

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 March 2017

CASE NO. 2016-STA-00040

In the Matter of

VERA RILEY,
Complainant,

v.

**EL-HAJJ MALIK EL-SHABAZZ
PUBLIC SCHOOL ACADEMY, CORDREE
McCONNELL, VINCENT PRICE, AND
CHARLES MOORE,**
Respondents.

Appearances: Samantha A. Zandee, Esq.
for Complainant

Heidi D. Hudson, Esq.
for Respondents El-Hajj Malik
El-Shabazz Public School Academy,
McConnell, and Price

Richard H. Morgan, Jr., Esq.
for Respondent Moore

Before: Steven B. Berlin
Administrative Law Judge

ORDER GRANTING SUMMARY DECISION

This matter arises under the employee protection (whistleblower) provision of the Surface Transportation Assistance Act, 49 U.S.C. § 31105, and its implementing regulations, 29 C.F.R. Part 1978. Complainant alleges that (1) she engaged in protected activity by reporting the unsafe condition of the Academy's school buses and (2) Respondents retaliated by laying her off, recalling her from layoff to a lower paying job, and harassing her when she returned from lay off.

All Respondents other than Charles Moore move a second time for summary decision. They assert that El-Hajj Malik El-Shabazz Public School Academy is a Michigan “public school academy.” They argue that such academies are political subdivisions of the State of Michigan and thus (1) they are outside the scope of the Act’s whistleblower prohibitions, (2) Complainant is outside the Act’s protections, and (3) the exclusion applies as well to the Academy’s agents and employees, thus requiring the dismissal of the action in its entirety.

The central facts are undisputed; it is the legal implications of those facts that the parties dispute. As a matter of law, I conclude that the Academy is a political subdivision of the State of Michigan, that Complainant is not an employee within the meaning of the Act’s whistleblower protection provision, and that the case must be dismissed in its entirety.

Undisputed Material Facts

Under Michigan law, Respondent El-Hajj Malik El-Shabazz Public School Academy is a statutory public school academy established under MCL § 380.501.¹ It operates under the direction of a Board, of which Respondent McConnell was a member at relevant times. Overall administrative responsibility was placed in a Chief School Administrator, who was Respondent Price at some of the relevant times. The Academy employed Complainant as the Administrative Assistant. Under the direction of the Chief School Administrator, her duties extended to the day-to-day administration of the school for non-instructional operations.² Her job duties were wide-ranging; relevant here were all of the duties of the previous Transportation Director, who had resigned. These included assisting in bus scheduling, resolving issues between home and bus drivers, and keeping a log of repair needs and contracting to have the repairs done (including for the Academy’s buses and vans). Respondent Moore was the Academy’s outside accountant.

Discussion³

The Surface Transportation Assistance Act prohibits certain adverse actions against “an employee” as follows: “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 certain protected activities].” 49 U.S.C. § 31105(a). The statute defines “employee”

¹ See https://www.michigan.gov/documents/mde/Schools_by_Authorizer_396738_7.pdf (cited by Complainant) at page 2 concerning schools that Central Michigan University chartered.

² A Curriculum Director administered all instructional matters, such as hiring and supervising teachers and being a liaison with federal, state, and county education officials.

³ *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; 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). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 29 C.F.R. §18.40(c). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. See *Anderson*, 477 U.S. at 252.

as follows: “In this section, ‘employee’ means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who--(1) directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier; and (2) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.” *Id.* § 31105(j).

The regulations further explicate forms of discrimination that are prohibited; again the proscribed discrimination expressly involves conduct against any “employee.” 29 C.F.R. § 1978.102(a), (b), (c). The regulations define an “employee” with very much the same language as the statute. *See* 29 C.F.R. § 1978.101(h).

Thus, to come within the statute’s protection, a person must be an “employee” within the statutory definition, and this excludes persons who are acting in the course of employment for the U.S. Government, a State, or a political subdivision of a state. Consistent with this, when a complainant was an employee of a university that under state law was seen as the “state,” his claim under the Surface Transportation Assistance Act was dismissed as a matter of law. *In Lewis v. Virginia Commonwealth University Police Department*, ARB No. 10-008 (June 16, 2011), 2011 WL 2614336.

Here, I conclude that El-Hajj Malik El-Shabazz Public School Academy is a political subdivision of the State of Michigan. Under Michigan law,

A public school academy is a public school under section 2 of article VIII of the state constitution of 1963, is a school district for the purposes of section 11 of article IX of the state constitution of 1963 and for the purposes of section 1225 and section 1351a, and is subject to the leadership and general supervision of the state board over all public education under section 3 of article VIII of the state constitution of 1963. A public school academy is a body corporate and is a governmental agency. The powers granted to a public school academy under this part constitute the performance of essential public purposes and governmental functions of this state.

MCL § 380.501(1).

Public school academies operate under a contract issued by a body authorized by statute to issue such contracts, including among others, “The governing board of a state public university.” MCL § 380.501(2)(a)(iv). For this purpose, a “‘State public university’ means a state university described in section 4, 5, or 6 of article VIII of the state constitution of 1963. MCL § 380.501(2)(f). Among those institutions of higher education named in section 4 of article VIII of the Michigan constitution is Central Michigan University. That university thus is authorized to issue contracts establishing public school academies under MCL § 380.501.⁴ In the present

⁴ “The authorizing body for a public school academy is the fiscal agent for the public school academy, and its aid payments are paid to the authorizing body. The authorizing body is responsible for the public school academy’s compliance with the contract and all applicable law. Further, the contract may be revoked at any time the public school academy fails to abide by the statute A public school academy is prohibited from charging tuition and is

case, Central Michigan University was the authorizing body for El-Hajj Malik El-Shabazz Public School Academy.⁵

For a school to be a “public school” under Michigan law, there is no requirement that the State have exclusive control; as the Michigan Supreme Court has held, the extent of the State’s control over public school academies is sufficient to make them public schools under Michigan law. *Council of Organizations & Others for Educ. About Parochiaid, Inc. v. Governor*, 455 Mich. 557, 572-73 (1997). This is because these schools “are under the ultimate and immediate control of the state and its agents.” 455 Mich. at 573. First, the authorizing body may revoke the charter based on a reasonable belief, for example, that the school failed to abide by its charter or failed to comply with applicable law. *Id.* Second, the statute establishes an application and approval process under which the authorizing body can reject an application if it “is not completely satisfied in any detail.” *Id.* “Third, the state controls the money” just as it does with any public school. *Id.* Finally, the Legislature intended the other sections of the School Code to apply to public school academies. *Id.* at 574.

As the court observed, there are no specific restrictions in the relevant statute that limit the power of the state to control public school academies. *Id.* While the boards of public school academies might not be elected, “the public maintains control of the schools through the authorizing bodies,” each of which in turn is controlled by persons who either were elected or were appointed by public bodies. *Id.* at 575-76. As the court held, unlike some states, Michigan does not mandate that schools be under the control of the voters of the school district. *Id.* at 577.

As they are public schools, public school academies “are necessarily subject to the leadership and general supervision of the State Board of Education to the same extent as are all other public schools.” *Id.* at 583-84. They must comply with all applicable law. *Id.* at 584. The State Board of Education “retains its constitutional authority over public school academies.” *Id.*

Given this statutory regime and the State Supreme Court’s interpretation of it, I reject Complainant’s argument that the Academy here is simply a creature of Central Michigan University and not a political subdivision of the State. Contrary to this argument, the Michigan State Board of Education exercises constitutional authority over the Academy. Central Michigan University is governed by either an elected body or one appointed by others who are appropriate government officials. It is exercising authority that the legislature has given it pursuant to the University’s explicit status in the Michigan constitution. As the court observed, public school academies are public schools. I thus conclude they are no less a political subdivision of the State than would be the Detroit Public Schools or any other statutory school district.

Indeed, this result is inescapable in that the authorizing statute defines a public school academy as “a body corporate and a governmental agency” created by statute. MCL § 380.501(1). Under Michigan law there are only two kinds of government agencies: the State itself or “a political

required to abide by the pupil admission policies set forth in the statute. If the public school academy has more applicants than space, it is required to hold a random selection process for the enrollment of its students.” *Council of Organizations & Others for Educ. About Parochiaid, Inc. v. Governor*, 455 Mich. 557, 567-68 (1997).

⁵ See fn. 1 above.

subdivision.” MCL § 691.1401(a). Whether a public school academy is the State or a political subdivision of the State, either way it comes within the express exclusion provision in the Surface Transportation Assistance Act’s definition of a covered “employee.”⁶

As Complainant is excluded from the Act’s protection, her claim fails in its entirety.

Order

For the foregoing reasons, Complainant’s complaint is DENIED and DISMISSED in its entirety.⁷

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge

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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service

⁶ I reject Complainant’s argument that public school academies cannot be political subdivisions of the State because they can be sued in their own name. A statutory waiver of sovereign immunity does not make the government agency any less a political subdivision of the State.

⁷ As I dismiss this action in its entirety based on the present motion for summary decision, I do not reach Respondent Moore’s separate motion for summary decision or the issue that I raised concerning whether the Academy was engaged in interstate commerce.

(eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).