

In mid-August 2008, after receiving Ms. Deetz's instructions, no later than the next day, Ms. Blum "went to the DAC on-line website," pulled up Mr. Carter's record, "and made the adjustments." Each employer has access to the DAC on-line site and can pull up a driver's record by social security number. When accessing the information, the company's name has to be provided. The on-line DAC website only shows the driver's history for the company accessing the report. So, when Ms. Blum went on-line, and pulled up Mr. Carter's report, she only saw his employment information with Marten Transport. The on-screen display has an edit option.

Specifically, in mid-August 2008, Ms. Blum changed: Mr. Carter's employment history to show June 2005 to July 2006, his eligibility for rehire to "yes," and his work record from "excess complaints" to "satisfactory." Marten 2 is a copy of Mr. Carter's on-line DAC report for Marten Transport. Page one is dated August 20, 2008. The page reflects the employment history change that Ms. Blum entered. When Ms. Blum edits a work record, she makes a copy of the "changed sheet." She prints the copy, dates it, and places her initials on the page. Then, the page goes into the employee's record. Based on her review of the applicable portion of the settlement agreement, Ms. Blum believed the changes she made in Mr. Carter's on-line record were consistent with the agreement and Ms. Deetz's instructions. Page three of Marten 1 is dated December 4, 2008 and again reflects the three changes.

After Ms. Blum made changes to the on-line DAC report, she pushed a "submit" button and then printed the page to confirm the changes. Ms. Blum never used the other DAC system to look up the work history of a driver. When Ms. Blum returned to Mr. Carter's on-line DAC report, she had to re-enter all three changes. She has no idea why the changes shown on the August 20, 2008 printed sheet were no longer in the on-line DAC report in December 2008.

Ms. Blum had seen the problem before, although not with Mr. Carter's record. Through her work with Marten Transport and contact with USIS customer service, Ms. Blum was aware that USIS had two different systems that "didn't necessarily talk with each other."

Ms. Blum believes that Marten Transport attempted to change Mr. Carter's employment record with USIS in August 2008 through her submission of the DAC on-line report. She again submitted the same changes in December 2008.

If someone sent some information with a change as it pertains to the DAC record, and Ms. Blum had a question, she could check Marten Transport's own files. She did not check Mr. Carter's personnel file, which is kept in an electronic form. Everyone in HR has access to it and many different people put information into the company's personnel files. Ms. Deetz was not the only person with access to Mr. Carter's personnel file.

Ms. Blum was surprised in December 2008 that she had to remake the changes.

Ms. Blum had nothing to do with Mr. Carter's reinstatement or rehire. She was not in Indianapolis when he was rehired. Ms. Blum doesn't believe that she received paperwork from the Indianapolis office as it pertains to his work history from a previous job when he was reinstated in June 2006 to go into his DAC record. Ms. Blum does not recall seeing a request from Mr. Carter for his work records.

Ms. Blum has not seen any other requests to change Mr. Carter's work record since December 2008.

Requested changes to a work record are called rebuttals and they go to USIS.

Ms. Blum doesn't recall the name of the female that she had contact with at USIS.

Ms. Blum wouldn't question application work histories if everything looked alright. She wouldn't know if other people made changes to Mr. Carter's DAC record. She did not know why she had to go in December 2008 to make the changes.

As a senior generalist, Ms. Blum was responsible for correcting DAC records for Marten Transport. If she received a driver's rebuttal from USIS, Ms. Blum would review and respond. However, she was not the only person involved if a correction was necessary. She did not have individual authority to make a correction. Instead, she would get with the appropriate director or supervisor to discuss the rebuttal. If the information in the rebuttal was correct, Ms. Blum would send Marten Transport's response to USIS, request an amendment, and provide the appropriate information. If the on-line DAC system was available, she would also make the changes in that system. Otherwise, Marten Transport would respond that the DAC work record was correct and no changes would be made.

Ms. Blum does not recall seeing any rebuttal from Mr. Carter. She did not hear about any such rebuttals. Usually, someone else would give her the relevant information regarding the work record. In Mr. Carter's case, Ms. Deetz was the only person who provided the information about Mr. Carter.

Marten Transport's personnel files contain all the drivers' records. It is in an electronic format. Once the actual paperwork is scanned, it is shredded. If a copy is need, it is printed from the electronic file. The DAC confirmation paperwork, Marten 1, was from Mr. Carter's electronic file.

Between August and December 2008, Ms. Blum was not aware that the changes she provided in the DAC on-line report in August 2008 had not been made.

The term "rebuttal" refers to information provided to Marten Transport from a driver through USIS informing them that a driver was disputing something in his record. After

discussing the rebuttal with the appropriate person, Ms. Blum would respond to USIS and indicate whether Marten Transport disagreed with the driver's version.

Mr. Theron K. Carter
(TRA, pp. 109-197 and TRB, pp. 15-65)

Mr. Carter started his career as a truck driver in 1964, hauling farm equipment. In 1978, he became an owner-operator and eventually had two trucks on the road. He used to haul hay down to Florida and drive produce back. In 1996, after he sold his farm, Mr. Carter began working as a solo truck driver for DLS Trucking and continued until 2002. He worked a 70 hour week, which was no problem, and earned about \$52,000 a year. After DLS was bought out by another company, Mr. Carter was changed from an east coast driver to a west coast driver, which he didn't like because he was home less often and got a lower rate of pay, but drove more miles. He enjoyed driving up and down the east coast, bought a home in Florida, and used to drop his wife off for a few days before returning to Michigan. Consequently, Mr. Carter left the company.

Mr. Carter then drove for ALTL back on the east coast from September 2003 to December 2003. However, Mr. Carter left the company because he was given overloaded trucks and asked to run around scales in Indiana and Michigan. For medical reasons, Mr. Carter did not drive a truck in 2004.

Then, in June 2005, tired of sitting around, Mr. Carter saw an ad, applied, and went to work for Marten Transport. He was making about 38 cents a mile, which would have worked out to about \$50,000 to \$52,000 a year, based on weekly mileage of about 3,000 miles.

After he was hired, Mr. Carter was directed to go to Pennsylvania to pick up a Peterbilt tractor/truck. At the time, Mr. Carter was not informed that the truck had been involved in an accident two or three days earlier. The driver had hit a bridge abutment. After looking over the repaired truck, he still found many things that were wrong, including a damaged radiator, a leaking fifth wheel coupler, and a missing bunk strap which is necessary to prevent things from getting into the driver's compartment during a sudden stop. Mr. Carter reported the deficiencies to Marten Transport which fixed most of them.

However, Mr. Carter still had problems with the radiator and he requested that problem and other things also be fixed. He also had an issue with load locks which Marten Transport refused to correct. So, Mr. Carter refused to drive a truck that wasn't up to standards. In response, on June 14, 2005, Ms. Deetz terminated Mr. Carter's employment with Marten Transport.

Due to his termination, Mr. Carter filed an STAA complaint and received a favorable administrative law judge decision, which included reinstatement as a remedy. However, after his termination, in the spring of 2006, Mr. Carter went to work for Swift Transportation. Although his DAC record had unfavorable information, Mr. Carter explained the situation to Swift Transportation and they had little problem with the situation since he was going to be placed in a brand new truck. Yet, due to delayed paperwork, Mr. Carter had to wait a week and

when he returned he was placed in an old truck that needed a jump start. He drove the truck to Florida in the heat without air conditioning. When Mr. Carter called Swift Transportation and expressed his belief that the truck had never been inspected, the company responded that Marten Transport had been right, Mr. Carter had a lot of complaint, in particular since air conditioning was not a requirement. However, when he got back, Mr. Carter was given a brand new truck and "things really straightened out" and Swift Transportation became a "good place to work."

In May 2006, Mr. Carter received the favorable ruling, which included reinstatement. Mr. Carter wanted stay at Swift Transportation, but upon advice of counsel, he returned to Marten Transport in July 2006. Mr. Carter was given an assignment that he believed wasn't going to work within the hours of service. He was instructed to go out and so he tried. However, due to loading difficulties, he had to fudge his log book, didn't get enough sleep, and became sick. After discussing the situation with his wife, Mr. Carter called his attorney who indicated that if Mr. Carter quit he wouldn't have a job.

In the meantime, Swift Transportation had put nothing in his DAC report and claimed that he was terminated and had abandoned his truck.

In 2007, Mr. Carter returned to farming and did not drive a truck.

Through counsel, Mr. Carter discovered in 2008 that USIS' DAC record still contained derogatory information contrary to the administrative law judge's decision. So, in June 2008, Mr. Carter filed his second STAA complaint against Marten Transport for blacklisting based on the information the company provided to Equity and USIS. And, he signed the settlement agreement in August 2008, which covered his first complaint and second complaint.

After the agreement was signed, Mr. Carter discovered that the DAC information was still incorrect. He requested the information from USIS shortly after the settlement.

Between August 2008 and January 2009, Mr. Carter completed several applications for employment as a truck driver. He never heard from the companies and couldn't figure out why. The applications required Mr. Carter to "show exactly where I was, when I was there as far as employment." He believed the information Marten Transport had provided to USIS for his DAC report showed continuous employment with them; whereas, he had only worked at Marten Transport in 2005 and when he returned in 2006. The report of continuous employment caused a problem since he had worked at Swift Transportation too because "you can't work two places at the same time." And, during the settlement discussion, he queried how he was supposed to do an application due to that problem.

At the same time, Mr. Carter was aware that the settlement agreement included a provision to show continuous employment. He "told them that there should have been an addendum put in the record" and he doesn't understand why they wouldn't put in an addendum to correct the record.

Mr. Carter read the settlement before he signed it. He was aware that the entry regarding excessive complaints was going to be changed; "anything unfavorable would also be changed."

Mr. Carter also asked Swift Transportation why they hadn't promptly reported his employment with them for DAC.

In January 2009, Mr. Carter went over to Equity Transportation. He went through orientation. They told him they had not received everything yet but they needed a driver. They intended to assign him to a Columbia freight liner. However, he switched trucks with another driver at orientation that didn't like the type of truck he'd been given. The next day, while putting his gear into his truck, he heard an air leak. When he pointed out the problem, the maintenance foreman confirmed it was an air bag leak and he would fix it. So, Mr. Carter went to the break room to wait. At that time, he was called into the recruiting room by the safety director who said that he'd gone over the paperwork and asked if he'd worked at Marten Transport. Mr. Carter said yes. He asked if Mr. Carter had been terminated. Mr. Carter again replied yes. When asked why he quit the second time, Mr. Carter said he would have had to breach the hours of service, which would have invalidated his first case against Marten Transport. The safety director also asked Mr. Carter for copies of magazine articles he had written, and Mr. Carter gave him copies. The safety director then told Mr. Carter to go home for the day since his truck wasn't going to be ready.

The next morning when he called, he was told the repair would take several days and they'd have it ready by Friday. So, Mr. Carter took care of a few things. When he went to work on Friday, he was told that he hadn't been available to work when his truck was ready the prior day. The person told Mr. Carter that as far as he was concerned Mr. Carter had failed to show up for work and no longer worked for Equity Transportation. So, Mr. Carter retrieved his gear and went home.

After he was released by Equity Transportation, Mr. Carter continued to try to find work with other carriers but "no one would call me back." Finally, in July 2010, he found an ad in the press and determined that it would be his last attempt. He told his wife he was not going to keep applying "because there's something wrong."

When he went to the company, Sunset Logistics, they were in terrible need of a driver with a Hazmat endorsement which Mr. Carter possessed. So, prior to completion of his DAC paperwork, they hired him on July 15, 2010. He worked for the company for six months, making about \$1,000 a week in take home pay. Then, he was given a load during a snow storm and a subsequent schedule that would have required him to drive beyond his hours of service. It was impossible to run the schedule within his hours of service considering the required rest periods. When he complained to the company owner, he was told to bring the truck back, and his employment was finished. During the processing of his unemployment claim, Sunset Logistics claimed that he had quit rather than being terminated.

After the settlement in 2008, Mr. Carter lived on his savings until his re-employment in 2010. He had also begun receiving Social Security benefits in December 2009. For the first half of 2011, he received unemployment benefits. Over the course of the years, he depleted about \$300,000 in savings, having cashed in his life insurance policies. Both his properties were also in foreclosure since he borrowed over \$300,000 on his homes which had been fully paid for.

USIS interfered with his re-employment efforts because he sent them DAC rebuttals, letting them know that he wanted the record changed because he couldn't be working and driving a truck at two places at the same time. The DAC report was a problem because Mr. Carter had been specifically told by one trucking company, Summit Trucking, that he had been putting false information on his employment application which was different than the information Summit Trucking had received. The company representative told Mr. Carter that he was not going to get a job with a record like his. USIS knew his rebuttal was correct. But USIS didn't change things and "they kept blacklisting me." Mr. Carter had insisted on an addendum to the settlement agreement but acknowledged there wasn't one.

Marten Transport also blacklisted Mr. Carter by providing an unfavorable work history into DAC, specifically, an unfavorable comment. A work history "[t]hey knowingly knew would never work." Summit Trucking indicated that the comment was the reason he wasn't being hired. This exchange with Summit Trucking occurred in July 2008.

Mr. Carter signed the August 2008 settlement agreement. In paragraph six of the agreement, the DAC report was going to be changed to from June 2005 to July 2006. Mr. Carter thinks Marten Transport "changed it and then changed it back." However, Mr. Carter acknowledged that a DAC employment history, dated January 27, 2009, CX 2 (page count 15 and 16, out of 45¹⁶), shows Mr. Carter's period of service with Marten Transport from June 2005 to July 2006, as required by the settlement agreement. However, that employment history causes a problem because he also worked for Swift Transportation in 2006, before he quit Marten Transport the second time in July 2006. You can't work for two companies at the same time. The record shows that he was working for two trucking companies on the same date, July 2006. CX 2 (page count 15 and 16) also indicates that Mr. Carter is eligible for rehire with Marten Transport, which is a "positive statement as far as just yes." That entry is also consistent with the settlement agreement. And, his work history is listed as satisfactory as required by the settlement agreement, which is also a positive reference. However, Mr. Carter annotated on CX 2 (page count 19) that the Marten Transport employment history was wrong because another DAC report would show that he was working for another company, Swift Transportation, in July 2006. He worked at Swift Transportation in between the two periods that he actually worked at Marten. Mr. Carter believes the lawyers involved in the settlement misled the settlement judge about his actual employment dates.

Mr. Carter does not have any idea what steps Marten Transport took in mid-August 2008 to modify his DAC report with USIS in accordance with the settlement agreement. He also does not know what efforts they took in December 2008 to modify his DAC report to be consistent with the settlement agreement.

Mr. Carter doesn't recall when he submitted his DAC rebuttal to USIS. He submitted the DAC rebuttal because he had been told by a prospective employer that his DAC work history had to be changed. He probably sent in two or three rebuttals.

¹⁶Mr. Carter stated CX 2 had 46 pages, TRB, p. 8; however, I only received 45 pages. Nevertheless, based on Mr. Carter's specific identification of the information in CX 2, I believe that I have the complete exhibit.

Between August and December 2008, Mr. Carter did not inform anyone at Marten Transport that he believed his DAC report had not been modified pursuant to the settlement agreement.

The first Marten Transport DAC work history, CX 2 (page count 15), dated January 27, 2009, contained unfavorable information, citing excessive complaints, company policy violation, and indicating that review would be required before rehiring. He received a copy of the January 27, 2009 USIS print out on March 27, 2009 from Equity Transportation. A portion of the report has unfavorable information, while a second part has favorable information from Marten Transport, CX 2 (page count 16 and 17).

On his job applications, Mr. Carter listed two periods of employment for Marten Transport, 2005 and 2006, which was different from the DAC report that was showing continuous service.

CX 2 (page count 15 to 17), appears to be in the DAC on-line format. He obtained that copy from Equity Transportation. Mr. Carter believes he received his DAC employment history work history, CX 2 (page count 18 to 20) on his fax machine. He believes that it is a copy of a USIS work product.

Mr. Carter may have ordered a DAC on-line report on January 27, 2009 of the Marten Transport work history, since he recognizes his fax number.

Mr. Carter believes that he sent two or three rebuttals to USIS in 2006.

Mr. Carter acknowledged that following Judge Solomon's 2006 decision in favor of Mr. Carter, the only immediate effect was reinstatement since Marten Transport appealed. Everything else in Judge Solomon's order, including correction of the employment record, was stayed until affirmation of the decision by the ARB.

Through another individual, Mr. Dereck Hinton, Mr. Carter sent a statement to USIS to express his position in regard to Marten Transport. Mr. Carter doesn't recall whether he filed a dispute in June 2008 because there was more than one.

Summit Trucking told Mr. Carter that either he wasn't being truthful on his application or there was something wrong with the work history report in regards to his periods of employment. The settlement agreement said there was going to be one period of employment with Marten Transport from June 2005 to July 2006.

Part of the problem was that Mr. Carter worked for Swift Transportation but there was no DAC report for Swift Transportation for a whole year. Mr. Carter doesn't know why that happened.

Mr. Carter applied for work at Summit Trucking sometime between 2006 and 2008. He doesn't recall specifically and an application summary he filed in May 2009 covering applications as early as June of 2008 doesn't include Summit Trucking.

Mr. Carter didn't submit an application to Summit Trucking. Instead, he spoke to the person who did hiring for the company. That person indicated the problem was that Mr. Carter mentioned two periods of employment with Marten Transport but Marten Transport had only listed one period in DAC. Mr. Carter did not report the employment period set out in the settlement agreement because he believed that he needed to be honest in the employment application process and provide the actual dates of employment. He was worried about putting false information on employment documentation.

As a result, although the DAC system showed one continuous period of employment for Marten Transport from June 2005 to July 2006, in his applications, Mr. Carter would report his first employment with Marten Transport, then his employment with Swift Transportation, and then his subsequent return to Marten Transport (based on Judge Solomon's reinstatement order). Mr. Carter again acknowledged that he signed the settlement agreement requiring Marten to report a continuous employment period from June 2005 to July 2006.

Mr. Carter had run into the problem with his work history with "many" prospective employers. Mr. Carter only contacted his attorney at the time about the problem. He did not contact Marten Transport. He does not know whether his lawyer contacted Marten Transport.

The settlement agreement required Marten Transport to report a continuous employment period to USIS for the DAC record.

When he applied for work with Swift Transportation, he had to wait for some paperwork from Marten Transport. When the documents came in from Marten Transport, they were "not too favorable." So, he had to talk with the people at Swift Transportation about his problems with Marten Transport, and explain what actually happened and why he left. Mr. Carter would have not had any reason to question USIS records which indicate Swift Transportation requested a DAC report that contained his work history from his recent employment with Marten Transport. He applied to Swift Transportation in the spring of 2006, while his whistleblower litigation involving Marten Transport was ongoing. So, the DAC report Swift Transportation would have received was the uncorrected report that showed an unsatisfactory work history. After their discussion, Swift Transportation hired Mr. Carter. Consequently, the Marten Transport information in DAC at that time did not prohibit him from getting a job with Swift Transportation.

When he started at Swift Transportation, Mr. Carter had a new truck and he was treated very well. However, a driver manager had some contact with Marten Transport and was aware that Mr. Carter was going to go back to Marten Transport. So, Mr. Carter explained the situation with the fleet manager, who said they would like Mr. Carter to stay. Yet, on one particular trip, Mr. Carter had problems with a truck's navigation system, rerouting for repairs. Then, he had difficulty with a trailer mechanism, had to wait for a trailer, and experienced problems with a repair person. At that time, he was starting to run out of hours, so he drove the tractor home since it was in the direction of the repair facility, and made arrangements to get the truck to the repair facility when there was no hours of service issue. But, the company questioned why he hadn't waited and he was accused of using the tractor for purposes other than hauling a load.

When Mr. Carter then brought the truck back, he was terminated for taking the tractor without permission.

So, although Swift Transportation had been a good place to work, Mr. Carter returned to Marten Transport.

In March 2009, someone at Equity Transportation told Mr. Carter that Marten Transport said they had fired him. The DAC report hadn't been corrected at that time.

USIS 1B is Mr. Carter's DAC employment report for June 22, 2008, before his settlement agreement. The report shows two employment periods, an October 2003 period for ALTL and a June 2005 period with Marten Transport. The reason for leaving is indicated as "resigned, quit, or driver terminated lease." So, at that time, Marten Transport didn't tell USIS to report that they fired him. On a report, it would be better if it indicated that the driver quit.

In July 2010, Sunset Logistics gave him an impossible schedule and fired him. Mr. Carter called the law enforcement because he didn't want a repeat of what happened at Marten Transport when they had the police escort him off the property.

In May 2008, Mr. Carter contacted USIS to dispute the Marten Transport entry showing excessive complaints and company policy violations. After May 2008, Mr. Carter knows that he contacted USIS about the Marten Transport entry because he has copies of his rebuttals in a file. However, without looking at his file, Mr. Carter can't state the specific dates. He also contacted Mr. Hinton and his attorney. Mr. Carter believes that he may have disputed the DAC report online. Mr. Carter isn't certain of what relationship Mr. Hinton has with USIS.

In May 2008, an appeal regarding Judge Solomon's decision was pending. Then, through counsel, Mr. Carter filed a second complaint against Marten Transport in June 2008.

Mr. Carter understood that during the appeal only the reinstatement portion of Judge Solomon's 2006 decision was effective. Everything else in the decision, including correction of employment records, was pending the appeal, including correction of the record. Judge Solomon had determined the case in Mr. Carter's favor due to a violation of the whistleblower provisions. Mr. Carter acknowledged that during that appeal process Marten Transport may have thought they had been correct. It was their choice whether they changed the employment record before a final decision by the appellate body.

Eventually, USIS investigated Mr. Carter's complaint. USIS 7 is the response, dated June 28, 2008. The letter indicates that Mr. Carter had the right to place a statement in his file setting out the reasons why he disputed certain information in the DAC report. He could also state how the report was incomplete or explain any negative information. And, Mr. Carter could also revise that statement by contacting USIS. Mr. Carter doesn't recall if he personally sent in a statement.

After reviewing his files, Mr. Carter determined that he provided documentation to his lawyer and his attorney then contacted USIS. Mr. Carter did not personally contact USIS. Mr. Carter believes that his attorney may have sent him correspondence about his USIS contacts.

In its response to Mr. Carter's dispute, USIS 7, the company removed the company policy violation comment.

Mr. Carter agreed that USIS followed the dispute resolution procedure provided by the Fair Credit Reporting Act, USIS 6 and USIS 7. The periods of employment listed on USIS 7 are relatively short, but they are accurate. The exhibit also does not show recent driving experience.

Mr. Carter does not have any reason to suggest that USIS intentionally wanted to blacklist him from getting another job.¹⁷

Mr. Carter does not have any reason to believe that USIS had a basis for questioning the accuracy of the employment information it received from Marten Transport on July 14, 2005 regarding his first period of employment with Marten Transport.

On August 17, 2006, USIS received Marten Transport's report for his second period of employment, which indicated his work record was satisfactory. There's no reason for USIS not to believe that his work record during his second employment with Marten Transport was not satisfactory.

USIS never communicated to Mr. Carter that they wanted to harm him.

When Mr. Carter sent his information dispute to USIS in May of 2008, Mr. Carter and Marten Transport were still engaged in a dispute about what his record should be.

USIS 10 is an excerpt from CX 3 which lists the more recent trucking companies Mr. Carter contacted at the end of 2008 and beginning of 2009. Eleven of the companies indicated the reason for not hiring him was his lack of recent driving experience. Another 15 companies indicated that they were not hiring at the time. So, his failure to get those jobs had nothing to do with any information reported by USIS based on information provided by Marten Transport.¹⁸

Mr. Carter believes the information USIS maintained in its system regarding his termination by Marten Transport in 2005 before the settlement in October 2008 was detrimental to his re-employment efforts. During that period, in September 2006, Summit Trucking was the only employer who indicated that the information they obtained from USIS was the reason he was not being hired.

¹⁷Q: "Do you have any reason to suggest that USIS wanted to blacklist you from getting another job?" A: "Not intentionally, no." TRB, pp. 48-49.

¹⁸Q: "So, you're not getting those jobs had nothing to do with your, as far as you know, any information supplied by Marten to USIS and reported by USIS, did it?" A: "As it pertains to USIS, correct." TRB, p. 55.

Mr. Carter doesn't know whether USIS was aware of the reports he made to Marten Transport in June 2005, which are the protected activities in this case.¹⁹ In regards to establishing that USIS was maintaining adverse employment information due to his protected activities, Mr. Carter notes that eventually USIS got a copy of the settlement agreement. And, Mr. Carter believes USIS' entry of continuous employment is adverse information because he made it known that he couldn't work at two places that the same time, "even with that settlement agreement."²⁰

Mr. Carter agreed that the DAC information about continuous employment came from the settlement agreement that he signed. That is, pursuant to the settlement agreement, Marten Transport provided to USIS the continuous employment change and USIS then put the employment history change from Marten Transport into the DAC record. Mr. Carter relied on his attorney at the time and believes there should have been an addendum to the settlement agreement. Plus, a year later, Swift Transportation filed an employment report with USIS about his work in 2006. "That changed everything"²¹ because although it wasn't there a year earlier, when that the Swift Transportation report did come in, Mr. Carter would have then questioned the multiple employment reports for 2006 if he had been at USIS.

In terms of Marten Transport's blacklisting, the company provided a document to Equity Transportation in January 2009 that showed two different periods of employment, "when one period was supposed to have been completely removed and cleaned up, nothing could be derogatory."²² Mr. Carter believes Marten Transport provided those two different work histories on the same paper, with one showing excessive complaints and company policy violations, to Equity Transportation to blacklist him.

Despite Mr. Carter's requests, other potential employers declined to provide Mr. Carter the information they had received from Marten Transport.

Mr. Carter was not aware of any technical or computer issues that USIS was having in 2008 and early 2009 regarding its reporting systems.

Mr. Carter had his conversation with Summit Trucking in September 2006, before the subsequent settlement.

¹⁹Q: "No, Mr. Carter. I'm focusing on your protected activity at Marten. The protected activities in this case involve your reporting problems with, I think it was the tractor trailer, that was the overheating radiator, the bunk strap, all those things were we talked about in the prior hearing." A: "As to Marten?" Q: "Okay, that was a protected activity, alright. How do you know whether or not USIS was aware of any of those activities that you engaged in at Marten?" A: "I wouldn't." TRB, p. 59.

²⁰TRB, p. 60.

²¹TRB, p. 61.

²²TRB, p. 62.

Mr. Bradley Kent Ferguson
(TRB pp. 91-188)

Mr. Ferguson is the Director of Transportation Solutions at HireRight Solutions, Inc., formerly USIS, formerly DAC Services, which started in 1981. Although involved in a number of different areas, he primarily handles the employment history files and DAC on-line, as well as associated consumer requests and disputes. He held the essentially same positions from 2005 through 2008. He has been with the company since April 1986.

USIS is a consumer reporting agency that provides background screening information, drug and alcohol testing, and employment verification products primarily to employers and some insurance companies. The company maintains a database of commercial driver work histories. The history contains information about employment, accidents, and drug and alcohol violations. Several other companies provide similar services. USIS customers subscribe to the database service and pay an access fee or a fee associated with the products they receive. In the United States, their principal customers are trucking companies. USIS is not a subsidiary of any trucking company. USIS does not own any trucks, have any truck drivers, or engage in the interstate transportation of commercial goods.

In the 2005 to 2008 timeframe, Marten Transport was a USIS customer. Marten Transport ordered various USIS products to help them with hiring decisions on truck drivers. That was the extent of the relationship between Marten Transport and USIS.

USIS is subject to the FCRA and similar state laws.

The DAC report is a driver's employment history file, which contains a commercial driver's work history, accident details, and any drug or alcohol violations with a company. The file is stored in the USIS database and approximately 2,500 customers participate in the database. As a participant, a customer is required to provide information to the database which can then be used to screen drivers. The DAC on-line product enables a customer to outsource his employment verifications and is a subset of the data that's in the driver's employment history. "[T]he difference there is DAC on-line is specific to a company and their records, and the employment history file (DAC) is more global and contains information on all companies."²³

Consequently, a DAC report on Mr. Carter would provide all the information provided by anyone for whom he worked who provided information. Those DAC inquiries come through the USIS Consumer Department by phone or written request. The information is then provided by mail.

The DAC on-line product allows drivers to register with a name and password and then view their reports specific to the company that's using the product. DAC disputes and rebuttals may also be presented through DAC on-line rather than the Consumer Department.

²³TRB, p. 97.

Under the USIS contract, DAC members are required to furnish only accurate information. They must agree to abide by the FCRA and follow the rules for the dispute process. They also have to agree to use the information for specific purposes, including employment.

The information from DAC and DAC on-line should be "exactly matching."²⁴

USIS 2 is the USIS guide for customers indicating the type of information they can provide. It has sections that can be filled in and was in use in 2005 and 2008. There's an electronic version available on the website.

In the June 2008, Mr. Carter disputed information supplied by Marten Transport. Other than that one dispute, USIS has no record of receiving any other dispute regarding Mr. Carter's employment with Marten Transport.

As required by the FCRA, in response to Mr. Carter's June 2008 dispute, USIS started the reinvestigation process, contacted Marten Transport, and provided the information that Mr. Carter was disputing. USIS 4 is the communication that USIS sent to Ms. Decker at Marten Transport.

USIS 5 is Marten Transport's response. The code number 935 and 912 relate to the codes in USIS 4.

In accordance with the FCRA, the investigation was completed within 30 days. Based on Marten Transport's clarification, USIS deleted the company policy violation annotation, since the excessive complaints Marten Transport cited technically fell under company policy violation and they couldn't use two codes for the same incident. "So, if excessive complaints was the company policy violation, we removed company policy violation."²⁵ The customer should understand that they can't use two codes to indicate the same situation.

USIS 1A is a sample DAC report that shows the format and how the data is presented to a customer. The DAC on-line report is typically in the same format.

Mr. Ferguson is familiar with the employment market for truck drivers and the effect associated with various entries on a DAC report on a truck driver's ability to obtain employment. An entry of "excessive complaints" would not make a truck driver unemployable.

As part of his DAC dispute, Mr. Carter included information from his whistleblower proceedings. USIS discovered the whistleblower case was still under appeal and the information in the materials was being disputed by both parties. There was no final decision and a consumer reporting agency is not required to resolve such disputes. USIS does note whether information is being disputed. The notice indicates that a dispute is pending. Then, a driver would have to present USIS with a notice of dispute resolution, and then the entry is dropped.

²⁴TRB, p. 99.

²⁵TRB, p. 107.

Mr. Carter also did not provide a rebuttal statement.

In a dispute investigation, USIS sends the disputed information to the customer that stored the information and asks the customer to make sure the information is accurate and that their files reflect that information. After receiving the customer's response, USIS does not go any further to evaluate the information. "If it supports what they originally stored in the data base, then under the FCRA, that's an acceptable verified reinvestigation."²⁶

To ensure the accuracy of information about drivers, USIS requires its customer to sign an agreement indicating they will provide accurate information that they can support. USIS also provides a standardized form for the information and provides definitions of terms that are used. USIS also does random and informal audits. An informal audit may be conducted if the Consumer Department sees an excessive number of complaints or disputes on a particular company's records. During the audit, USIS pulls its records and sees how that company is providing information. In particular, they look for an excessive number of negative comments, since 75 to 80% of the data is positive or satisfactory.

In 2005, USIS was not advised of a problem with Marten Transport. Similarly, in mid-2008, USIS was not advised of any problems with the information provided by Marten Transport. "Their information is generally reliable."²⁷

USIS 6 is a notice of consumer rights, which USIS provided each time they sent a report to a consumer.

USIS does not blacklist drivers. The USIS database contains negative information on drivers that has been provided by its customers in regard to drivers' work histories. But, again about 75 to 80% of the information is positive. The people providing the work histories are the same people who use the DAC information. Generally, there is a shortage of truck drivers, so the industry tries to make an offer of employment as soon as it can. With USIS service, an employer can get access to "call instant" information within a minute or two. Further, at times drivers omit bad work records from prior employers and DAC provides information that is outside the control of the driver.

If the DAC record contains some negative information, such as excessive complaints, then the prospective employer can contact the company that provided that information to get more details about the excessive complaints. The prospective company can also discuss the issue with the driver.

As Mr. Carter testified, Swift Transportation discussed the excessive complaint entry with him. So, they did a follow-up and didn't just make a hiring decision based on the USIS report.

²⁶TRB, p. 112.

²⁷TRB, p. 113.

A USIS survey conducted a few years ago indicated that companies don't reject a driver just because there is some negative information in the DAC report unless it relates to excessive accidents.

In the past, a prospective employer was required to obtain a minimum amount of information from a previous employer. A 2004 federal regulation also required that a past employer respond to such inquiries and provide the information. So, USIS developed DAC on-line in order that a company could readily respond to such inquiries. DAC on-line also contains current driver information; whereas the DAC employment history file only has information about former drivers.

The two DAC databases should coordinate with each other. However, in late 2008 and early 2009, USIS experienced a system issue with the DAC on-line program. Specifically, a customer would edit and add information about a driver to the database, which would cause an e-mail to be sent to a different department to update the DAC employment history file. "So, there was a problem with that process . . . some changes were made in the DAC on-line . . . [which] didn't for the lack of a better word, stick."²⁸ A little over 3,000 records were affected during that time frame, out of a total database of 2.5 million records. Mr. Carter's DAC record was one of those adversely affected records.

Marten Transport sent changes to the DAC on-line for Mr. Carter on a couple of different occasions under the terms of the settlement agreement. USIS intended to make those changes. The company's computer problem was not designed to hurt Mr. Carter. USIS was never able find out exactly how the periodic disconnects occurred. However, they identified the issue, and through programming made a change that automated the update process. Now, whenever a change is made in a DAC on-line record, the system automatically also updates the DAC employment history file. The update is no longer done by e-mail for another department to make the change.

The update problem would explain why a report provided by USIS after August 2008 would not reflect the terms in Mr. Carter's settlement agreement. USIS did not intend not to provide the corrected information required by the settlement agreement.

According to a USIS inquiry list, USIS 3B, page 7, USIS provided Mr. Carter's DAC employment history report to Equity Transportation on January 27, 2009. That DAC employment history record only contained the employment information consistent with the settlement agreement. Mr. Carter's old 2005 employment information for Marten Transport had been removed. All the January 29, 2009 DAC employment history report for Mr. Carter's employment with Marten would contain was the corrected information.

CX 2 is a work history from the DAC on-line system. Mr. Ferguson identifies the source based on the annotation at the bottom of the page "dol/USIS csd.com," and the format of the report. The heading also shows that it is a work history for a single carrier, Marten Transport, which DAC on-line provides. The "dol" annotation means DAC on-line.

²⁸TRB, p. 119.

Based on USIS' records, Equity Transportation did not order CX 2 from USIS. Mr. Ferguson speculated that Mr. Carter had access to DAC on-line and could have copied the report when it was indicating the wrong information. However, Mr. Ferguson does not know how CX 2 was produced. He only knows that USIS did not provide CX 2 to Equity Transportation. USIS' records do not indicate that Equity Transportation used DAC on-line to get CX 2.

"Driver's Facts" was provided by another reporting company.

The information in the DAC employment history provided to Equity Transportation and the DAC on-line report, CX 2, is not consistent. This inconsistency was due to the USIS computer problem. Because the USIS computer issue wasn't resolved until March 2009, even though Marten Transport attempted to correct Mr. Carter's employment history for a second time in December 2008 in accordance with the settlement agreement, the changes still didn't take. Through at least March 2009, the DAC employment history database and the DAC on-line inputs didn't link up. Even though Marten Transport made the correction and printed it out in December 2008, "[a]t that particular point in time when it goes to our system, it didn't update correctly, they would have to had gone back in, you know, probably several days later to actually see that it did not [updated]." ²⁹ The on-line print-out of the updated corrections didn't mean the employment database history had actually been corrected because the two systems weren't actually talking to each other under the procedures at that time which involved e-mail notification and other people making the database corrections.

In March 2009, USIS notified Marten Transport and other affected companies that the update issue had been corrected.

In January 2009, USIS had two databases, one for the DAC employment history files, and one for the DAC on-line information. In addition to the two databases not synching up, USIS also had problems with the DAC on-line information database because it was incorrect. As a result, the January 2009 DAC on-line report, CX 2, was incorrect; whereas the DAC employment history file would be correct.

In August 2008 and December 2008, when Marten Transport corrected Mr. Carter's DAC on-line record and printed out those activities, they thought the corrections had been made. Those changes were supposed to generate an e-mail to another department to update the DAC employment history file. But the DAC on-line system also wasn't synching up. In addition to the synching problem between the two USIS databases, the DAC on-line system itself was bad. So, even though a screen print out would show the corrected entries, the DAC on-line system wasn't actually corrected in some cases. At other times, the information was captured, "that's why it was a difficult issue to figure out." ³⁰

If 10 days after Marten Transport made the correction on August 1, 2008, the company went back to DAC on-line, they possibly would have found the uncorrected information still in

²⁹TRB, p. 135.

³⁰TRB, p. 140.

the record. "It was so intermittent, in some cases it did update correctly, in some cases it didn't."³¹

Based on technical analysis, USIS determined that a little over 3,000 records had been affected.

From the fall of 2008 to the first quarter of 2010, due to recession and resulting diminished tonnage and freight loads, trucking companies were not doing a lot of hiring of truck drivers.

In considering the qualifications for a driver, trucking companies consider experience, low accident rate, and the absence of drug and alcohol incidents. Some companies also look for a pattern of hopping around companies because it costs \$3,000 to \$5,000 to recruit and train a truck driver. So, they try to get at least six months out of a driver to recoup those expenses.

In Mr. Carter's uncorrected employment history, USIS showed three employers over a short period of time.

Recently, the hiring situation for truck drivers has improved. Based on the present shortage of drivers, although he doesn't have current driving experience, Mr. Carter would have a better chance of getting a job now.

Marten Transport did not object to USIS decision to delete the company policy violation annotation. Mr. Carter did not provide a rebuttal statement to USIS' June 2008 investigation. If he had submitted a rebuttal statement, it would have been shown up in the DAC report. No rebuttal statement was in Mr. Carter's DAC report.

USIS did not employ Mr. Carter.

When Marten Transport provided the initial entries to Mr. Carter's employment to USIS in July 2005, and indicated excessive complaints, they did not tell Mr. Ferguson or anyone at USIS the actual content of Mr. Carter's complaints. When USIS receives the employment information, the company only validates that the codes are correct and then the information "populates the database."³² The USIS person receiving the information has no discretion on whether to accept the information. The system also doesn't permit someone at USIS to embellish, change, or alter the submitted information.

When Mr. Carter filed his second STAA whistleblower complaint for blacklisting, he included USIS as a named respondent. So, from the moment Mr. Carter filed that second complaint, USIS was aware that Mr. Carter was engaged in litigation involving the whistleblower provisions.

³¹TRB, pp. 140-141.

³²TRB, p. 149.

As part of their agreement, USIS asks its customers to provide information as quickly as it comes in, but the delay by Swift Transportation in making its report about Mr. Carter is not necessarily unusual. Sometimes, when a driver applies to a trucking company and lists a prior employer who is a USIS customer, and USIS doesn't have any employment information about the driver, the company considering employment will ask USIS why the prior employment information isn't in the system and USIS will then contact the former employer and ask them to provide the information. That may explain the year delay for Swift Transportation.

It is possible for USIS to have two employment histories that conflict with each other, with the Marten Transport employment history showing both the continuous employment based on the settlement agreement and an employment history with Swift Transportation over the same period. Such overlapping conflict between two companies does not automatically cause USIS to believe something is wrong because some drivers may be owner-operators that are trip leasing. USIS doesn't look at such overlaps unless specifically asked.

USIS did not inform Mr. Carter or any other of the affected drivers about its database problems.

The top of the page on CX 2 says "3/27/2009, Friday 11:53" with a fax number. Below that is an entry that reads, "print record," followed by "Marten Transport Work History." The report comes from DAC on-line. But the USIS report would not have come out with a fax number. The fax number shows the date it was faxed, but that fax number is not USIS. The date at the lower right corner is "1/27/2009," and the report release date is "1/27/2009, 9:07:49 am." The entries on USIS 3A, B, C, and D do not reflect DAC on-line inquiries. USIS 3 reflects a different type of inquiry.

Mr. Ferguson is not aware of a second complaint by Mr. Carter's attorney in June 2008, which would have been handled by a different department since a lawyer was involved. If that complaint had contained new information, it would have triggered a new investigation.

Again, concerning overlapping periods of employment, generally if the companies submit the correct codes, USIS accepts the report and unless someone raises an issue, that's the end of the analysis by USIS, other than internal audits. The only time that may occur is if there is an overlapping period of service from the same company.

The September 10, 2007 drug and alcohol disclosure form showing Marten Transport, Swift Transportation, and Marten Transport, was prepared by USIS to accompany the employment history file and indicates which employers have that type of information stored in their records. Since release of the information requires a driver's release, the report only provides employer's names and if the prospective employer wants specific information, then it has to obtain a driver's release before USIS will disclose the information.

If Swift Transportation didn't provide employment data to USIS until a year after Mr. Carter left, then USIS would not have been able to provide that information to Marten Transport in April, May, or June of 2006. If Marten Transport knew Swift Transportation had been a former employer and that employment is not in the USIS database, then Marten Transport would

have to obtain any employment information directly from Swift Transportation. "The only way we could report Swift [Transportation] information was if it was in our database, and if it wasn't there at that time, then we wouldn't have reported it, couldn't report it."³³

USIS applies two processes for removing information from its database. First, under the FCRA, after seven years from the end of service, a record becomes restricted. Second, after 10 years, USIS doesn't report any record.

If during an investigation of a driver's complaint, the trucking company verifies the employment information it provided to USIS is correct, then the information in the database remains the same and the driver is provided an opportunity to tell his side of the story. If the driver responds, that submission is considered a rebuttal and put in the driver's employment history record.

Counsel for USIS did not provide Mr. Ferguson information about Mr. Carter's second complaint.

If a trucking company has issues or a concern, they contact the USIS Customer Service Department or sometimes account managers.

The USIS database doesn't make a distinction between a rehire and reinstatement.

Prior to the submission from Swift Transportation, Mr. Ferguson had no knowledge about any contact between Marten Transport and Swift Transportation.

Occasionally, a prospective employer will call USIS, indicate that the employment history from a former employer who participates with USIS hasn't provided anything in the system, and ask USIS to contact the former employer to ask them to update the employment history.

Since drivers register for access to DAC on-line, USIS had their contact information.

Under the regulations, drivers must provide their past 10 years of commercial driving experience on their applications. That's why USIS reports go back 10 years.

USIS customers were informed about the coordination between the DAC on-line database and the employment history database. So, when Marten Transport made a correction through DAC on-line, their expectation would be that the same change would be made to the DAC employment history report.

USIS became aware of its database problems in December 2008. The employment history report provided to Equity Transportation was produced on January 27, 2009 and had the correct information. However, the DAC on-line report from January 27, 2009 had the incorrect information. The database problem was not fixed until March 2009.

³³TRB, p. 166.

Documentary Evidence

Mr. Carter's Response to Marten Transport's Memorandum³⁴ (CX 1)

On May 23, 2009, in addition to alleged procedural and attorney issues associated with his settlement agreement, Mr. Carter indicated that he became aware on March 27, 2009 that his DAC record for Marten Transport, maintained by USIS, was changed and altered which caused "my employment applications not coinciding with DAC records." Mr. Carter claims that a supplemental addendum "should have been placed" showing that he worked for Swift Transportation in April, May, and June 2006.

Mr. Carter's Response to USIS' Position Statement with Attachments³⁵ (CX 2)

On May 23, 2009, in addition to contesting numerous statements in USIS' position statement, Mr. Carter alleged "Marten provided to DAC Records information continuing to blacklist Carter whereby my work history has been altered, changed, fraudulently making statements." He also asserted that "DAC is a co-conspirator or acting as an agent." DAC was aware that his employment record was incorrect based on information it received from Marten Transport. The derogatory blacklisting has prevented Mr. Carter from obtaining a solo truck driving job. USIS was aware from his May 2008 correspondence about the misleading information and did not investigate until after June 2008. Although Mr. Carter has provided rebuttal statements, USIS has allowed information to remain on the record that should have been removed. USIS knew that it was providing false information. (Page count 1 to 5.)

On January 26, 2009, having intended to respond a "couple of months earlier," counsel for USIS advised Mr. Carter's former counsel by letter that "USIS has verified that the disputed information has been removed from [sic] DAC on-line product, as well as the employment history database (DAC Report)." Counsel advised that if Mr. Carter desired confirmation he should contact the USIS Consumers Department for a copy of his DAC Report. (Page count 9.)

In an e-mail response to the January 26, 2009 letter, Mr. Carter's former attorney noted that Mr. Carter advised USIS about Marten Transport's retaliation, provided Judge Solomon's decision, and requested that USIS investigate the dispute. Due to USIS' inaction, Mr. Carter's former attorney alleged that USIS was a co-conspirator. (Page count 11.)

In a January 27, 2009 reply, USIS' counsel observed that USIS had advised Marten Transport of the asserted dispute which fulfilled its obligations under the FCRA and

³⁴In response to my April 24, 2009 Show Cause Order, Marten Transport filed a memorandum to establish cause for the dismissal of Mr. Carter's STAA complaint on May 13, 2009.

³⁵In response to my April 24, 2009 Show Cause Order, USIS filed a response to support dismissal of Mr. Carter's STAA complaint on May 15, 2009.

subsequently Marten Transport verified their information. As a consumer reporting agency, USIS does not act as a trier of fact. Counsel also noted that since Marten Transport filed an appeal, Judge Solomon's determination was not a final decision. Finally, counsel denied that DAC was engaged in blacklisting Mr. Carter. (Page count 10 and 11.)

Mr. Carter's attorney replied with an expressed belief that investigation means more than merely accepting the trucking company's version of the facts, especially when presented with evidence that the motor carrier was wrong. (Page count 10.)

A Drug/Alcohol Test History report from "dol.usis-csd.com" for Mr. Carter's employment with Marten Transport, with a disclosure date of January 28, 2009, lists his service dates of June 2005 to July 2006. The service history is circled with the annotation, "wrong." (Page count 13.)

A "DriverFacts" report prepared for Equity Transportation on January 27, 2009 indicates that Mr. Carter worked for Swift Transportation from April 5, 2006 to July 8, 2006. The service dates are circled with the annotation, "correct." (Page count 14 and 21.)

A Work History Report from "dol.usis-csd.com" for Mr. Carter's employment with Marten Transport, with a release date of January 27, 2009, shows two periods of service. The first period goes from June 2005 to June 2005. The service history is circled with the annotation, "correct." The associated work record is coded as follows: "912 Excessive Complaints" and "935 Company Policy Violation." These codes are circled with the annotation, "was to be removed by Marten." The eligible for rehire section contains "004 Review required before rehiring." The second period of service is June 2005 to July 2006. The associated work record is "901 Satisfactory." And, the eligible for rehire code is "001 Yes." (Page count 15 and 17.)

A copy of the work history report discussed immediately above also shows at the top a fax number with a fax date of March 27, 2009. (Page count 16.)

A Transportation Employment History for the customer, Equity Transportation, obtained by Mr. Dave Ward from "members.dacservices.com" with a date of January 27, 2009 shows three employment histories for Mr. Carter. First, Mr. Carter was employed by ALTL, Inc. from October 2003 to December 2003. Second, Mr. Carter was employed by Marten Transport from June 2005 to July 2006 with a work history of "satisfactory." The service dates are circled with the annotation, "wrong." The eligible for rehire code is "001 Yes." Third, Mr. Carter worked for Swift Transportation from April 2006 to June 2006. (Page count 18 to 20.)

A "USIS Employment Record," dated February 2, 2009 shows Mr. Carter's period of service with Marten Transport from June 2005 to July 2006. He is eligible for rehire and his work performance was satisfactory. The report also indicated Mr. Carter worked for Swift Transportation from April 2006 to June 2006. These dates are circled with the annotation "correct." (Page count 22.)

A "USIS Employment Record," dated September 10, 2007 shows Mr. Carter's period of service with Marten Transport from June 2005 to June 2005. His eligibility for rehire indicates

"Review required before rehire." His work record reflects "excessive complaints and company policy violation." The employment dates are circled with the annotation "correct." The record work comments are circled with the annotation "was to have been removed by ct. order." The report also indicated Mr. Carter worked for Marten Transport for a second period of June 2006 to July 2006. While the eligible for rehire comments remain the same, the work record is "satisfactory." The employment dates are circled with the annotation "correct." Finally, the report shows Mr. Carter's employment with Swift Transportation from April 2006 to June 2006. Eligible for rehire is "no" and the work record is "other. The report notes that DAC received the original employment data from Swift Transportation on June 12, 2007. The employment dates are circled with the annotation "correct." (Page count 23 and 24, and also CX 3.)

An undated USIS Drug/Alcohol Disclosure report shows the following employment dates: Marten Transport from June 2006 to July 2006, Swift Transportation from April 2006 to June 2006, and Marten Transport from June 2005 to June 2005. The employment dates are circled with the annotation "correct." (Page count 25, and also CX 3.)

A September 2008 article titled "My name isn't mud," indicates that a driver's reputation is only as good as his work history record in USIS' DAC employment history which is used by 2,600 motor carriers and based on information supplied by the motor carrier employers. The article stresses the importance of developing a good driving record, giving proper two weeks notice before leaving, and not continuously switching trucking companies. According to the article, a negative DAC report can be a "killer" for a driver's career. The article suggests going directly to a trucking company to get corrections made. USIS also has a correction process which involves notifying a trucking company of a dispute and asking the company whether a correction in the database is warranted. In this process, "the carrier ultimately decides whether to change its report" and USIS accepts that determination. In that situation, a trucker may then file a rebuttal. The article closes with a suggestion that an attorney may prove effective in getting a change to be made to the DAC employment history. (Page count 26 to 30.)

An insert to the above article features Mr. Carter's problems with his DAC report after raising equipment deficiencies to his employer which led to his termination. The story describes the favorable administrative law judge's determination that Mr. Carter obtained, which included a finding that the employer's DAC history comments about excessive complaints and company policy violation were in retaliation for his safety-related complaints. Although the judge ordered the comments be removed from DAC, the article noted the trucking company had filed an appeal. Absent legislative reform, such adverse comments remain in the DAC employment history pending the appeal. In Mr. Carter's case, the comments have remained in his DAC employment history and he "is still unemployed more than three years after his 2005 termination." (Page count 27.)

A June 9, 2008 Business Week article titled, "The Trouble with Background Checks," describes the unregulated, and large, business of background screening and the associated problems with the unregulated business. The article recounts Mr. Carter's efforts to get his name cleared in such a database for more than two years after receiving a favorable administrative law judge decision. According to an attorney for Marten [Transport], an appeal had been filed and the adverse comments remained valid from the company's perspective. (Page count 31 to 35.)

In an August 12, 2008 settlement position statement, counsel for Marten Transport continued to assert its termination of Mr. Carter was warranted to his excessive complaints regarding equipment deficiencies that had been corrected by the company. Although Marten Transport immediately complied with Judge Solomon's reinstatement order in June 2006, the company also filed an appeal and Mr. Carter voluntarily quit a week later. On June 30, 2008, the ARB affirmed Judge Solomon's decision, including his award of damages. Subsequently, Mr. Carter filed additional litigation regarding the information Marten Transport had furnished USIS. However, Marten Transport notes that Mr. Carter was able to obtain employment with Swift Transportation after he left Marten Transport in July 2006, such that the information Marten Transport provided to DAC did not interfere with his re-employment. Marten Transport believes that an appeal to the United States Court of Appeals for the Seventh Circuit will result in a reversal of the ARB's determination. At the same time, Marten Transport is interested in resolving the case through mediation. (Page count 36 to 39.)

In a settlement position statement, Mr. Carter's former attorney recounts the circumstances of Mr. Carter's employment termination by Marten Transport in [June] 2005. Subsequently, due to Marten Transport's DAC comments about excessive complaints and company policy violations, Mr. Carter was denied employment by several companies, including J. B. Hunt. After noting the favorable determination by Judge Solomon and the ARB, counsel asserts applicable appellate law supports affirmation of the ARB's decision. Counsel also notes that although Marten Transport did not correct the DAC information because Judge Solomon's decision was only recommended, Mr. Carter nevertheless was denied employment after his termination from Marten Transport due to the adverse information. As a result, Mr. Carter intended to seek additional relief from, and damages due to, Marten Transport's continued blacklisting. In May 2008, Mr. Carter disputed Marten Transport's DAC information. In June 2008, USIS informed Mr. Carter that Marten Transport re-confirmed its submission of excessive complaints and company policy violation comments. As a result, Mr. Marten filed his second STAA complaint on the basis that the reconfirmation was an impermissible adverse action. (Page count 40 to 45.)

Mr. Carter's Additional Response to
USIS' Response with Attachments
(CX 3)

On May 23, 2009, Mr. Carter also alleged that USIS DAC records "knew that there should have been a Supplemental Addendum provided to the ARB showing working at Swift and further protecting my rights of Protected Activity."

In an August 29, 2006 letter to USIS' Consumer Consulting Department, Mr. Carter asks for a copy of a report which he believes has changed since he received his last report in July 2006. He notes that he was terminated by Swift Transportation, went back to Marten Transport, and then quit.

In a November 14, 2006 letter to USIS' Consumer Consulting Department, Mr. Carter asks for another copy of his DAC report which he believes was changed at the end of August 2006.

A NextGen Consumer Inquiry History by Mr. Carter's Social Security Administration ("SSA") number from November 30, 2004 to November 22, 2006 lists the following inquiries: ALTL, Inc., November 9, 2006; J. B. Hunt, September 11 and 25, 2006; Marten Transport, August 17, 2005; and DAC Consumers, July 11, 2006.

In a June 28, 2008 letter, USIS advised Mr. Carter that after they received his DAC dispute, USIS conducted an investigation and attached a copy of his current file. The letter explained that in reinvestigating the dispute, USIS directly contacted the provider of the information and the provider in turn will advise whether the DAC information is correct. USIS advised that Mr. Carter had a right to place a statement in his file setting forth the basis of his dispute and providing an explanation.³⁶

A June 27, 2008 DAC Drug/Alcohol Disclosure report shows the following employment dates: Marten Transport from June 2006 to July 2006, Swift Transportation from April 2006 to June 2006, and Marten Transport from June 2005 to June 2005.³⁷

In addition to six employment contacts that occurred between February and May 2005, Mr. Carter contacted another seven trucking companies in October 2005, November 2005, and March 2006. A few companies either did not respond or indicated they had nothing. One trucking company declined to hire Mr. Carter because he had been discharged by Marten Transport. Based on the advice of his former counsel, Mr. Carter declined to attend an employment interview with another company. In October 2005, after initially inviting Mr. Carter to orientation, and after a release of his DAC record, J. B. Hunt declined to consider Mr. Carter for employment since he had not indicated where he had worked in 2004.³⁸

Between June 2008 and February 2009, Mr. Carter contacted and submitted applications to 45 trucking companies. He was not hired by one company due to adverse DAC information provided by ALTL and Swift Transportation. Nine companies declined since Mr. Carter had not driven since July 2006. Several companies did not respond. Many companies indicated they were not hiring.

³⁶See also USIS 7.

³⁷See also USIS 7.

³⁸See also USIS 10.

Settlement Agreement
(Marten 1)

On August 20, 21, 22 and 25, 2008, Mr. Carter's former counsel, Mr. Carter, Marten Transport's attorney, and Ms. Deetz, respectively, signed a settlement agreement. Under the settlement provisions, in general terms, Mr. Carter agreed to give up and waive any claims, "whether known or unknown," against Marten Transport "for any conduct that occurred before the effective date of the agreement," thereby releasing Marten Transport from any liability for "any expense, damage, costs or any other losses he might claim," including those related to his employment with, and subsequent termination from, Marten Transport. He also specially agreed to withdraw all motions with the DOL that were filed after the June 30, 2008 issuance of the ARB's decision regarding his first STAA complaint. Further, he agreed not to file any additional complaint or law suit of any kind for any claims, known and unknown, "accruing before the effective date" of the agreement. Finally, Mr. Carter agreed to withdraw his second STAA complaint filed on July 8, 2008, "as to Marten Transport."

In exchange, Marten Transport similarly gave up and waived any claims, "whether known or unknown," the company may have against Mr. Carter for any conduct that occurred before the effective date of the agreement. Marten Transport agreed to pay Mr. Carter \$24,496.00 in back pay, \$30,540.00 in compensatory damages, \$2,903.29 in litigation expenses, and attorney fees. Marten Transport also agreed to within 10 days of the effective date of the agreement "to cause Mr. Carter's employment records with USIS Commercial Services to be amended to reflect only the following information:

Period of Service: From June 2005 to July 2006 . . .
Eligible for Rehire: Yes . . .
Work Record: Satisfactory."

Marten Transport further agreed that if a prospective employer contacted the company about Mr. Carter, the company would provide only the information set out in his corrected DAC report.

The agreement would become effective upon approval by the ARB, "or upon receipt of notice from an authorized representative of the Secretary of Labor that approval of the settlement is not required."³⁹

³⁹In regards to the portions of the settlement agreement relating to Mr. Carter's second complaint, in an August 19, 2008 e-mail (Exhibit 3 to Ms. Rowland's Second Affidavit submitted with Marten Transport's June 19, 2009 memorandum to support dismissal of Mr. Carter's second complaint), Mr. Benjamin indicated that OSHA would accept the executed settlement as resolution of Mr. Carter's second complaint. Concerning the resolution of Mr. Carter's first complaint, on October 28, 2008, the ARB denied Mr. Carter's unopposed motion to approve the settlement agreement since the settlement agreement was executed after the ARB had issued its June 30, 2008 Final Decision. Since I consider the ARB's denial an implicit representation that ARB's approval of the settlement in regards to the first complaint was not required, I will use October 28, 2008 as the effective date of the settlement agreement.

Finally, "by signing this Agreement," the parties represented that they understood all the terms of the agreement. Mr. Carter also specifically agreed that he fully understood all the provisions of the agreement and that he "knowingly and voluntarily entered into the Agreement."

DAC On-Line Screen Shots
(Marten 2)

A DAC On-Line Screen Shot, current view date of August 20, 2008, shows the service start date for "T. Carter" of "06/2005." The service end date is "07/2006." The code of rehire eligibility is "001 Yes." And, the work history is "901 Satisfactory Selected."

A DAC On-Line Screen Shot, current view date of December 4, 2008, contains two sections. The first section shows the service start date for "T. Carter" of "June 2005." The service end date is "July 2006." The code of rehire eligibility is "001 Yes." And, the work history is "901 Satisfactory Selected." The second section shows start and end service dates of "06/2005." The code for rehire eligibility is "004 Review required before rehiring." The work history is "912 Excessive Complaints Selected," and "935 Company Policy Violation Selected."

A DAC On-Line Screen Shot, current view date of April 6, 2009, shows the service start date for "T. Carter" of "06/2005." The service end date is "07/2006." The code of rehire eligibility is "001 Yes." And, the work history is "901 Satisfactory Selected."

USIS DAC Services Employment Record
(USIS 1B and USIS 7)

A DAC Services employment record, dated June 27, 2008,⁴⁰ has four separate histories for Mr. Carter. First, based on data provided on December 26, 2003, Mr. Carter worked for ALTL, Inc. from October 2003 to December 2003. His rehire eligibility is "Review Required Before Rehiring." His work record is recorded as "Satisfactory." One accident, hitting a parked or stopped vehicle, is reported. Second, based on information provided on July 14, 2005, Mr. Carter worked for Marten Transport from "06/2005 to 06/2005." His rehire eligibility is "Review Required Before Rehire" and his work history notes "excessive complaints." Third, based on information submitted on June 12, 2007, Mr. Carter worked for Swift Transportation from "04/2006 to 06/2006." He was not eligible for rehire and his work record is reported as "other." Fourth, based on information submitted on August 17, 2006, Mr. Carter worked for Marten Transport from "06/2006 to 07/2006." His eligibility for rehire is again "Review Required Before Rehire." His work history is "satisfactory."

A Drug/Alcohol Disclosure Report, also dated June 27, 2008, shows the same employment dates for ALTL, Inc., Swift Transportation, and Marten Transport.

⁴⁰This work history was apparently attached to USIS' June 28, 2008 letter to Mr. Carter regarding his dispute with the work record reported by Marten Transport (*see* CX 3).

DAC Services Information Form
(USIS 2)

The DAC Services Information Form, Termination Record for CDL Drivers, provides numerous codes for various areas of a commercial driver's record. The codes for work record include 901 Satisfactory, 912 Excessive Complaints ("have been received regarding the driver's service and/or safety"), and 935 Company Policy Violation ("use this code only if the other selections in this section do not indicate the company policy violated").

VMS Consumer Inquiry History Report
(USIS 3A)

In addition to 64 inquiries by TISI/Ratbert, from October 1, 2003 to March 29, 2010, the following inquiries were made: Hogan Transport, March 22, 2006; KLLM, LLC, July 6, 2005; Marten Transport, May 23, 2005; and, Heartland Express, November 22, 2001.

NextGen Consumer Inquiry History Report by SSA Number
(USIS 3B)

In addition to 46 inquiries by DAC Consumer/"Test," from October 1, 2003 to October 20, 2011, the following inquiries were made: Marten Transport, July 26, 2011; Hutt Trucking, March 29, 2011; Larsen Trucking, March 2, 2010; Equity Transportation, January 13, 2010, Stageline Express, October 27, 2009; Equity Transportation, June 15, 2009; Schneider Nat'l Carriers, April 9, 2009; Marten Transport, April 6, 2009; Equity Transportation, January 27, 2009; Cal-Ark, December 31, 2008; Marten Transport, August 20, 2008; Marten Transport, July 10, 2008; Swift Transportation, June 12, 2007; ALTL, November 9, 2006; J. B. Hunt, September 25, 2006; Marten Transport, August 17, 2006; Swift Transportation, March 22, 2006; Mike Brooks, Inc., October 24, 2005; G. B. Management, October 24, 2005; Landstar, May 5, 2005; Total Logistic Control, September 9, 2004; and ALTL, December 26, 2003.

NextGen Consumer Inquiry History Report by Name
(USIS 3C and USIS 3D)

In addition to 27 inquiries by DAC Consumer/"Test," and HireRight Internal, from August 5, 2009 to June 18, 2012, the following inquiries were made: Thomco, June 18, 2012; Thomco, March 21, 2011; Thomco, October 25, 2010; Great West Casualty, mid-2010;⁴¹ Hutt Trucking, March 29, 2010; Larsen Trucking, March 2, 2010; Equity Transportation, January 13, 2010; and Stageline Express, October 27, 2009. Additionally, on December 6, 2011, Larsen Trucking submitted an employment history inquiry.

DAC Consumer's Transportation Employment History
(USIS 3C)

Mr. Carter's employment history, dated June 18, 2012, shows three employers: ALTL, Inc., from October to December 2003; Swift Transportation, from April to June 2006; and

⁴¹Month is unreadable.

Marten Transport, from June 2005 to July 2006. Since more than seven years has elapsed, no work record or eligibility for rehire is provided for ALTL. The work record at Swift Transportation is "other" and the Marten Transport work record is "satisfactory." Mr. Carter is not eligible for rehire by Swift Transportation. Mr. Carter's rehire eligibility for Marten Transport is "yes."

USIS Reinvestigation Notification
(USIS 4)

In a June 7, 2008 letter, USIS notifies Ms. Decker (now Ms. Blum) at Marten Transport that Mr. Carter is disputing his work history with the company. Specifically, Mr. Carter states there were not complaints against him and that he did not violate any company policy. USIS requests, "Please check your records to determine if an error has been made on the information" and asks that USIS be notified of the "reverification" by June 26, 2008.

Marten Transport Response
(USIS 5)

On June 26, 2008, by a faxed letter, Ms. Decker (now Ms. Blum) notifies a USIS consumer consultant that upon review of Marten Transport's record the "information provided is correct." Ms. Decker explains that the company policy violation was Mr. Carter's failure to meet the company's expectations. The comment "(912) Excessive Complaints is listed to further describe the incident."

Consumer Rights under the FCRA
(USIS 6)

In order to protect the accuracy and fairness of information in consumer reporting agencies, the FCRA provides an individual the right to dispute incomplete or inaccurate information. The corresponding agency must investigate the dispute.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Credibility Assessments

Based on their hearing demeanor, direct answers, candor, consistency within their respective testimonies, and the absence of confusion or equivocation, I generally found all the witnesses who appeared before me, including Ms. Deetz,⁴² Ms. Blum, Mr. Carter, and Mr. Ferguson, to be credible.

Specific Findings of Fact

1964

Mr. Carter starts his career as a truck driver, hauling farm equipment.

1978

Mr. Carter becomes an owner-operator and eventually has two trucks on the road.

1996 to 2002

After selling his farm, Mr. Carter works as a solo truck driver for DLS Trucking and a successor company.

October to December 2003

Mr. Carter works as a commercial truck driver along the east coast for ALTL, Inc. ("ALTL").

December 26, 2003

ALTL provides Mr. Carter's employment information to USIS. He worked for ALTL from October 2003 to December 2003. His rehire eligibility is "Review Required Before Rehiring." His work record is recorded as "Satisfactory." One accident, hitting a parked or stopped vehicle, is reported.

2004

Due to medical reasons, Mr. Carter does not work as a commercial truck driver.

⁴²I specifically note that although Judge Solomon may have reached a different conclusion based on his January 2006 hearing, and while recognizing Ms. Deetz's prior role in the June 2005 termination of Mr. Carter's employment with Marten Transport, I nevertheless found her testimony during my hearing regarding the attempts by Marten Transport to correct Mr. Carter's DAC employment record to be credible, and her testimony was also further corroborated by Ms. Blum's credible testimony.

2005

USIS is a consumer reporting agency that provides background screening information, drug and alcohol testing, and employment verification products primarily to employers and some insurance companies. The company maintains a database of commercial driver work histories. The history contains information about employment, accidents, and drug and alcohol violations. USIS customers subscribe to the database service and pay an access fee, or a fee associated with the products they receive; the principal customers are trucking companies. USIS is not a subsidiary of any trucking company. USIS does not own any trucks, have any truck drivers, or engage in the interstate transportation of commercial goods. USIS is subject to the FCRA and similar state laws.

Marten Transport is a USIS customer.

The main USIS database contains a driver's employment history file, called a DAC Report, which contains a commercial driver's work history, accident details, and any drug or alcohol violations with a company. Approximately 2,500 customers participate in the DAC Report database. As a participant, a customer is required to provide accurate information to the database which can then be used by other customers to screen drivers. The customers must agree to abide by the FCRA and follow the rules for the dispute process. They also have to agree to use the information only for specific purposes, such as making employment decisions.

USIS also provides another service called the DAC on-line product, which enables a customer to outsource its employment verifications and is a subset of the data specific to that trucking company that's in the DAC report database. The DAC on-line product is specific to a company and their records; whereas the DAC Report is global in that it contains all the information about a driver that has been provided by participating trucking companies for whom the driver has worked. The DAC on-line service enables an employer to obtain information about its drivers to respond to inquiries from prospective employers. And, DAC on-line may be used by a company to store information about its current drivers.

A driver's employment information in the DAC Report and the DAC on-line product should match exactly.

An inquiry for information in the DAC Report database is usually presented to the USIS Consumer Department by phone or written request. The requested information is then provided by mail. To expedite a hiring decision, an employer may also access a "call instant" service.

The DAC on-line product allows drivers to register with a name and password and then view their reports specific to the companies that are using the product. DAC disputes and rebuttals may also be presented through DAC on-line rather than the Consumer Department.

June 2, 2005 to June 14, 2005⁴³

Responding to an ad, Mr. Carter becomes employed by Marten Transport, an interstate trucking company, as a commercial truck driver. During the course of his employment, Mr. Carter reports numerous equipment deficiencies to Marten Transport which represent actual or potential violations of specific motor vehicle safety regulations, including an unsecured, damaged fire extinguisher, an over-heating tractor, an engine oil leak, bent and broken vent louvers, a plugged radiator, a cut steering tire, an inoperable fifth wheel, a missing bunk strap, and a missing inspection book. While many of the noted deficiencies are repaired, the issues involving the plugged radiator, fifth wheel, missing bunk strap, and missing inspection book are unresolved at the time of his discharge, such that those complaints remained protected activities. Mr. Carter also informed his supervisors of his intention to call federal and state agencies about some of the deficiencies. Subsequently, Mr. Carter contacted the respective agencies, which also constitutes protected activity.

On June 14, 2005, Ms. Susan Deetz, Marten Transport HR Director, terminates Mr. Carter's employment for excessive complaints, violation of company policy, failure to meet company expectations, and Mr. Carter's unhappiness with the company. In regards to the excessive complaints, Ms. Deetz refers to Mr. Carter's stated concerns about the functionality of the Marten Transportation equipment, the safety of its trucks, and his continued concerns even after repairs have been made.

June 16, 2005

Mr. Carter files the first STAA whistleblower complaint alleging that Marten Transport has violated the employee protection provisions under the STAA.

July 14, 2005

Marten Transport enters Mr. Carter's June 2005 employment information into the DAC on-line system. His employment history is "06/2005 to 06/2005" His eligibility for rehire is "review required before rehire." And, his work history comments are "excessive complaints" and "company policy violation." The DAC on-line system entry does not indicate the content of the excessive complaints or the circumstances surrounding the company policy violation.

October 2005 and November 2005

Mr. Carter contacts several trucking companies seeking re-employment. After Mr. Carter is invited to, and attends, an orientation, and after the release of his DAC report, J. B. Hunt declines to consider Mr. Carter on the basis that he did not show where he had worked in 2004.

⁴³In rendering these particular findings, I adopt a portion of Judge Solomon's factual findings in his May 18, 2006 Amended Decision and Order, 2005 STA 63.

March 2006

Mr. Carter contacts several trucking companies seeking re-employment.

April 5, 2006

After explaining his DAC employment history for Marten Transport, Mr. Carter is hired as a commercial truck driver by Swift Transportation who is not concerned about his DAC report since Mr. Carter will be given a new truck.

May 18, 2006⁴⁴

Judge Solomon issues an Amended Recommended Decision and Order. Concluding Marten Transport had violated the STAA employee protection provisions, Judge Solomon orders reinstatement; back pay from June 14, 2005 through the date of a bona fide offer of reinstatement or comparable re-employment, which at the time of his decision equaled about \$14,296.00; compensatory damages of about \$11,000.00 for lost items, personal litigation expenses, and emotional distress; and attorney fees. Based on Mr. Carter's counsel's request, Judge Solomon also directs Marten Transport to correct his employment history by taking action to have USIS amend its DAC employment report for Mr. Carter, deleting any unfavorable work record information, and correcting the record to show continuous employment. The recommended decision and order is automatically sent to the ARB for review and a final decision.⁴⁵ Before the ARB, Marten Transport contests its liability. Although the reinstatement order has immediate effect, the remaining provisions of the recommended decision and order are not effective until the ARB renders a final decision.

May 19, 2006 to end of June 2006

Mr. Carter continues to drive commercial trucks for Swift Transportation, which he considers to be a good place to work. Upon advice of counsel, Mr. Carter considers leaving Swift Transportation in order that he may be reinstated with Marten Transport. Eventually, due to a dispute over Mr. Carter's use of a truck, Mr. Carter's employment is terminated by Swift Transportation. At the time of his departure, Swift Transportation does not submit an employment history to DAC.

End of June 2006 to Beginning of July 2006

Based on Judge Solomon's reinstatement order, Mr. Carter returns to work with Marten Transport for a few days. Due to various demands associated with the work, Mr. Carter becomes sick. He decides to leave Marten Transport.

⁴⁴Amended Decision and Order, 2005 STA 63, May 18, 2006.

⁴⁵Pursuant to the automatic review provision in effect at the time, 29 C.F.R. § 1978.109(c)(1).

August 17, 2006

Marten Transport furnishes Mr. Carter's June/July 2006 employment information to USIS. He worked from "06/2006" to "07/2006." His eligibility for rehire is "review required before rehire." His work history is "satisfactory."

August 29, 2006

Mr. Carter sends a letter to USIS' Consumer Consulting Department, and asks for a copy of his DAC report which he believes has changed since he received his last report in July 2006. He notes that he was terminated by Swift Transportation, went back to Marten Transport, and then quit.

September 2006

Mr. Carter returns to farming and does not drive a commercial truck.

September 5, 2006

A hiring representative for Summit Trucking advises Mr. Carter that he will have difficulty finding employment because the information he was providing on his job applications was different from the work histories that his former employers were providing.⁴⁶

November 14, 2006

Mr. Carter sends a letter to USIS' Consumer Consulting Department, asking for another copy of his DAC report which he believes was changed at the end of August 2006.

⁴⁶During the initial portion of his testimony, Mr. Carter indicated that Summit Trucking accused him of placing false information on his employment application because that information was different from the information Summit Trucking had received from former employers. Additionally, based on an unfavorable work history comment, Summit Trucking declined to hire Mr. Carter. He believed that exchange happened after the August 2008 settlement agreement. However, on cross examination, upon being shown his list of job applications which didn't show an application to Summit Trucking after June 2008, Mr. Carter indicated that he really couldn't recall when he applied to Summit Trucking but thought it might be between 2006 and 2008. He also testified that he didn't actually submit an application to Summit Trucking. Instead, he spoke with a hiring representative for Summit Trucking who pointed out the problem he was going to have in finding employment due to the disparity associated with the dates on his employment applications and the employment histories provided by his former employers. Finally, at the close of his testimony, Mr. Carter said the conversation with Summit Trucking took place on "September 5th of '06," and that he did not have a conversation with Summit Trucking after the August 2008 settlement agreement, TRB, p. 64. I accept Mr. Carter's delayed, but specific, recollection of the date of his conversation with Summit Trucking. However, due to Mr. Carter's varied recollection on whether Summit Trucking was responding to an employment application that he had submitted, I only consider the portion of his testimony relating to the conversation about disparate employment histories to be sufficiently reliable for a factual determination.

June 12, 2007

Swift Transportation provides USIS Mr. Carter's employment information for his mid-2006 employment. His employment period is reported as from "04/2006" to "06/2006." Mr. Carter is not eligible for rehire and his work record is reported as "other."

September 10, 2007

A DAC Report for Mr. Carter shows three periods of employment. First, Mr. Carter worked for Marten Transport from June 2005 to June 2005. His eligibility for rehire indicates "review required before rehire," and his work record reflects "excessive complaints and company policy violation." Second, the report shows Mr. Carter's employment with Swift Transportation from April 2006 to June 2006. Eligible for rehire is "no" and the work record is "other." Third, Mr. Carter again worked for Marten Transport from June 2006 to July 2006. While the eligibility for rehire indicates "review required before rehire," his work record is "satisfactory."

Late May to Early June 2008

Discovering through counsel that the USIS DAC employment record still contains derogatory employment information from Marten Transport, which Mr. Carter believes is contrary to Judge Solomon's decision,⁴⁷ Mr. Carter contacts USIS. He advises USIS that no complaints were made about him as a Marten Transport driver and he did not violate any company policy. As part of his DAC dispute, Mr. Carter includes information from his whistleblower proceedings, including Judge Solomon's decision and order.

Other than this one dispute, USIS has no record of receiving any other dispute from Mr. Carter regarding his employment with Marten Transport.

June 7, 2008

USIS notifies Ms. Kristi Blum (then Ms. Decker), an HR senior generalist, that Mr. Carter is disputing the employment history provided by Marten Transport, indicating there were no complaints against him and he did not violate any company policy. USIS requests Marten Transport to re-verify the information the company provided regarding Mr. Carter by determining whether an error was made. USIS requests a response by June 26, 2008.

June 26, 2008

By a faxed letter, Ms. Blum notifies a USIS consumer consultant that upon review of Marten Transport's record they determined the "information provided is correct." Ms. Blum explains that the company policy violation was Mr. Carter's failure to meet the company's expectations. The comment "(912) Excessive Complaints is listed to further describe the incident." Ms. Blum does not tell the USIS consultant the circumstances of the "incident" or the content of the excessive complaints.

⁴⁷As previously noted, other than the immediate reinstatement, the provisions of Judge Solomon's recommended decision and order were not effective until a final decision by the ARB.

June 27, 2008

Having conducted an investigation in compliance with the FCRA, USIS retains the excessive complaints comment in Mr. Carter's DAC Report for two reasons. First, Marten Transport verified that the information it provided is correct. Second, USIS has discovered that Mr. Carter's whistleblower case, including Judge Solomon's decision and order, is under appeal, which means the litigation information that Mr. Carter provided in support of his employment history dispute is still being contested by Marten Transport. Since there has been no final decision in the litigation, and because as a consumer reporting agency USIS is not required to investigate the accuracy of the verification by Marten Transport, USIS does not remove the excessive complaints comment.

However, USIS removes the "company policy violation" comment from Mr. Carter's DAC Report regarding his June 2005 work history for Marten Transport because the excessive complaints comment technically fell under the company policy violation category and a company can not use two codes for the same incident.

A DAC Report shows four separate histories for Mr. Carter. First, Mr. Carter worked for ALTL from October 2003 to December 2003. His rehire eligibility is "review required before rehiring." His work record is recorded as "satisfactory." One accident, hitting a parked or stopped vehicle is reported. Second, Mr. Carter worked for Marten Transport from "06/2005 to 06/2005." His rehire eligibility is "review required before rehire" and his work history notes "excessive complaints." Third, Mr. Carter worked for Swift Transportation from "04/2006 to 06/2006." He was not eligible for rehire and his work record is reported as "other." Fourth, Mr. Carter worked for Marten Transport from "06/2006 to 07/2006." His eligibility for rehire is again "review required before rehire." His work history is "satisfactory."

A DAC Drug/Alcohol Disclosure Report shows the following employment dates: Marten Transport from June 2005 to June 2005; Swift Transportation from April 2006 to June 2006; and Marten Transport from June 2006 to July 2006.

June 28, 2008

By letter, USIS advises Mr. Carter that after they received his DAC dispute, USIS conducted an investigation. After contacting the provider of the disputed information (Marten Transport), USIS deleted the portion of the disputed information that could not be verified (company policy violation). However, the provider (Marten Transport) verified the disputed information that remained in his employment history report (excessive complaints). USIS attaches a June 27, 2008 DAC Report employment history and DAC Drug/Alcohol Disclosure Report that reflect his current reports. USIS explains that investigation of a dispute involves directly contacting the provider of the disputed information. In turn, the provider will advise whether the DAC information is correct. USIS advises that Mr. Carter has a right to place a statement in his file setting forth the basis of his dispute and providing an explanation. The June 27, 2008 DAC Report and DAC Drug/Alcohol Disclosure report are attached to the letter.

Mr. Carter does not provide a rebuttal statement upon receiving USIS' response.

June 30, 2008⁴⁸

The Administrative Review Board (“ARB” and “Board”) affirms Judge Solomon’s determination and remedies. Specifically, the ARB concludes that Mr. Carter's unresolved Marten Transport equipment complaints, as well as his agency contacts about equipment deficiencies, were protected activities. Since Ms. Deetz did not distinguish between Mr. Carter's unprotected (resolved/repared) and protected (unresolved) equipment complaints when indicating his termination was based in part on excessive complaints, the Board finds that Ms. Deetz's discharge action was motivated in part by Mr. Carter's protected activities and that Marten Transport failed to establish dual motive.⁴⁹ Consequently, the ARB orders Marten Transport to make an unconditional, bona fide offer of reinstatement to Mr. Carter, and affirms Judge Solomon's award of back pay, compensatory damages for expenses, lost items, and emotional distress. The Board also approves the award of attorney fees and litigation expenses. Finally, the ARB affirms Judge Solomon's order that Marten Transport take such action as necessary to cause USIS to amend Mr. Carter's DAC report.

July 8, 2008

Through counsel, Mr. Carter files the second STAA complaint, alleging that both Marten Transport and USIS engaged in blacklisting. Previously, in May 2008, Mr. Carter advised USIS of Judge Solomon’s decision and order and contested the continued inclusion of notations in his DAC employment history about excessive complaints and company policy violations for his employment with Marten Transport. He notes that in a June 28, 2008 response, USIS advised him that Marten Transport reaffirmed the annotations as accurate. Mr. Carter asserted Marten Transport’s affirmation and USIS’ failure to correct his DAC employment record represented blacklisting.

August 2008 to March 2009

In August 2008, a database update issue with the USIS DAC on-line system develops. Usually, a change made in the DAC on-line system causes an e-mail to be sent to a USIS department to update USIS’ database system, which contains about 2.5 million records and consists of two databases, the DAC on-line database, and the DAC Report database. However, although many DAC on-line corrections and changes are updated properly, for an unexplained reason, changes made to about 3,000 records during this period through the DAC on-line system, including Mr. Carter’s employment record with Marten Transport, are not retained by both USIS databases. For the affected records, the update issue causes the two databases to have inconsistent information, and the DAC on-line database to have incorrect information.

USIS becomes aware of its database issues in December 2008.

⁴⁸ARB Case Nos. 06-101, 159 (ARB June 30, 2008).

⁴⁹The ARB applied the causation standard of "motivating factor" that was applicable prior to the 2007 revisions to the STAA, as discussed later.

In March 2009, after experiencing difficulty in identifying the cause of its computer database update problem, USIS institutes a software programming change that automates the database update process for DAC on-line and the DAC Report, and resolves the database update issue.

About August 18, 2008

Based on the information in Mr. Carter's personnel folder, Ms. Deetz is aware that Mr. Carter worked with another trucking company in 2006. However, understanding that the parties' recent settlement agreement will be executed, Ms. Deetz provides Ms. Blum with the contents of the settlement agreement and tells Ms. Blum to go ahead and make the three agreed changes regarding Mr. Carter's employment history with Marten Transport in the USIS on-line DAC system.

August 20, 2008 to August 25, 2008

On August 20, 2008, Ms. Blum makes three corrections to Mr. Carter's Marten Transport work history in the DAC on-line system. In accordance with the settlement agreement, she changes his employment start date to "06/2005" and the employment end date to "07/2006." She amends the rehire eligibility to "yes," and changes the work record to "satisfactory." After Ms. Blum enters and submits these three corrections in the DAC on-line system, she prints a copy of the change screen image and places the document in Mr. Carter's personnel folder. However, due to the USIS computer database update problem, the corrections are not permanently stored in the database.

On August 20, 2008, Mr. Carter's counsel signs the settlement agreement. Acknowledging his understanding of all the terms of the settlement agreement, Mr. Carter signs the agreement on August 21, 2008. And, on behalf of Marten Transport, Ms. Deetz signs the settlement agreement on August 25, 2008.

According to the agreement, Mr. Carter agrees to: a) to give up and waive any claims, "whether known or unknown," against Marten Transport "for any conduct that occurred before the effective date of the agreement," thereby releasing Marten Transport from any liability for "any expense, damage, costs or any other losses he might claim," including those related to his employment with, and subsequent termination from, Marten Transport; b) not to file any additional complaint or law suit of any kind for any claims, known and unknown, "accruing before the effective date" of the agreement; and, c) withdraw his second STAA complaint filed on July 8, 2008, "as to Marten Transport."

In exchange, Marten Transport agrees to: a) to pay Mr. Carter \$24,496.00 in back pay, \$30,540.00 in compensatory damages, \$2,903.29 in litigation expenses, and attorney fees; b) to "cause" within 10 days of the effective date of the agreement Mr. Carter's employment records with USIS Commercial Services to be amended to reflect a period of service "from June 2005 to July 2006," his eligibility for rehire as "yes," and a work record of "satisfactory;" and, c) provide prospective employers only the information set out in his corrected DAC report.

Between August and December 2008

Mr. Carter completes several applications for commercial truck driver jobs. Based on the applications' instructions, he accurately reports his employment with Marten Transport in June 2005, Swift Transportation from April to June 2006, and Marten Transport in June/July 2006. Mr. Carter receives no other responses from the trucking companies.

Mr. Carter does not inform anyone at Marten Transport that he believes his DAC employment history has not been modified in accordance with the settlement agreement.

Early December 2008

Ms. Deetz becomes aware of a USIS database problem and technology glitch associated with the changes which has caused the DAC employment history for Mr. Carter to still show his uncorrected two work histories for Marten Transport. Ms. Deetz asks Ms. Blum to again update the DAC on-line system by making the three changes to Mr. Carter's Marten Transport employment history as set out in the August 2008 settlement agreement.

December 3, 2008

When Ms. Blum pulls up Mr. Carter's Marten Transport employment history on the DAC on-line system, she is surprised not to see any of the three changes that she previously entered in August 2008. Ms. Blum again updates Mr. Carter's Marten Transport employment history. She inputs the start and end employment dates as "06/2005" and "07/2006." She amends the rehire eligibility to "yes," and changes the work record to "satisfactory." After Ms. Blum enters and submits these three corrections in the DAC on-line system, she prints a copy of the screen change image and places the document in Mr. Carter's personnel folder.

January 2009

Mr. Carter attends a driver's orientation conducted by Equity Transportation, which has expressed an intention to hire him as a commercial truck driver. At that time, the company had not yet received his driving records.

Near the End of January 2009

On behalf of Equity Transportation, Mr. Dave Ward receives a January 27, 2009 DAC Report employment history for Mr. Carter from USIS. The report shows three employment histories for Mr. Carter. First, Mr. Carter was employed by ALTL from October 2003 to December 2003. Second, Mr. Carter was employed by Marten Transport from June 2005 to July 2006 with a work history of "satisfactory." The eligible for rehire code is "001 Yes." Third, Mr. Carter worked for Swift Transportation from April 2006 to June 2006.

On the same day, Equity Transportation also receives a January 27, 2009 DAC on-line employment history for Mr. Carter.⁵⁰ The report shows two periods of service for Mr. Carter at Marten Transport. The first period goes from June 2005 to June 2005. The associated work record is coded as follows: "912 Excessive Complaints" and "935 Company Policy Violation." The eligible for rehire section contains "004 Review required before rehiring." The second period of service is June 2005 to July 2006. The associated work record is "901 Satisfactory." And, the eligible for rehire code is "001 Yes."

Having completed driver's orientation, Mr. Carter loads his gear into his assigned Equity Transportation truck. However, he hears an air bag leak which has to be repaired. As Mr. Carter waits for the repair, the safety director asks him about his two employments with Marten Transport; specifically, the circumstances of his first termination with the company, and the reason he left the second time. The safety director tells Mr. Carter to go home for the day since his truck isn't going to be ready. Mr. Carter calls Equity Transportation the next day and is told the truck repairs will take several days and the truck will be ready on Friday. However, when Mr. Carter calls that Friday, a company representative tells him that he no longer works for the company because he wasn't available for work the day before when the truck had been ready to go.

January 28, 2009

A Drug/Alcohol Test History report from DAC on-line for Mr. Carter's employment with Marten Transport lists his service dates of June 2005 to July 2006.

⁵⁰According to Mr. Carter, he received this DAC on-line employment report, CX 2 (page count 15 and 17), from Equity Transportation. However, while acknowledging that he did not know who produced this DAC on-line report, Mr. Ferguson testified that USIS has no record of Equity Transportation ordering that product; noted the report is a DAC on-line product that only contains information from Marten Transport; and speculated that Mr. Carter may have copied the report when he observed the incorrect information. Ms. Deetz credibly testified that she did not provide the DAC on-line product to Equity Transportation. In light of this testimony, and since Equity Transportation would have on-line access to a DAC on-line product for Marten Transport, I am unable to determine how Equity Transportation obtained this particular DAC on-line product of Mr. Carter's employment with Marten Transport.

Post-January 2009

Mr. Carter continues to submit job applications, but nothing happens.

February 2, 2009

A DAC Report shows Mr. Carter's period of service with Marten Transport from June 2005 to July 2006. He is eligible for rehire and his work performance was satisfactory. The report also indicates that Mr. Carter worked for Swift Transportation from April 2006 to June 2006.

March 10, 2009

OSHA denies Mr. Carter's second STAA complaint.

March 27, 2009

Equity Transportation sends Mr. Carter a copy of the January 27, 2009 DAC on-line report showing two employment histories with Marten Transport. At that time, Mr. Carter becomes aware that his employment history in the USIS DAC on-line system still shows employment history information that was to have been changed by Marten Transport under the August 2008 settlement agreement.

April 3, 2009

On April 3, 2009, Mr. Carter files objections to OSHA's dismissal of the second STAA complaint. Mr. Carter again notes that Marten Transport and USIS did not remove unfavorable statements in his DAC record. Specifically, Mr. Carter indicates that he discovered in March 2009 that a prospective employer had been provided his DAC employment history in January 2009 which still included derogatory information of excessive complaints and company policy violation. For the first time, Mr. Carter alleges that the same report also contained a "deception of employment" by Marten Transport and USIS, since for his employment with Marten Transport they showed a starting date of June 2005 and ending date of July 2006.

April 6, 2009

A Marten Transport DAC on-line report screen image shows a service start date of June 2005 and service end date of July 2006. The entry for eligibility rehire is "yes." And, the work history is "satisfactory."

July to December 2010

Mr. Carter works for Sunset Logistics as a commercial truck driver. Six months later, after he complains to the company about a schedule that would require him to violate his hours of service, his work with Sunset Logistics is "finished."

Adjudication Principles

In order to provide protection for STAA whistleblowers, 49 U.S.C. § 31105(a)(1) mandates that a "person" may not discharge, discipline, or discriminate against an employee regarding pay, terms, or privileges of employment because the employee filed a complaint, began a proceeding, or testified in such a proceeding related to a violation of a commercial motor vehicle safety or security regulation standard or order; or refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial vehicle safety, or would cause serious injury to the employee or public due to a vehicle's hazardous safety or security condition.

On August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, sec. 1536, § 31105, 121 Stat. 266, 464-67 (2007), Congress amended paragraph (b)(1) of 49 U.S.C. § 31105 to make applicable in the adjudication of STAA whistleblower claims the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b) ("AIR 21").

Under the AIR 21 standard set out in 49 U.S.C. § 42121(b)(2)(B)(iii), complainants must show by a "preponderance of evidence" that a protected activity was a "contributing factor" to the adverse action described in the complaint. Once a complainant has established that a protected activity was a contributing factor in the employer's decision to take adverse action, then under 49 U.S.C. § 42121(b)(2)(B)(iv), an "employer" may escape liability only by providing clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *See also* 29 C.F.R. § 1978.109(B)⁵¹ and *Sacco v. Hamden Logistics, Inc.*, ARB No. 09-204, ALJ Nos. 2008 STA 43, 44; slip op. at 4-5 (ARB Dec. 18, 2009).

Accordingly, to establish that a respondent subject to the Act has committed a violation of the employee protection provisions of STAA, a complainant must prove by a preponderance of the evidence: a) protected activity; b) unfavorable personnel action or adverse action; and, c) causation/contributing factor. With these general adjudication principles in mind, I turn to the specific issues in Mr. Carter's case.

⁵¹At the time of the present litigation, the applicable implementing regulation was 29 C.F.R. § 1978.109 (Interim Final Rule, 75 Fed. Reg. 53,544, August 31, 2010). Subsequently, DOL issued 29 C.F.R. § 1978.109 (Final Rule, 77 Fed. Reg. 44,121, July 27, 2012).

Issue # 1 - Covered Respondent

USIS maintains that it is not a respondent covered by the whistleblower provision of Section 405 of the Act. Specifically, USIS is not a person as defined by the Act because it was neither Mr. Carter's employer nor a company engaged in commercial trucking. That is, since USIS did not employ Mr. Carter, the company would be unable to discharge, discipline, or discriminate against Mr. Carter as its employee.

As noted above, 49 U.S.C. § 31105(a)(1) prohibits in part a "person" from discriminating against "an employee regarding pay, terms, or privileges of employment." Since blacklisting is clearly a form of employment discrimination and Mr. Carter meets the definition of "employee" under the whistleblower provisions,⁵² the issue becomes whether USIS is a "person" subject to the STAA whistleblower protection provision.

Turning first to the statute itself, since 1994, STAA relies on the definition of "person" in 1 U.S.C. § 1 which includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Certainly, under that broad definition, USIS is a "person." However, because an "employee" protected by the STAA whistleblower provision is defined in terms of a driver employed by a commercial motor carrier, and considering that a non-employer generally would not be in a position to either affect an individual's pay, terms, or privileges of employment as a commercial truck driver, or provide some of the mandated relief under 49 U.S.C. § 31105(b)(3)(A), specifically, reinstatement of the complainant driver to the former position with the same pay and privileges of employment, some ambiguity exists as to whether the "person" must be, or have been, the commercial driver's employer, or acted in some capacity as such an employer. Adding to the ambiguity, the affirmative defense provision that Congress incorporated into the STAA in the 2007 amendments uses the term "employer" and not "person."⁵³

Considering next the ARB's interpretation of "person" within the context of whistleblower protection provisions, I note that the ARB has indicated that use of "person," rather than "employer" in the prohibition sections of various environmental statutes still requires that the respondent have had an employment relationship with the complainant or acted in the capacity of an employer. *See Culligan v. American Heavy Lifting Shipping Co.*, No. 03-046, ALJ Nos. 2000 CAA 20, 2001 CAA 9 and 11 (ARB June 30, 2004), slip op. at 6.⁵⁴

⁵²According to 49 U.S.C. § 31105(j), "employee" means "a driver of a commercial motor vehicle . . . who directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier" (emphasis added).

⁵³49 U.S.C. § 42121(b)(2)(B)(iv), "Prohibition. – Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior" (emphasis added). Without discussion in the Federal Register, when DOL revised the STAA regulation, 29 C.F.R. Part 1978, the term "respondent" was substituted for the statute's term of "employer." *See* 75 Fed. Reg. 53,544-53,558 (August 31, 2010) and 77 Fed. Reg. 44,121-44,139 (July 27, 2012).

⁵⁴"To prevail on a complaint of unlawful retaliation or discrimination under the whistleblower protection provisions, a complainant must first establish that he is an employee and the respondent is an employer." *Demski v. Indiana Michigan Power Co.*, ARB No. 02-084, ALJ No. 2001 ERA 36, slip op. at 4 (ARB Apr. 9, 2004). *See also Anderson v. Metro Wastewater Reclamation Dist.*, ARB No. 01-103, ALJ No. 1997 SDW 7, slip op. at 8 (ARB May

Consequently, in promulgating the final regulatory rule for the employee protection provisions of six environmental statutes and Section 211 of the Energy Reorganization Act of 1974, 29 C.F.R. Part 24, 76 Fed. Reg. 2,808-2,826 (January 18, 2011), DOL decided to use the term "employer" in the obligation and prohibitions section of the regulation,⁵⁵ even for statutes that provided no "person" shall fire or discriminate against any employee, such as the Solid Waste Disposal Act, 42 U.S.C.A. 6971(a), on the basis that "employer" was not too restrictive because "the ARB has held that the use of "person" in the FWPCA, SWDA, and CERCLA, in place of "employer" still requires that the respondent have an employment relationship with the complainant or act in the capacity of an employer." 76 Fed. Reg. at 2,810. Within this interpretative framework, and although a "person" under 49 U.S.C. § 31105(a)(1), USIS would not be subject to whistleblower prohibitions and obligations since the company did not have an employment relationship with Mr. Carter.

However, Mr. Carter's whistleblower complaint does not arise under the above referenced environmental statutes or the provisions of 29 C.F.R. Part 24. Significantly, when addressing the same interpretative issue involving the STAA, without a discussion regarding the other similar federal whistleblower statutes, the ARB appears to have reached a contrary conclusion. In *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 2003 STA 11 (ARB Oct. 14, 2003), acknowledging that in most cases a "person" who will be in a position to discharge, discipline, or discriminate against an employee will be an employer, the Board still observed that the regulatory definition of "person,"⁵⁶ which in part was similar to the statutory definition "does not exclusively restrict its coverage to 'employers.'" In light of that determination, and since the same version of 29 C.F.R. § 1978 (1988) was in effect at the time of Mr. Carter's second and third complaints in 2008 and 2009, and thus applicable to this determination, USIS appears to be a covered respondent.

Yet, about a year after Mr. Carter's third complaint, DOL "revised" the provisions of 29 C.F.R. § 1978, Interim Final Rule, 75 Fed. Reg. 53,544-53,558 (August 31, 2010), in part "to the extent possible within the bounds of applicable statutory language, to be consistent with the regulations implementing the whistleblower provisions of the following statutes:" SDWA, FWPCA, TSCA, SWDA, CAA (Clean Air Act), ERA, and CERCLA, AIR 21, SOX (Sarbanes-Oxley Act of 2002), and the Pipeline Safety Improvement Act. The revised regulation defined "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any groups of individuals." 29 C.F.R. § 1978.101(k) (2010).⁵⁷ DOL

29, 2003) (noting that SWDA (Solid Waste Disposal Act), SDWA (Safe Drinking Water Act), CERCLA (Comprehensive Environmental Response Compensation, and Liability Act), FWPCA (Federal Water Pollution Control Act), TSCA (Toxic Substance Control Act), and ERA (Energy Reorganization Act) require the complaining employee to have an employment relationship with respondent employer)."

⁵⁵29 C.F.R. § 24.102(a) "No employer . . . may discharge any employee with respect to the employee's compensation, terms, conditions, or privileges of employment . . ."

⁵⁶29 C.F.R. § 1978.101(i) (1988) "*Person*" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any groups of persons."

⁵⁷75 Fed. Reg. 53,554.

also added a new paragraph, 29 C.F.R. § 1978.102(b) (2010), Obligations and Prohibited Acts,⁵⁸ which used the term "person" in the general prohibition against employment discrimination but then specifically added, in subparagraph (b) "it is a violation for any employer to . . . blacklist . . . any employee," (emphasis added).⁵⁹ Under this revised provision, USIS would no longer be a covered respondent in Mr. Carter's STAA blacklisting complaint.

Finally, about two years later, DOL published 29 C.F.R. § 1978, Final Rule, 77 Fed. Reg. 44,121-44,139 (July 27, 2012), again with the expressed intent to make the STAA regulations consistent with other federal whistleblower protection statutes and the associated regulations. With the exception of inserting "organized" in front of "group," the final version of 29 C.F.R. § 1978.101(k) (2012)⁶⁰ also defined "person" as previously set out in 29 C.F.R. Part 1978 (2010). However, while again using "person" in the general prohibition, and without any specific discussion or comment in the Summary and Discussion of Regulatory Provisions, Section 1978.102 Obligations and Prohibited Acts,⁶¹ DOL changed "employer" to "person" so that the revised 29 C.F.R. § 1978.102(b) provides, "It is a violation for any person to blacklist . . . any employee" (emphasis added).⁶² Arguably, under the new, final version, USIS again becomes a covered respondent.

In conclusion, despite a stated effort for consistency between the STAA and other federal whistleblower statutes and their associated regulations, which appear to require an employment relationship between a respondent and a complainant, the position of the ARB and DOL has waxed and waned on whether an employment relationship between a person and a complainant is similarly required under the STAA in order that a "person" is a covered respondent, particularly if blacklisting is the alleged adverse action. Nevertheless, for two reasons in Mr. Carter's case, I find that USIS is a covered respondent. First, in light of the ARB's broad interpretation in *Somerson* as to the meaning of "person" under the applicable regulation, 29 C.F.R. Part 1978 (1988), USIS may not avoid being considered a covered respondent on the basis that it did not actually employ Mr. Carter. Second, USIS stands in a unique position as a consumer reporting agency in the trucking industry because it makes available to prospective employers the work histories and driving records of thousands of commercial truck drivers. Although USIS may be simply storing and disseminating driver information provided by former employers, its products certainly have the capacity to affect the pay, terms, and privileges of employment for commercial truck drivers. Accordingly, inclusion of USIS as a covered respondent would further the purposes of the STAA employment protection provisions by removing a discouragement to bringing to light commercial trucking safety and security issues due to a concern about a driver's employment history stored, and subsequently provided to prospective employers, by USIS.

⁵⁸In the previous version, 29 C.F.R. Part 1978 (1988), the regulation simply incorporated the statutory prohibitions in 49 U.S.C.A. § 31105(a)(1) by reference.

⁵⁹*Id.*

⁶⁰77 Fed. Reg. at 44,135.

⁶¹77 Fed. Reg. at 44,125-44,126.

⁶²77 Fed. Reg. at 44,135.

Issue # 2 – Marten Transport Blacklisting

On April 3, 2009, in his objection to OSHA's dismissal of his second STAA complaint, Mr. Carter essentially alleged that Marten Transport engaged in two types of blacklisting.⁶³ First, contrary to the August 2008 settlement agreement, Marten Transport did not remove the unfavorable comments regarding his work record with the company from the USIS DAC employment history. Specifically, Mr. Carter learned in March 2009 that a prospective employer obtained a DAC employment history in January 2009 which still contained derogatory comments of excessive complaints and company policy violation which Marten Transport was to have removed within 10 days of the effective date of the settlement agreement (October 2008). Second, Marten Transport engaged in "deception" by changing his work history with the company to show a continuous period of employment with Marten Transport from June 2005 to July 2006 and then subsequently not removing that information. By showing a continuous period of employment with the company, Marten Transport is interfering with his re-employment efforts because his DAC Report now shows that he worked for two employers, Marten Transport and Swift Transportation, during the same period in 2006, which causes a problem since a driver can not work for two companies at the same time.

As previously discussed, to establish that Marten Transport violated the employee protection provisions of STAA, Mr. Carter must prove by a preponderance of the evidence the following three elements: a) protected activity; b) unfavorable personnel action or adverse action; and, c) causation/contributing factor.

Protected Activity

As previously mentioned, the STAA prohibits the discriminatory treatment of employees who have engaged in certain activities related to commercial motor vehicle safety. These protected fall into the two categories: safety complaints and refusal to drive in violation of regulatory standards. Under 49 U.S.C. § 31105(a)(1)(A), an employee is protected if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. DOL interprets this provision to include internal complaints from an employee to an employer. The complaint or concern need only "relate" to a violation of any commercial motor vehicle safety standard. In particular, complaints relating to alleged violations of DOT regulations constitute protected activities. *Hernandez v. Guardian Purchasing Co.*, 91 STA 31 (Sec'y June 4, 1002). Title 49 U.S.C. § 31105(a)(1)(B)(i) also protects an employee who refuses to operate a commercial motor vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." The complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn's Tree*

⁶³In his second STAA complaint filed on July 8, 2008, Mr. Carter also charged that Marten Transport engaged in blacklisting when USIS sent an inquiry to Marten Transport in June 2008 and Marten Transport reconfirmed the derogatory comments in his DAC employment history, which led USIS to retain the comment about excessive complaints in his DAC employment history. That allegation was resolved by the ARB-affirmed August 2008 settlement agreement, which released Marten Transport from liability for any conduct associated with Mr. Carter's employment that arose prior to the effective date of the agreement.

Service, 94 STA 55 (Sec'y Aug. 4, 1995). In that regard, a driver's refusal due to hazardous and dangerous conditions is a protected activity.

As previously determined by Judge Solomon, and affirmed by the ARB, during the course of his employment with Marten Transport between June 3 and 14, 2005, Mr. Carter engaged in several activities protected under the STAA as a Marten Transport commercial truck driver when he made complaints about a plugged radiator, a fifth wheel, a missing bunk strap, and a missing inspection book, which related to regulatory safety regulations and remained unresolved at the time of his employment termination. Mr. Carter also informed his supervisors of his intention to call federal and state agencies about some of the deficiencies. Subsequently, Mr. Carter contacted the respective agencies, which also constitute protected activities. Finally, Mr. Carter initiated proceedings under the STAA regarding these issues when he filed his first STAA complaint in June 2005, participated in a January 2006 hearing before Judge Solomon, filed a second STAA complaint in July 2008, engaged in a settlement process in August 2008, and objected to OSHA's dismissal of his second complaint in April 2009, which are all STAA protected activities. Accordingly, Mr. Carter has proven the first element of protected activity.

Adverse Action//Blacklisting

Having engaged in STAA protected activities, Mr. Carter must next prove that he suffered an adverse personnel action. As also previously discussed, 49 U.S.C. § 31105(a)(1) prohibits a person from discharging, disciplining, or discriminating against an employee regarding pay, terms, or privileges of employment because he or she engaged in a protected activity. In light of that prohibition, the ARB has recognized blacklisting as an adverse action in STAA cases. *Murphy v. Atlas Motor Coaches, Inc.*, ARB No. 05-055, ALJ No. 2004 STA 36 (ARB July 31, 2006). Such impermissible blacklisting occurs when an individual, or group of individuals acting in concert, disseminates improper⁶⁴ or "damaging information that affirmatively prevents another person from finding employment." *Pickett v. Tennessee Valley Auth.*, ARB Nos. 02-056, 02-059, ALJ No. 2001 CAA 18, slip op. at 5 (ARB Nov. 28, 2003). Further, whether negative statements actually caused any damage is "immaterial." *Beatty v. Inman Trucking Management, Inc.*, ARB No. 11-021, ALJ Nos. 2008 STA 20, 21, slip op. at 7 (ARB June 28, 2012).⁶⁵ Consequently, according to the ARB, disseminated DAC comments of "excessive complaints [and] company policy violation . . . are on their face damaging information that would affirmatively prevent" a complainant from finding employment. *Id.*⁶⁶

⁶⁴See *Earwood v. Dart Container Corp.*, No. 1993-STA-016, slip op. at 3 (Sec'y Dec. 7, 1994).

⁶⁵In *Beatty*, the ARB reversed the administrative law judge's determination that the trucking company did not blacklist the complainant because the complainant merely speculated the DAC comments of excessive complaints and company policy violation caused the complainant not to be hired.

⁶⁶Notably absent in the ARB's declaration is any discussion on whether such employment history comments remain "damaging," or represent blacklisting, if they are accurate or are the subject of on-going litigation which has not reached a final determination, such that the comments are not yet improper.

With these principles in mind, I will address the two types of alleged blacklisting in Mr. Carter's third complaint⁶⁷ in regards to Marten Transport. First, as to the excessive complaints and company policy violation comments that were present in the January 27, 2009 DAC on-line product for Mr. Carter's employment with Marten Transport, the ARB's determination in *Beatty* is directly on point and leads to the conclusion that those two comments on his work history for his first period of employment represent an adverse action of blacklisting.

However, Marten Transport's DAC entry of continuous employment from June 2005 to July 2006 is not "damaging" information on its face. To the contrary, that work history for Mr. Carter's employment with Marten Transport first arose as part of the restoration relief ordered by Judge Solomon in his May 2006 decision and order, which implies that a continuous employment history with Marten Transport was a good, not damaging, work history. Further, the September 2008 article submitted by Mr. Carter, CX 2, which in part stresses the importance of not continuously switching trucking companies, supports a determination that a continuous employment history of just over a year with Marten Transport was better for Mr. Carter than two separate employment periods of about a month each. And, while the continuous employment history for Marten Transport caused an overlap with Mr. Carter's additional three month employment in 2006 with Swift Transportation, Mr. Ferguson observed that such overlapping employment periods standing alone did not represent adverse employment information to a prospective employer since an owner-operator may lease trips to separate trucking companies during the same employment period.

Similarly, contrary to Mr. Carter's charge of deception, the continuous employment entry by Marten Transport also was not "improper," even given the difficulties Mr. Carter subsequently experienced due to that work history information. Although Mr. Carter did not actually work for Marten Transport from June 2005 to July 2006, the continuous employment history entered into Mr. Carter's DAC employment history by Marten Transport was still a proper legal fiction agreed to by both Marten Transport and Mr. Carter. Rather than engaging in a deceptive or fraudulent act of placing a factually erroneous employment history for Mr. Carter in his DAC employment history, Marten Transport was actually legally bound to make the continuous employment change under the terms of the August 2008 settlement agreement.

Consequently, despite the subsequent effects on his re-employment opportunities Mr. Carter may have suffered, Marten Transport's entry of a continuous employment history for him of June 2005 to July 2006 in his DAC employment history in compliance with their settlement agreement was a proper, did not represent damaging information on its face, and did not constitute blacklisting.

⁶⁷The additional blacklisting allegations against Marten Transport in Mr. Carter's July 2008 second STAA complaint were resolved by the August 2008 settlement agreement.

Causation/Contributing Factor

Having established STAA protected activities and at least one type of adverse personnel action, the work history comments of excessive complaints and company policy violation, Mr. Carter must also prove by a preponderance of the evidence a causal connection between these two elements. Specifically, Mr. Carter must prove that his protected activities at Marten Transport and subsequent litigation were contributing factors, or a contributing factor individually, in Marten Transport's continued retention of the adverse comments in his DAC employment history after the August 2008 settlement agreement. The Courts have defined "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way" the decision concerning the adverse personnel action, *Marano v. U. S. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993). Based on this definition, the determination of contributing factor has two components: knowledge and causation. In other words, the respondent must have been aware of the protected activity (knowledge) and then taken the adverse personnel action in part due to that knowledge (causation). Additionally, since direct evidence of causation may not exist, a determination involving a contributing factor requires consideration of circumstantial evidence. In particular, such circumstantial evidence may involve temporal proximity, or a short interval between a compensation claim and discharge action. See *Rayner v. Maritime Terminals, Inc. [Rayner II]*, 22 BRBS 5, 8 (1988); *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26, 30 (1988). Or, the contributing factor requirement may be demonstrated if an employer's stated reason for taking a discriminatory act is determined to be pretext rather than actual. *Rayne*, 22 BRBS at 7; *Jaros*, 21 BRBS at 29-30 (1988); *Powell v. Nacirema Operating Co., Inc.*, 19 BRBS 124, 126 (1986).

Knowledge

As the evidentiary record clearly establishes, Marten Transport was well aware of Mr. Carter's protected activities in June 2005 preceding his termination. And, as the other active participant in the subsequent litigation, Marten Transport also knew of Mr. Carter's protected activity associated with his successful pursuit of his first STAA complaint against the company, and continuing litigation.

Causation

As a preliminary matter, Mr. Carter released Marten Transport from liability for any conduct associated with his employment which arose prior to the effective date of the August 2008 settlement agreement which would include the initial placement of the derogatory information of excessive complaints and company policy violation in his DAC employment history following his June 2005 termination, continued retention of those derogatory comments following Judge Solomon's May 2006 decision and order, and reconfirmation of those comments to USIS in June 2008. Consequently, those actions may not be used to establish causation. Instead, I must look at Marten Transport's actions following the settlement agreement and determine whether the continued retention of the adverse comments in the DAC employment history database for Mr. Carter were due in part to his protected activities.

Next, I turn to an analysis of the actions Marten Transport took from just after the August 2008 settlement agreement through the beginning of December 2008 in regards to the adverse action of the derogatory comments to determine whether Mr. Carter's protected activities were a contributing factor. After Marten Transport, Mr. Carter, and their attorneys had reached an agreement, but before the settlement was actually executed, and well before the effective date of the settlement agreement, Ms. Deetz took immediate action to have the agreed-to changes made in Mr. Carter's DAC employment history, including the removal of the two derogatory work record comments by instructing Ms. Blum to make the changes. On August 20, 2008, in compliance with Ms. Deetz's instructions, Ms. Blum used the USIS DAC on-line system to make the changes. The associated screen shot image, Marten 2, showed that "satisfactory" was selected for Mr. Carter's work history. Absent any information to the contrary from either Mr. Carter or USIS, based on the retained screen shot, and the understanding that an employee's work history could be updated through the DAC on-line system, Marten Transport, Ms. Deetz, and Ms. Blum reasonably believed at that time that the previous derogatory comments of excessive complaints and company policy violation had been removed from Mr. Carter's DAC employment history on August 20, 2008.

Although their belief that the adverse comments had been removed was correct as to the DAC Report employment history, the two adverse comments remained in Mr. Carter's DAC on-line product employment history. And, in terms of temporal proximity, the continued retention of the adverse information occurred shortly after Mr. Carter's protected activity of pursuing his whistleblower litigation. However, the evidentiary record establishes that Ms. Deetz and Ms. Blum did not cause the continued retention of that adverse information. Specifically, the August 20, 2008 DAC on-line screen image, the corrected DAC Report employment history,⁶⁸ and Mr. Ferguson's credible testimony about the database update issue that USIS was experiencing with some of its employment records, including Mr. Carter's work history with Marten Transport, demonstrate that the USIS database update problem caused the DAC on-line database to retain the adverse comments about excessive complaints and company policy violation. Additionally, in light of that evidence, Marten Transport's explanation for the continued retention of the derogatory comments in at least one of USIS' employment history databases after the effective date of the settlement agreement was not pretext. To the contrary, Marten Transport, Ms. Deetz, and Ms. Blum made a bona fide, good faith effort to remove the derogatory comments. Consequently, none of Mr. Carter's protected activities was a contributing factor in the continued retention of the excessive complaints and company policy violation comments in his DAC on-line employment history from August 20, 2008 to the beginning of December 2008. Instead, the retention issue was directly caused by a computer database update problem in the USIS DAC databases.

⁶⁸The two comments appeared to have been removed in a timely manner since DAC Report employment histories, dated January 27, 2009 and February 2, 2009, CX 2, did not contain the two adverse comments and instead reported his work history for Marten Transport as "satisfactory." While Mr. Carter's frustration with the continued retention of the two derogatory comments in the DAC on-line product database after the August 2008 settlement is understandable, the USIS DAC Report employment history upon which prospective employers usually rely, was corrected prior to January 27, 2009 and did not have any blacklisting remarks.

I essentially reach the same causation conclusion regarding the continued retention of the two derogatory comments beyond early December 2008 through at least January 27, 2009 when a DAC on-line employment history still included excessive complaints and company policy violation for Mr. Carter's employment with Marten Transport. In early December 2008, when Ms. Deetz became aware that the previous corrections that Marten Transport had inputted through the DAC on-line system had not been permanently retained by the USIS employment history database, she directed Ms. Blum to make the agreed-to changes again. And, once again on December 4, 2008, consistent with Ms. Deetz's instructions, and as evidenced by the associated DAC on-line screen image, Ms. Blum made the three corrections, which included changing Mr. Carter's work history comment to "satisfactory" in a second attempt to comply with the August 2008 settlement agreement.

Considering these actions in terms of temporal proximity and pretext, I note that the timing of this second change was based on Ms. Deetz's awareness that the corrections had not been made and the cause of the nearly three and a half month retention up to December 2008 was USIS' on-going database problem. Additionally, without receiving any dispute from Mr. Carter, Ms. Deetz again immediately took action to get the derogatory information removed from the DAC on-line employment history consistent with the settlement agreement. Of course, in light of the apparent problem with the DAC on-line corrections in August 2008, the reliance of Ms. Deetz and Ms. Blum on the December 4, 2008 DAC on-line screen image to conclude that the corrections had been permanently made to Mr. Carter's DAC on-line employment history was less reasonable the second time round. Nevertheless, Ms. Deetz and Ms. Blum did not know that the second corrections Ms. Blum entered on December 4, 2008 had not permanently changed the DAC on-line employment history for Mr. Carter. The retention of the adverse comments through at least January 27, 2009, as demonstrated by the DAC on-line report produced that day, CX 2, was again directly attributable to the continued update issue within the USIS databases, over which neither Ms. Deetz nor Ms. Blum had any control, and was not the fault of Ms. Deetz, Ms. Blum, or Marten Transport. As a result, Mr. Carter's protected activities were not a contributing factor to the continued retention of the excessive complaints and company policy violation for Mr. Carter's Marten Transport work history in the DAC on-line product through at least January 27, 2009.⁶⁹

Finally, although I have concluded the entry did not constitute blacklisting, for the sake of completeness, I have also considered whether Mr. Carter's protected activities were a contributing factor in Marten Transport's placement, and continued retention, of a continuous period of employment from June 2005 to July 2006 in his DAC employment history.

Concerning the initial change in his employment record from two short periods of employment to a single employment with Marten Transport of just over a year, I find that act was not an egregious attempt to interfere with Mr. Carter's subsequent employment. Instead, although Marten Transport had become aware when Mr. Carter was reinstated in June 2006 of his additional employment with Swift Transportation earlier in 2006, the parties' agreement to change Mr. Carter's employment history for Marten Transport to a continuous period from June 2005 to July 2006 restored Mr. Carter's work history to what it would have been had he not been

⁶⁹Mr. Ferguson credibly testified that USIS rectified the DAC database problem in March 2009, and an April 6, 2009 DAC on-line screen shot for Marten Transport shows Mr. Carter's work history was "satisfactory," Marten 2.

terminated in June 2005 due to whistleblower activities and instead continued to be employed by the company until he quit in July 2006. That agreed change was also consistent with the additional relief Judge Solomon had previously ordered as corrective relief. Additionally, and significantly, Mr. Carter was obviously also aware of his intervening employment with Swift Transportation. While he was concerned about the problems due to the continuous employment provision because of his over-lapping employment with Swift Transportation and sought an addendum, Mr. Carter still chose to sign the settlement agreement on August 21, 2008 with the continuous employment provision, in exchange for nearly \$60,000 and the final resolution of his employment and whistleblower dispute with Marten Transport.

As to the continued retention of the legal fiction of continuous employment, Marten Transport has as much right to rely on the terms of their settlement agreement, including the continuous employment provision, as Mr. Carter does on the removal of the derogatory comments from that same work history. Marten Transport's continued reliance upon, and compliance with, the continuing employment provision for Mr. Carter's work record in their legally binding settlement agreement of Mr. Carter's first two STAA whistleblower complaints does not subsequently become an additional violation of the whistleblower protection provisions of the STAA if Mr. Carter later experiences problems with that part of their agreement, particularly when he anticipated the issue before signing the settlement document.

In summary, Mr. Carter's protected activities were not a contributing factor in the inclusion in the August 2008 settlement agreement of the provision showing a continuous employment work history with Marten Transport, its subsequent placement in his DAC employment history in accordance with the executed settlement agreement, and the continued retention of that continuous work period in Mr. Carter's DAC employment history.

Issue # 3 – USIS Blacklisting

In his July 2008 second STAA complaint, Mr. Carter alleged that USIS blacklisted him by keeping derogatory information in its DAC employment history database and failing to correct it. Specifically, after he submitted his dispute to USIS regarding his DAC employment history for Marten Transport in June 2008, which included Judge Solomon's decision, USIS refused to remove all of the adverse information USIS had received from Marten Transport. Then, following the August 2008 settlement agreement which required removal of derogatory information from Marten Transport, USIS continued to retain the adverse information in his DAC employment history through March 2009. In his April 3, 2009 OSHA objections, Mr. Carter also asserted that USIS engaged in deception and blacklisting by showing continuous employment of June 2005 to July 2006 for Marten Transport in his DAC employment history and not removing that inaccurate DAC employment history. At the hearing, Mr. Carter also indicated that since Swift Transportation submitted its employment history for Mr. Carter in June 2007, USIS should have recognized that a three month overlap for 2006 existed after Marten Transport changed his employment history to show continuous employment.

In determining whether Mr. Carter can prove that USIS blacklisted him, I again return to the three elements that he must establish by a preponderance of the evidence: a) protected activity; b) unfavorable personnel action or adverse action; and, c) causation/contributing factor.

Protected Activities

Mr. Carter didn't specifically identify the protected activities to which he believed USIS was responding. However, as previously discussed, Mr. Carter has proven that he engaged in protected activities while a Marten Transport employee and during the course of his litigation with both Marten Transport and USIS.

Adverse Action//Blacklisting

Again, in light of the ARB's determination in *Beatty*, the excessive complaints and company policy violations in Mr. Carter's DAC employment history for Marten Transport in the databases maintained by USIS represent an adverse action of blacklisting. However, for the reasons previously discussed, the report of Mr. Carter's continuous employment with Marten Transport is neither adverse on its face, damaging, nor improper.

Causation/Contributing Factor

Since the USIS DAC employment history for Mr. Carter extend back to 2003, even before he first worked for Marten Transport, I will use progressive timeframes in discussing the knowledge and causation aspects in relation to the alleged blacklisting by USIS, starting with Mr. Carter's employment termination in 2005.

Knowledge

In July 2005, after Mr. Carter's termination, Marten Transport entered into his DAC employment history maintained by USIS two adverse work history comments of excessive complaints and company policy violation. At that time, as Mr. Carter acknowledged, and consistent with its business practice of accepting an employer's employment history submission without verification of its accuracy, and absent any DAC coding issues, USIS had no basis for questioning Marten Transport's July 14, 2005 adverse comments about his employment record. USIS simply stored the two adverse comments in its database and had no knowledge of Mr. Carter's underlying protected activities at Marten Transport associated with the remarks. As a result, from July 2005 through May 2008, Mr. Carter's protected activities did not play any role in USIS' retention Marten Transport's adverse comments regarding Mr. Carter's employment in the DAC employment history database.

On the other hand, when Mr. Carter disputed his DAC employment history for Marten Transport at the beginning of June 2008, he provided a copy of Judge Solomon's decision, which made USIS aware of both his protected activities in June 2005 while working at Marten Transport and his subsequent litigation which was also a protected activity.

Finally, since USIS was a named respondent in Mr. Carter's second complaint filed in July 2008 and remained involved with his continuing litigation, the company has also been aware of his protected activity associated with the STAA proceedings.

Causation

In assessing whether Mr. Carter's protected activities were a contributing factor in USIS' responses in regards to his DAC employment history, I will first examine its actions when Mr. Carter disputed Marten Transport's adverse comments in June 2008. Then, I will address USIS' actions following the August 2008 settlement agreement.

June 2008

Upon receipt of Mr. Carter's dispute in June 2008, USIS initiated the investigative process under the FCRA, which involved notifying Marten Transport of Mr. Carter's disputed information and seeking confirmation of whether the information Marten Transport had provided in July 2005 was in error. When Marten Transport re-confirmed the information, and after removing the company policy violation comment due to a coding issue, USIS kept the remaining excessive complaints in Mr. Carter's DAC employment history for Marten Transport, informed Mr. Carter of the re-verification by Marten Transport, and provided him with an opportunity to file a rebuttal. Since Mr. Carter attached a copy of Judge Solomon's decision in support of his dispute, USIS had notice of his protected activities before USIS decided how to respond to his dispute. However, the procedure USIS followed in response to Mr. Carter's dispute both complied with its obligations as a consumer reporting agency under the FCRA, and, as publicized in the September 2008 magazine article, CX 2, was consistent with USIS' standard business practice for responding to a DAC employment history dispute.

Based on Judge Solomon's decision, USIS was also aware that Mr. Carter had received a favorable determination that the excessive complaints comment represented impermissible retaliation. Yet, Mr. Ferguson credibly testified USIS was also aware that Marten Transport contested that determination and Judge Solomon's decision was under appeal. Consequently, consistent with its status as a consumer reporting agency, USIS declined to investigate the accuracy of Marten Transport's re-verification since there had not been a final decision in the litigation between Marten Transport and Mr. Carter.

And, as a final consideration, USIS did not produce the adverse comment concerning excessive complaints or cause it to be placed in Mr. Carter's DAC employment history in July 2005. Instead, as with every other employer's DAC employment history input, absent any dispute, USIS simply stored Marten Transport's employment history for Mr. Carter for the next nearly three years, and then followed its usual investigative routine when Mr. Carter submitted a dispute in June 2008.

In light of the above circumstances, I do not find USIS' stated reasons for not removing the excessive complaints comment from Mr. Carter's DAC employment history in response to his June 2008 dispute, and the attached decision by Judge Solomon, to be pretext or probative circumstantial evidence based on temporal proximity of impermissible discrimination under the STAA due to his protected activities. To the contrary, the evidentiary record does not contain probative direct or circumstantial evidence that Mr. Carter's protected activities in June 2005 while working as a Marten Transport commercial truck driver, or his resulting litigation with Marten Transport, which is only one of USIS' nearly 2,600 customers, contributed in any way with either the investigative process USIS decided to conduct three years later in response to Mr. Carter's dispute, or its decision to retain Marten Transport's excessive complaints comment in Mr. Carter's DAC employment history. Accordingly, I find Mr. Carter's protected activities through June 2008 were not a contributing factor in USIS' determination to retain Marten Transport's work record comment of excessive complaints in Mr. Carter's DAC employment history.

August 2008 to January 2009

By this time period, in addition to protected activities Mr. Carter presented to USIS in his June 2008 dispute, at least one of Mr. Carter's protected activities, his continuing litigation with Marten Transport, now directly affected USIS as a named respondent in Mr. Carter's second STAA complaint alleging blacklisting. Nearly contemporaneously, at least one of USIS' DAC databases continued to show excessive complaints and company policy violation for Mr. Carter's first employment with Marten Transport. Such temporal proximity may represent circumstantial evidence of blacklisting due to a protected activity. However, while USIS was responsible for retention of the adverse information in one of its DAC employment history databases, the preponderance of the probative evidence in this case outweighs the circumstantial evidence of temporal proximity, and establishes that USIS' continued storage of the adverse comments in at least one of its employment history databases after August 2008 was due solely to a computer database update issue.

Specifically, the USIS database update problem between August 2008 to March 2009 was real as evidenced by the fact that some of the corrections that Marten Transport made to Mr. Carter's DAC employment record in August and December 2008 were actually captured and stored in one of the USIS databases. Notably, while the January 27, 2009 DAC on-line employment history still retained the adverse comments Marten Transport had attempted to remove, the January 27, 2009 DAC Report ordered by Equity Transportation did not contain the same adverse comments. Instead, as corrected by Marten Transport in August and December 2008, the January 27, 2009 DAC Report employment history showed Mr. Carter's work record with Marten Transport to be "satisfactory." Additionally, the database update problem was not personal to Mr. Carter. As Mr. Ferguson credibly testified, the USIS database update problem adversely affected about 2,999 other employment records maintained by USIS. And, finally, through a software update, USIS eventually resolved its database update issue, such that in addition to the January 27, 2009 and February 2, 2009 DAC Report employment histories being correct, the April 2, 2009 DAC on-line product also showed Mr. Carter's work record for Marten Transport to be "satisfactory," and no longer contained the two adverse comments.

In light of the probative evidence discussed above, I also conclude that USIS' explanation about why the changes Marten Transport made to Mr. Carter's DAC employment history through the DAC on-line system in August and December 2008 were not permanently retained in that system credible and not a pretext to cover impermissible retaliation for Mr. Carter's protected activities.

Consequently, I find Mr. Carter's protected activities, including his litigation against USIS, were not a contributing factor in USIS' failure through at least January 27, 2009 to ensure all its databases no longer retained the adverse comments regarding Mr. Carter's work record after Marten Transport twice attempted to have those comments removed from his DAC employment history.

Continuing Employment

Again, although the continuous period of employment comment in Mr. Carter's DAC employment history does not represent blacklisting, in the interest of completeness, I will also address USIS' retention of that information in its database. Based on Swift Transportation's submission in June 2007 of its employment history for Mr. Carter, USIS may have been aware of an employment overlap in 2006 for Mr. Carter when Marten Transport, in compliance with the settlement agreement, attempted in August and December 2008 to change Mr. Carter's two employment periods for Marten Transport to a continuous period of employment in the DAC system. Yet, as Mr. Ferguson credibly explained, such an overlap does not raise a concern for USIS absent a dispute. Thus, USIS' acceptance, and only partially successful storage of the continuous employment information for Marten Transport, was consistent with its usual business practices as a consumer reporting agency subject to the FCRA. Consequently, Mr. Carter's protected activities were not a contributing factor to USIS' acceptance of Marten Transport's

change in Mr. Carter's work history from two periods of employment to a continuous employment period.⁷⁰

Conclusion

In this particular case, under the Act and 29 C.F.R. Part 1978 (1988), USIS is a covered respondent.

The change in Mr. Carter's DAC employment history showing continuous employment for Mr. Carter with Marten Transport from June 2005 to July 2006 does not represent blacklisting and is not an adverse action.

Although Mr. Carter engaged in multiple protected activities and some USIS reports of his employment history with Marten Transport continued to show adverse comments of excessive complaints and company policy violation, which represent blacklisting, after the August 2008 settlement agreement, Mr. Carter has not proven by a preponderance of the probative evidence that his protected activities were a contributing factor to the retention of those adverse comments. Similarly, even if the continuous employment entry was considered to be blacklisting or an adverse action, Mr. Carter also has not proven by a preponderance of the probative evidence that his protected activities contributed to Marten Transport's inclusion, and USIS' retention, of that work history in his DAC employment history. Accordingly, having failed to prove causation, a requisite element for whistleblower protection under the Act, Mr. Carter's STAA complaints against Marten Transport and USIS must be dismissed.

ORDER

The blacklisting STAA complaints against MARTEN TRANSPORT, LTD., and USIS COMMERCIAL SERVICES, INC. (now HIRERIGHT SOLUTIONS, INC.) by MR. THERON K. CARTER are **DISMISSED**.

SO ORDERED:

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: March 11, 2013
Washington, D.C.

⁷⁰I also note that by April 2009, following Mr. Carter's objections to the OSHA dismissal of his second complaint, USIS also would have become aware that Marten Transport made the continuous employment change in accordance with a settlement agreement between Mr. Carter and Marten Transport.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a). At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).