**U.S. Department of Labor**

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**Issue Date: 08 February 2016**

CASE NO. 2015-STA-00003

*In the Matter of*

**REED A. CULVER,**
Complainant,

v.

**LARRY KING ENTERPRISES and FIBERON, LLC,**
Respondents.

Appearances: Jason J. Rudd, Esq.
for Complainant

C. Clayton Gill, Esq.
Jamie Kerr Moon, Esq.
for Fiberon, LLC

Before: Steven B. Berlin
Administrative Law Judge

## ORDER ON RECONSIDERATION GRANTING FIBERON'S MOTION FOR SUMMARY DECISION

This matter arises under the Surface Transportation Assistance Act, 49 U.S.C. § 31105. In 2007, Congress amended the statute in the Implementing Recommendations of the 9/11 Commission Act, P.L. No. 110-053 (Aug. 3, 2007). The Secretary of Labor's implementing regulations are codified at 29 C.F.R. § 1978. The Secretary revised the regulations in two steps in view of the statutory amendments. The respective revisions were published as an Interim Final Rule (Aug. 31, 2010; clarified Nov. 23, 2010) and a Final Rule (July 27, 2012).

Complainant named as respondents his former employer, Larry King Enterprises, and one of its customers, Fiberon, LLC. On March 5, 2015, Fiberon moved for summary decision. It contended there was no evidence by which Complainant could show (1) that he engaged in activity that the statute's whistleblower provision protects, or (2) that his protected activity was a contributing factor to an adverse action. At the time Fiberon filed the motion, Complainant was representing himself. On March 9, 2015, I issued an order explaining the procedure on summary

decision and notifying Complainant that he might want to retain counsel. Complainant filed an opposition (without benefit of counsel) on March 20, 2015. Fiberon filed a reply four days later.

Soon afterward, Complainant notified this Office that he had found counsel. I continued the hearing and allowed Complainant (through counsel) to file a supplemental opposition to summary decision. Complainant filed the supplemental opposition on April 30, 2015. Fiberon filed a supplemental reply on May 26, 2015.

I allowed oral argument (by telephone) on June 1, 2015. At the conclusion of the argument, I denied the motion from the bench, stating reasons on the record. I issued a short written order on June 5, 2015, confirming that the motion had been denied for the reasons stated on the record at the hearing on the motion.

On June 15, 2015, Fiberon timely moved for reconsideration. As I will set out in detail below, the crux of its argument is that my rationale for denying the motion relied on the current implementing regulations. According to Fiberon, it was error to rely on those regulations because they were not effective until *after* the events on which Complainant's claim is based. Fiberon argues that this is an improper retroactive application and that Fiberon is entitled to summary decision under the regulations in effect at the time of the relevant conduct.

On June 16, 2015, I issued an order to show cause, setting a briefing schedule on the motion for reconsideration. Acting through counsel, Complainant filed an opposition on June 19, 2015.[1]

I find Fiberon's argument on reconsideration meritorious, and I grant summary decision, leaving Larry King Enterprises as the sole Respondent.

## Undisputed Material Facts[2]

Complainant worked for Respondent Larry King Enterprises, LLC, driving a truck both locally and over-the-road. Larry King terminated the employment on or about June 1, 2012. Fiberon is an indirect customer of Larry King Enterprises. It contracts with a "logistics provider," which in turn contracts with trucking companies, including Larry King Enterprises, to transport materials for Fiberon.

In or around early May 2012, Complainant told both Fiberon and Larry King Enterprises that he would not accept certain over-the-road loads that he believed would cause him to violate hours-of-service regulations. On summary decision, Complainant offered sufficient evidence to raise a genuine issue as to whether, in the days after his refusal to accept these loads, a Fiberon manager singled him out and delayed his waiting time for loading and unloading at the Fiberon yard.

[1] On October 23, 2015, Complainant's counsel moved to withdraw. I allowed the withdrawal by order of November 6, 2015. Since that time, Complainant again has been representing himself.

[2] As discussed below, on summary decision, I consider only undisputed facts as seen in the light most favorable to the non-moving party (here Complainant). I make no credibility determinations and do not weigh the evidence. The recitation of facts in the text above is therefore for purposes of this motion only.

Complainant's employer, Larry King Enterprises, generally expressed concern when Complainant's loads were delayed. A delay could reduce revenue because the truck would be occupied and could not be used elsewhere. But when Complainant expressed concern that the delays at Fiberon were costing Larry King Enterprises money, Larry King told Complainant not to worry about it, not to discuss it with Fiberon, to let Fiberon run its own business, and that Larry King would pay Complainant for his time.

At or around the beginning of the next month (June 2012), Larry King Enterprises terminated the employment. Its stated reason was that, contrary to Larry King's directives, Complainant continued to dispute with Fiberon managers about what he saw as continued unnecessary delays.

Complainant has no knowledge and does not assert that Fiberon was involved in Larry King's decision to terminate the employment. *See* Dep. of Culver, Feb. 13, 2015, at 152:14-153:12 (filed May 26, 2015). Rather, Complainant's contention is that Fiberon's singling him out for delay put him in fear that Larry King Enterprises would discipline and possibly terminate the employment (despite Larry King's statement to Complainant that he need not be concerned about the delays).

## Discussion

*Legal requirements on summary decision.* On summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. §18.72(a) (2015); FED. R. CIV. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under FED. R. CIV. P. 50 and 56). To defeat summary judgment, the dispute as to a material fact must be genuine; bare assertions will not suffice. *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1982). Nor will a mere "scintilla of evidence." *Anderson*, 477 U.S. at 251 (1986). Rather, the existence of a genuine dispute depends on whether there is sufficient evidence for a reasonable factfinder to rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

*Initial ruling denying summary decision.* When I initially considered Fiberon's motion, I concluded that there was a genuine issue as to whether Fiberon had harassed Complainant in a manner that made him fearful about job security. I found this was more than trivial and could deter other truckers from engaging in protected activity. I therefore held that there was a genuine issue as to adverse action. *See* 49 U.S.C. § 31105(b)(1) (2007) (applying legal standards of AIR 21 to STAA cases); *Williams v. American Airlines*, ARB No. 09-018 (Dec. 29, 2010), slip op. at 15 (in AIR 21 cases, "the term 'adverse actions' refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged"); *see also Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) (action materially adverse when it causes more than a trivial harm and would deter other employees from pursuing complaints).

I relied in particular on one of the current regulations. 29 C.F.R. § 1978.102 (July 27, 2012). It gives meaning to the statutory language that generally prohibits retaliatory discrimination in the terms and conditions of employment. *See* 49 U.S.C. § 31105(a)(1) (2007) (making it a violation to "discriminate against an employee regarding pay, terms, or privileges of employment, because" of the employee's protected activity). For example, the regulation forbids any person from intimidating, harassing, or otherwise retaliating against an employee who refuses to operate a vehicle because the operation would violate a regulation, standard, or order related to motor vehicle safety. 29 C.F.R. § 1978.102(c)(1)(i).

At oral argument, Fiberon argued that the regulation was expressly limited to the conduct of "any employer." But after reviewing the text during oral argument, Fiberon conceded that the regulatory language extended to "any person." Based on that understanding, I denied summary decision.

*Reconsideration.* On reconsideration, Fiberon argued that Larry King Enterprises terminated the employment no later than the beginning of June 2012. The regulations on which the denial of summary decision depended are in the Secretary's Final Rule, published July 27, 2012. These regulations were not in effect at any relevant time. Rather, the regulations in effect were in the Secretary's Interim Final Rule, published on August 31, 2010, and clarified on November 23, 2010. Unlike the Final Rule, which referred to "any person" in the regulation on which I relied, the Interim Final Rule used the words "any employer" in that regulation.

The difference is crucial. Because Fiberon was a customer[3] of Complainant's employer – and never itself employed Complainant – the revision imposes new duties on Fiberon and cannot be applied retroactively. Applying the regulation in effect at the relevant times, Fiberon did not engage in an adverse action and is entitled to summary decision.

I. The Relevant Provisions of the Final Rule May Not Be Applied.

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

[3] Fiberon hired trucking companies only indirectly, through an intermediary. There is no indication of any contractual relationship between Larry King Enterprises and Fiberon. Nonetheless, for purposes of this motion, I consider Fiberon to be a customer of Larry King Enterprises' services (as opposed to having no cognizable relationship).

*Landgraf v. USI Film Products*, 411 U.S. 244, 280 (1994) (holding that the punitive damages provision of the Civil Rights Act of 1991 may not be applied retroactively). The same rule applies to administrative regulations. *See Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 835 (9th Cir. 1997) (modification of HUD implementing regulations for the Fair Housing Act cannot be applied retroactively), quoting *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result").

The Court's holdings do not preclude all retroactive applications of statutory amendments or regulatory revisions: Retrospective application of an amendment may still be proper if the amendment does not attach new legal consequences to events that were completed before its enactment. *See Johnson v. Siemens Building Technologies, Inc.*, ARB No. 08-032 (March 31, 2011) (*en banc*) at 8-16 (Dodd-Frank amendments to Sarbanes-Oxley whistleblower provision are merely clarifications and apply retrospectively), citing *Landgraf* at 268-69. For example, Congress "may enact an amendment 'to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases.'" *Id.* at 8, citing cases.

The application of the Final Rule thus turns on whether new legal consequences attach to events completed before the Final Rule was published. I find that new legal consequences do attach.

A. The Regulatory Scheme under the Interim Final Rule.

The statutory language provides only the following prohibition: "A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because [the employee engaged in protected activity]." 49 U.S.C. § 31105(a)(1) (2007).[4] The Interim Final Rule included regulatory language designed to give meaning to the words: "discriminate against an employee regarding pay, terms, or privileges of employment." 29 C.F.R. § 1978.102(b), (c) (2010).

In language relevant here, the regulation included the following:

> It is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against any employee because the employee: (1) Refuses to operate a vehicle because: (i) The operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security.

29 C.F.R. § 1978.102(c)(1)(i) (2010). Subsection (b) of the regulation similarly forbids "any employer" from the same retaliatory actions for filing a complaint. 29 C.F.R. § 1978.102(b) (2010).

[4] The quoted statutory language prior to the 2007 amendments was the same. Until the Secretary published the (August 31, 2010) Interim Final Rule to implement the 2007 amendments, the applicable regulations offered no further explication or gloss to define the prohibited conduct. *See* 29 C.F.R. Part 1978 (2010), 53 Fed. Reg. 47676 (Nov. 25, 1988).

The Supreme Court recently had occasion to construe similar language in the whistleblower protection provisions of the Sarbanes-Oxley Act. *Lawson v. FMR LLC*, ___ U.S. ___, 134 S.Ct. 1158 (2014) (holding that Sarbanes-Oxley's protections extend to employees of a public company's contractors). At the time relevant to *Lawson*, the Sarbanes-Oxley Act provided:

> "No [public] company ..., or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of [whistleblowing or other protected activity]."

134 S.Ct. at 1161, quoting 18 U.S.C § 1514A(a) (2006 ed.).[5] As the Court observed,

> The prohibited retaliatory measures enumerated in §1514A(a)—discharge, demotion, suspension, threats, harassment, or discrimination in the terms and conditions of employment—are commonly actions an employer takes against its *own* employees. Contractors are not ordinarily positioned to take adverse actions against employees of the public company with whom they contract.

134 S.Ct. at 1166 (emphasis in original).

As the language of the STAA and the implementing regulations in the Interim Final Rule prohibit substantially the same conduct as in Sarbanes-Oxley (and AIR 21), it would also appear to apply to instances when an employer engages in such conduct against its own employees.[6] As with contractors in SOX, customers such as Fiberon in STAA cases are not ordinarily positioned to take adverse actions (of the kinds listed in the STAA) against the employees of covered trucking companies.

The conclusion is more compelling here that in *Lawson*. First, unlike Sarbanes-Oxley, the language in the Surface Transportation Assistant Act contains no express prohibition of threats or harassment; it contains only the general prohibition of retaliatory discrimination found in Sarbanes-Oxley. The prohibition applicable here comes only from the gloss that the Interim Final Rule places on that general prohibition of discrimination in the statute. And that regulatory prohibition is expressly limited to employers. *See* 29 C.F.R. § 1978.102(c)(1)(i) (2010), prohibiting "any *employer* to intimidate, threaten . . . or in any other manner discriminate against an employee in the terms and conditions of employment" (emphasis added).[7]

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[5] As the Court observed, Congress "borrowed" this language from the "Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121. That Act provides: "'No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment' when the employee [engages in protected activity]. § 42121(a)(1)."

[6] Recognizing commonplace work arrangements in the trucking industry, the STAA whistleblower provision includes in the definition of a covered "employee" persons who drive trucks as independent contractors. 49 U.S.C. §§ 31101(2), 31105(j). The regulations have consistently done the same. *See, e.g.*, 29 C.F.R. § 1978.101(h) in both the Final Rule and the Interim Final Rule. It would thus appear that the whistleblower protection extends to such independent contractors as well as actual employees.

[7] Given that the statutory and regulatory definition of "employee" includes independent contractor truck drivers, 29 C.F.R. §§ 1978.102(b)(1), (c)(1)(i) (2010) arguably would extend to companies for whom truck drivers worked as

I conclude that the statute and the regulatory prohibition[8] – at the time relevant here – of such conduct as retaliatory intimidation, threats, and coercion did not reach a customer of a complainant's employer or former employer.

B. The Final Rule Added New Legal Consequences.

The Final Rule (July 27, 2012) revised the relevant regulation in the Interim Final Rule to read:

> It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee: (1) Refuses to operate a vehicle because: (i) The operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security.

29 C.F.R. § 1978.102(c)(1)(i) (2012). The relevant changes include the substitution of the word "person" for "employer" and the addition of the words "harass" and "suspend."[9]

The pre-existing inclusion of the words "intimidate, threaten, restrain, coerce" in the Interim Final Rule adequately describes Fiberon's conduct (seen in the light most favorable to Complainant). In this factual context, the addition of "harass" and "suspend" to the Final Rule is merely clarification or duplication; it adds no new legal consequences.

But I reach a different conclusion for the substitution of the word "person" for "employer." The Final Rule defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any other organized group of individuals." This appears to include virtually every individual or business entity; it is much broader than those who have an employment relationship with the complainant (*i.e.*, an "employer"). It could well be construed – as I construed it when I initially denied summary decision – to extend to a customer interacting with a covered employee who was doing her job as an employee of a different company.

The Secretary's preamble to the Final Rule can provide additional explication. *See* 77 FR 44121 (July 27, 2012). As the Secretary explained generally:

> The regulatory provisions in this part have been made to reflect the 9/11 Commission Act's amendments to STAA, to make other improvements to the procedures for handling STAA whistleblower cases, to interpret some provisions of STAA, and, to the extent possible within the bounds of applicable statutory language, to be consistent with regulations implementing the whistleblower

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independent contractors. But that is irrelevant here, as Complainant was neither a Fiberon employee nor an independent contractor working for Fiberon.

[8] This includes 29 C.F.R. §§ 1978.102(b)(1) and (c)(1)(i) (2010).

[9] The revisions to 29 C.F.R. § 1978.102(b) are the same. For example, the word "person" is substituted for "employer."

> provisions of the following statutes, among others, that are also administered and enforced by OSHA: [listing other whistleblower statutes].

*Id.* With respect to the particular changes in 29 C.F.R. § 1978.102, the Secretary stated: "In describing the conduct that is prohibited under STAA, the final rule adds the words "'harass, suspend, demote' to paragraphs (b), (c), and (e) to make this rule more consistent with other OSHA whistleblower rules." But the Secretary was silent about the deletion of the phrase "any employer" and the substitution of the phrase "any person."

In all, the Secretary made no statement that the regulatory revisions in the Final Rule should apply retrospectively. She made no comment that the revisions were merely clarifying the Interim Final Rule or that they imposed no change or had no legal consequences on the parties to a whistleblower claim. The Secretary's comments in the preamble offer little direction for the construction of the regulatory language at issue here. But the comments do show an intent to make substantive changes by interpreting some provisions of the statute and to reinterpret other provisions to make them more consistent with other whistleblowing statutes "to the extent possible within the bounds of applicable statutory language."

I conclude that the July 2012 revisions in the Final Rule expanded the scope of 29 C.F.R. § 1978.102 to prohibit persons in addition to employers from retaliatory acts of intimidation, threat, coercion, and restraint, as well as harassment. The regulation as announced in the Interim Final Rule did not extend to Fiberon, which was a customer and not an employer; the regulation as announced in the Final Rule would. The Final Rule provision at issue thus has legal consequences for the parties and would impose greater duties on Fiberon than those that existed at the time of all relevant conduct. Application of the Final Rule to the present case would be retroactive and improper. *See Landgraf; Bowen; Covey*, *supra*.[10]

II. Under Interim Final Rule, Fiberon Is Entitled To Summary Decision.

As discussed above, the relevant regulation in the Interim Final Rule is expressly limited to the conduct of "any employer." Fiberon was not Complainant's employer at any relevant time. Nor does Complainant offer evidence – or even contend – that Fiberon conspired with or acted in concert with Larry King Enterprises to retaliate against Complainant by terminating his employment. The only evidence (and the only allegation) is that Fiberon retaliated by delaying Complainant at the Fiberon yard repeatedly in May 2012.

The very fact that the Secretary changed the regulatory language from "any employer" to "any person" suggests that the Secretary found that the language in the Interim Final Rule narrowed whistleblower protection inconsistent with Congressional purpose (or administrative policy) and that, in the Secretary's view, an expanded scope still came "within the bounds of applicable

[10] Alternatively, if the change in 29 C.F.R. § 1978.102 from "any employer" to "any person" made no substantive change affecting the rights of companies such as Fiberon, I would apply the ordinary dictionary definition of "employer," find that Fiberon was never Complainant's employer, find that the change in regulatory language to "person" made no difference, and conclude that the Act did not extend to Fiberon. That is, if Fiberon was not an employer, and the regulatory change did not alter anyone's obligations or rights, then the regulation (as revised) still would not bring Fiberon within the prohibitions in 29 C.F.R. § 1978.102.

statutory language." The revision in the Final Rule substantively broadens the application of the statutory prohibitions in a way that is material here.

Complainant offers no argument or evidence to dispute any of this. Rather, he argues that Fiberon waived the argument because it "tacitly concedes" it was his employer (within the meaning of the Act) by not disputing it in its opening papers on summary decision or at any previous time in the litigation. He also argues that Fiberon offered no evidence that it was not his employer. These arguments are without merit.[11]

Complainant does not contend that Fiberon has ever actually conceded that it was Complainant's employer at any time. Nor does Complainant contend that Fiberon made a knowing and voluntary waiver on the point. Neither does Complainant offer any evidence that in fact Fiberon ever was his employer. He points to no affidavits, declarations, disclosures, discovery responses, or any of the other materials generally considered on summary decision. *See* 29 C.F.R. § 18.72(c)(1).

It is a complainant's burden to demonstrate that his protected activity was a contributing factor to an adverse action alleged in the complaint. *See* 29 C.F.R. § 1978.109(a). If the statute and the applicable regulations define certain conduct as adverse only if the person engaged in the conduct is the employer, the complainant must show that the respondent is her employer to demonstrate that an adverse action occurred. In short, even if Complainant had alleged in his complaint that Fiberon was his employer, it would be his burden to prove as much if Fiberon disputed it, not Fiberon's burden to disprove it. *Id.* But Complainant offered nothing on this motion to establish that Fiberon was his employer; to the contrary, all of his arguments until now have treated – not Fiberon – but Larry King Enterprises as his only relevant employer. That is also what he alleged in his complaint.

Fiberon has waived no defenses through insufficient pleading. Most pleadings under the STAA are filed at the Occupational Safety & Health Administration and are informal. At the time Complainant filed his complaint (as now), no particular form was required; the complaint could even be filed orally. 29 C.F.R. § 1978.103(b). The respondent may, but is not required to, submit a position statement answering the allegations within 20 days of notice (from OSHA) that the complaint was filed. 29 C.F.R. § 1978.104(b). Again, no particular form of answer is required (other than that any position statement must be in writing): The respondent may submit a statement and may include affidavits or documents of any kind in support of its position. *Id.* There is no requirement for an express listing of defenses. As the position statement is permitted but not required, no adverse inferences may be drawn from a respondent's decision not to file one. The absence of an answer is not a waiver of any defense.

The only pleading at this Office is the objection and request for hearing that a party must file if the party is dissatisfied with the OSHA determination and wants to appeal. 29 C.F.R. § 1978.106. In the present case, the OSHA determination was adverse to Complainant. That

[11] In another argument, Complainant misplaces his reliance on OSHA findings. STAA hearings at this Office are "conducted de novo on the record." 29 C.F.R. § 1978.107(b). No weight is assigned to OSHA findings, except that any OSHA order of reinstatement remains effective absent an ALJ's order staying reinstatement. 29 C.F.R. § 1978.105(c).

meant he was the party who objected and requested a hearing. Respondents, including Fiberon, were not required to file any pleading at this Office; the regulations do not even provide for a permissive filing here.

Indeed, in his objection to OSHA's determination and his request for a hearing, Complainant stated: "I as an employee of Larry King Enterprises, LLC started experiencing hold ups in the Fiberon, LLC yard in Meridian, ID just after an altercation of a load I was going to turn down over legality [involving a 10-hour layover after one day's shift before starting the next day]." Request for Hearing, Oct. 13, 2014. Thus, Complainant asserted that Larry King Enterprises was his employer, not Fiberon. Fiberon had no reason to dispute that.

Complainant is correct that Fiberon did not raise the question of whether it was Complainant's employer. At oral argument on summary decision, the administrative law judge asked the parties to apply 29 C.F.R. § 1978.102 (including its prohibition of retaliatory harassment) and answer whether this defeats summary decision. Fiberon answered that the regulation applies only to employers and that Fiberon was a customer, not an employer.

An administrative law judge may raise issues for summary decision. *See* 29 C.F.R. § 18.72(f),[12] which provides: "*Decision independent of motion.* After giving notice and a reasonable time to respond, the judge may: (1) Grant summary decision for a nonmovant; (2) Grant the motion on grounds not raised by any party; or (3) Consider summary decision on the judge's own after identifying for the parties facts that may not be genuinely in dispute."

Fiberon did assert in its opening papers that it was entitled to summary decision because, as a matter of law, Complainant's protected activity was not a contributing factor to an adverse action. Arguably, it should have been Complainant who would counter that with an argument that Fiberon's intimidation and harassment was an adverse action under the applicable regulations; there would be no reason for Fiberon to raise the issue. But regardless of who should have addressed the relevant regulations in their submissions on summary decision, there is no question that, so long as the parties had notice and a reasonable time to respond, the administrative law judge could ask the parties to address the regulation and could decide the motion while relying on the applicable regulation even if no party cited it. *See* 29 C.F.R. § 18.72(f).

Here, the briefing on reconsideration gave Complainant reasonable time to respond to the question about 29 C.F.R. § 1978.102 (assuming there was not a reasonable time to respond at oral argument on the motion). The purpose and effect of the Order to Show Cause, issued June 16, 2015, was to give Complainant reasonable time to respond on that issue.[13] Nothing about this is improper, and nothing about it amounted to Fiberon's waiver of any defense based on its not being an employer for purposes of 29 C.F.R. § 1978.102 (in the Interim Final Rule).

[12] This Office's procedural rules apply to STAA cases except as the STAA otherwise provides. 29 C.F.R. § 1978.107(a). The STAA is silent as to procedures on summary decision. Our procedural rule at 29 C.F.R. § 18.72 therefore controls.

[13] Complainant should have begun considering his response as soon as he received Fiberon's motion for reconsideration, which Fiberon served by mail on June 12, 2015.

I reject Complainant's argument and find that Fiberon has not waived any defense asserting that it was a customer (rather than an employer) and that Fiberon did not tacitly concede that it was Complainant's employer by failing to raise the question earlier.

Accordingly, Fiberon was a customer of Complainant's employer; it was never Complainant's employer. Fiberon's conduct, even when viewed in the light most favorable to Complainant as the non-moving party, was not adverse action within the then-applicable implementing regulations. Retroactive application of the more recent regulations would be improper. Fiberon therefore is entitled to summary decision.

## Order

Fiberon's motion for summary decision is GRANTED. Complainant's claim against Fiberon is DENIED. Fiberon is DISMISSED. The case will continue as to the complaint against Larry King Enterprises only.

SO ORDERED.

Digitally signed by STEVEN BERLIN
DN: CN=STEVEN BERLIN, OU=ADMIN LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

STEVEN B. BERLIN
Administrative Law Judge