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Issue Date: 22 March 2017

CASE NO.: 2016-STA-00067

In the Matter of:

JEFF SCHINDLER,
Complainant,

vs.

ESTENSON LOGISTICS,
Respondent.

Appearances: M. Lani Esteban-Trinidad, Esq.
For the Complainant

Jerome L. Rubin, Esq.
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND VACATING HEARING

This matter arises out of a whistleblower complaint filed by Jeff Schindler ("Complainant") against Estenson Logistics ("Respondent") pursuant to the whistleblower protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "Act"). It was initiated with the Office of Administrative Law Judges ("OALJ") on July 19, 2016, when OALJ received Complainant's objection to the Secretary's findings as presented by the Assistant Regional Administrator for the Occupational Safety & Health Administration ("OSHA"). Presently before me is Respondent's Motion for Summary Decision.

For the reasons set forth below, Respondent's Motion for Summary Decision is GRANTED. The May 18, 2017, hearing in this case is VACATED.

I. Procedural History

On May 29, 2014, Complainant filed a complaint with OSHA alleging that Respondent had unlawfully retaliated against him in violation of the STAA. The Secretary dismissed this complaint on June 14, 2016, on the grounds that even if Complainant could make out his case for

retaliation, Respondent had established its affirmative defense to liability. Complainant filed an appeal on July 13, 2016. The case was assigned to me on July 29, 2016, and on August 11, 2016, I issued a Notice of Hearing setting this case for hearing on December 15, 2016, in Las Vegas, Nevada. After a September 16, 2016, status conference, I moved the hearing to December 16, 2016. On October 6, 2016, the hearing was moved to December 29, 2016.

Complainant thereafter procured counsel. M. Lani Esteban-Trinidad, Esq. filed a notice of appearance on behalf of Complainant on November 14, 2016, and asked for a continuance to prepare for hearing. After discussing the matter with the parties in status conference, on November 25, 2016, I granted this motion and set the hearing for March 2-3, 2017. On January 18, 2016, I modified the pre-hearing schedule to accommodate the parties' requests, allowing for the delay of Complainant's deposition to February 7, 2017. On February 16, 2017, Respondent filed a Motion for Leave to File Motion for Summary Decision ("RMSD"), which included the Motion for Summary Decision. The time specified in the pre-hearing order for filing such a motion had passed, but Respondent argued that due to the timing of Complainant's deposition, a timely motion had not been possible. I conducted a status conference with the parties on February 17, 2017, to discuss the request. The parties agreed to continue the hearing so that the motion could be addressed, so on February 23, 2017, I granted Respondent's Motion for Leave to File a Motion for Summary Decision and continued the hearing to May 18, 2017. Complainant filed an opposition to Respondent's Motion for Summary Decision ("COSD") on March 6, 2017.

II. Legal Standard for Summary Decision

Under OALJ Procedural Rules, an administrative law judge ("ALJ") may grant a motion for summary decision if the pleadings, affidavits, evidence obtained by discovery, or other evidence shows that there is no genuine issue of material fact and that the moving party would prevail as a matter of law. 29 C.F.R. § 18.72; Fed. R. Civ. P. 56(c). Summary decision "is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact." *United States v. JP Morgan Chase Bank Account No. Ending 8215*, 835 F.3d 1159, 1162 (9th Cir. 2016). The burden is on the moving party to present evidence that shows "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party presents such evidence, the non-moving party "may not rest upon mere allegations or denials of his pleading, but … must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). This evidence must be potentially admissible and based on personal knowledge, not mere conclusions or speculations. *See Payne v. Pauley*, 337 F.3d 767, 771-72 (7th Cir. 2003); *see also FTC v. Nevoi, Inc.*, 604 F.3d 1150, 1159 (9th Cir. 2010) (affirming summary judgment when non-moving party "put forward nothing more than a few bald, uncorroborated, and conclusory assertions rather than evidence").

When considering a motion for summary decision, an ALJ does not assess credibility or weigh conflicting evidence, as all evidence must be viewed in the light most favorable to the non-moving party and all reasonable inferences made in his favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n.*, 809 F.2d 626, 630-31 (9th Cir. 1987); *see also Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curium); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). To prevent summary decision, however, the non-moving party must have more than

a mere "scintilla" of evidence supporting his position. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). The non-moving party must designate certain facts in dispute, *Anderson*, 477 U.S. at 250, and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In ruling on a motion for summary decision, the ALJ evaluates "whether there is the need for trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 249-50. Where a genuine dispute of fact remains on a particular issue essential to the disposition of a case, a motion for summary decision must be denied. *Direct Tech., LLC v. Elec. Art, Inc.*, 836 F.3d 1059, 1067 (9th Cir. 2016); *Animal Legal Def. Fund v. FDA*, 836 F.3d 987, 990 (9th Cir. 2016) (en banc) (per curium).

III. Legal Background

The employee protection provisions of the STAA were enacted to encourage employees in the transportation industry to report noncompliance with applicable safety regulations governing commercial motor vehicles. *Brock v. Roadway Express, Inc*., 481 U.S. 252, 255-58 (1987). To accomplish that purpose, the STAA provides that:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because—(A) (i) the employee…has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or … (B) the employee 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 or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a); *see also Calhoun v. U.S. Dept. of Labor*, 576 F.3d 201, 208 (4th Cir. 2009); *Leach v. Basin W., Inc*., ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 3 (ARB July 31, 2003). The STAA also contains protections against retaliation for correctly reporting hours of duty, cooperating with a safety or security investigation by the DOT, Department of Homeland Security, or National Transportation Safety Board, and furnishing information to authorities regarding an incident in connection to commercial motor vehicle transportation that resulted in injury, death, or damage to property. 49 U.S.C. § 31105(a)(1)(C)-(E).

The STAA provides that complaints are evaluated in accordance with the burdens of proof set forth by 42 U.S.C. § 42121(b), the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). 49 U.S.C. § 31105(b). The AIR 21 burden of proof is considerably less stringent than the familiar burdens of proof in Title VII cases that in the past governed actions under the STAA. *Beatty v. Inman Trucking Mgmt., Inc.*, ARB Case No. 13-039, ALJ Case Nos. 2008-STA-020, 2008-STA-020, slip op. at 7-11 (ARB May 13, 2014); *see also Arjuno v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3d Cir. 2013). The complaining employee bears the initial burden, and must "prove, by a preponderance of the evidence, that protected activity was a contributing factor in the unfavorable personnel action."

Palmer v. Canadian Nat'l Ry., ARB No. 16-036, ALJ No. 2014-FRS-00154, slip op. at 14 (ARB Sept. 30, 2016; reissued Jan. 4, 2017) (en banc). More schematically, "a complainant must prove by a preponderance of evidence that: (1) he engaged in protected activity, (2) he was subjected to an adverse employment action, and (3) the protected activity was a contributing factor in the adverse action." *Clark v. Hamilton Haulers, LLC,* ARB Case No. 13-023, ALJ Case No. 2011-STA-007, slip op. at 3-4 (ARB May 29, 2014)); *see also Ferguson v. New Prime, Inc.*, ARB Case No. 10-075, ALJ Case No. 2009-STA-047, slip op. at 3 (ARB Aug. 31, 2011). Some of the case law includes an additional required showing: that the respondent had knowledge of the protected activity.[1] *See, e.g., Araujo*, 708 F.3d at 157; *Williams v. Domino's Pizza*, ARB Case No. 09-092, ALJ Case No. 2008-STA-052, slip op. at 5-6 (Jan. 31, 2011). A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Araujo*, 708 F.3d at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5th Cir. 2011)); *see also Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7th Cir. 2009); *Williams*, ARB No. 09-092 at 5. The ARB has stressed that contribution is a minimal amount of causation, requiring only a showing that the protected activity played *some* role. An ALJ may consider all evidence relevant to the issue, but must avoid weighing reasons for the adverse action and must not require that the complainant show that the protected activity was a substantial, significant, motivating, or predominant factor—a contributing factor is simply *any* role given to a protected activity. *Palmer*, ARB No. 16-036 at 14-15, 51-55.

The burden then shifts to the respondent employer, which in order to avoid liability must demonstrate "by clear and convincing evidence, that [it] would have taken the same [adverse] action in the absence of that [protected] behavior." 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1978.104(e)(4); *Araujo*, 708 F.3d at 157; *Beatty*, ARB No. 13-039 at 7-11. Clear and convincing evidence is evidence that shows "that the thing to be proved is highly probable or reasonably certain." *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015). To prevail, the respondent must show that its factual contentions are highly probable. "Clear and convincing evidence" is a burden of proof residing in between "preponderance of the evidence" and "proof beyond a reasonable doubt." *See Araujo*, 708 F.3d at 159 (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 525 (1979)). Evidence is clear when the employer has presented an unambiguous explanation for the adverse action. It is convincing when based on the evidence the proffered conclusion is highly probable. *DeFrancesco,* ARB No. 13-057 at 7-8.

IV. Evidence Presented

In support of its Motion for Summary Decision, Respondent has provided a "Stipulation Admitting Clark Olsen Testimony" prepared in this case, a June 8, 2016, interdepartmental memo from the OSHA investigation, the Secretary's Findings, and the Declaration of Brian Harper ("HD"). Complainant has submitted his February 7, 2017, deposition transcript ("CD").

The Stipulation submitted was signed by Respondent's Counsel and is notated as orally agreed to by Complainant's counsel. Complainant acknowledges that counsel had indicated that

[1] If not included, knowledge gets subsumed in the showing of contribution—in order for the protected activity to have contributed, in some way, to the adverse action, the individuals taking the adverse action must have had some sort of knowledge of the protected activity.

she would agree to such a stipulation orally, but stresses that she never signed it and questions whether it is binding. (*See* COSD, p.7.) Given that no stipulations have been submitted and accepted as of yet and the stipulation provided is not executed, I find that it cannot serve to establish entitlement to summary decision. It is not a declaration by Clark Olsen, it is an agreement reflecting what Mr. Olsen would declare, meant to expedite matters at the potential hearing. In any event, it does not add to what can be independently discerned from the Harper declaration. It might serve to make the Harper declaration more credible, but if I am in a position to evaluate credibility, summary decision is already inappropriate.

Further, neither document from OSHA is properly considered. The Secretary's findings are already part of the case file. This matter is before me *de novo*, and I could not infer any substantive conclusions from them. *See* 29 C.F.R. § 1978.107(b). The same holds for OSHA's internal memorandum. It reflects conclusions reached by OSHA during its investigation, but it would defeat the purpose of a *de novo* hearing if I took such notes as substantive evidence. As with the stipulation, the OSHA note, if considered, would only make aspects of the Harper declaration more credible, but if I am evaluating credibility, summary decision is inappropriate.

Thus, I only consider the Harper declaration and the Complainant's deposition.

V. Basic Factual Background

Respondent is a trucking company, or "a third-party logistics company that provides trucks and drivers to various sites." One of its customers is Darigold. (HD, ¶ 2.) Complainant is a truck driver with a commercial driver's license. He currently lives in Las Vegas and works driving a truck for Global Experience Specialists ("GES"), a company that sets up and takes down conventions in Las Vegas. (CD, pp. 3-4.) Complainant grew up in Seattle and in the 80s and 90s worked for several companies in the area. (*Id.* at 4-5.) His entire family still lives in Seattle. His brother Darren Schindler is a truck driver for Respondent. (*Id.* at 6-7.) Complainant also knew Justin Lancaster, who was a branch manager at one of Respondent's sites in Seattle, but not any of Respondent's management beyond Mr. Lancaster or anyone at Darigold. (*Id.* at 9-10.)

Brian Harper is a Regional Manager for Respondent who works as a liaison between Respondent and Darigold, providing the transportation requested by Darigold in the relevant region. In this position, he has the authority to hire and fire. (HD, ¶¶ 2-3.) Respondent's hiring of drivers is derivative from the requests of its customers: Mr. Harper must adhere to Darigold's directives as to whether additional drivers can be hired for its needs. (*Id.* at ¶ 3.) Hiring is done on each site, and requires approval by both Respondent and Darigold. After a position is approved, the prospective employees can apply. (*Id.* at ¶ 4.) Mr. Harper explained:

> Estenson then reviews applications and interviews applicants that it believes are the best fit for the job. Once Estenson hires a driver, the driver must complete a drug test and a physical. If the driver passes both tests, Estenson has the driver come in and fill out paperwork. The completed paperwork is then reviewed by the corporate office for its final approval. If the corporate office finds a reason to not hire a driver, Estenson will tell the driver that his or her application has been denied and that he or she no longer has a position at Estenson.

(*Id.*)

In November 2013, Complainant learned from his brother that Mr. Lancaster was the new branch manager at one of Respondent's sites. Complainant knew Mr. Lancaster from his work in Las Vegas and had a good relationship him, so he called and inquired about jobs. Mr. Lancaster told him that he needed good drivers and asked Complainant to apply. Complainant completed the online application. (CD, pp. 12-13.) Next, Mr. Lancaster called him and set up the drug screening and medical examination for Complainant in Las Vegas. (*Id.* at 11, 13.) Complainant passed, so Mr. Lancaster called him and asked him to move up to Seattle. Complainant packed what he wanted to keep, sold or got rid of the rest of his property, and moved to Seattle. (*Id.* at 13-14.) After he arrived, Mr. Lancaster asked Complainant to come in to finish the process with the driving test, interview, and orientation. (*Id.* at 14-15.)

This occurred in the latter part of December 2013. After the orientation, Complainant and Mr. Lancaster talked in Mr. Lancaster's office. Complainant was given a company cell phone and key card and told to report to work at 5:00 or 6:00 a.m. the following Monday. (*Id.* at 15.) The next day, however, Mr. Lancaster called and as Complainant recalled in his deposition told him "that the corporate decision was made that he could not hire. He didn't give me a full explanation as to why, and I didn't question it at the time." (*Id.* at 16.) Mr. Lancaster was apologetic but didn't say anything about a hiring freeze—he just referred to a "corporate decision." (*Id.* at 16-17.) Complainant understood he was being "unhired." He stayed in Seattle through January 2014, but then returned to Las Vegas to work for GES. (*Id.* at 17.)

In Mr. Harper's declaration, he states that Clark Olsen, his counterpart at Darigold, informed him that Darigold had a hiring freeze that was in effect in December 2013, meaning that if Estenson were to hire a driver, Darigold would not pay for his or her services. (*Id.* at ¶ 5.) The declaration does not establish when exactly Mr. Harper was told this by Darigold. He conveyed this information to his site managers. Next:

> One of my site managers, Justin Lancaster, then told me, 'Oh, well I kind of got this guy coming in.' I told him that he would need to call the new hire and tell him Estenson could not hire him at that time. I did not have any knowledge as to the identity of the person hired by Mr. Lancaster. In fact, Mr. Lancaster did not tell me who he was hiring until after the hiring freeze was implemented. Estenson did not hire any new drivers for two or three months due to Darigold's hiring freeze.

(*Id.*) Mr. Harper states that he knew that Complainant's brother was a driver for Estenson, but he did not know that Mr. Lancaster was attempting to hire Complainant and the relationship "did not have any influence on my decision to tell Mr. Lancaster not to hire him." (*Id.* at ¶ 6.) Instead, the instruction was based on the hiring freeze. Mr. Harper did not know that Mr. Lancaster had instructed Complainant to move to Seattle for the job. (*Id.* at ¶ 7.)

Complainant, however, came to believe based on conversations with his brother that "Mr. Harper had a personal vendetta against my brother, and then he saw my name on the application and put a stop to the hiring." (CD, p. 19.) This was the basis for his OSHA complaint. (*Id.* at

21-22.) Based on what his brother told him, Complainant understands that in the 30 days after the hiring process for him was undone, Respondent hired two new employees. (*Id.* at 23.)

VI. Analysis

Respondent alleges that "Complainant cannot prove a single element of his claim." (RMSD, p. 9.) It does not, however, challenge that Complainant suffered an adverse action. There is some lack of clarity over whether Claimant was hired and then dismissed before officially working, hired and then "unhired," or not hired at all.[2] This is not important, since it is well established that failure to hire is an adverse action within the meaning of anti-relation statutes. *E.g. Saporito v. Exelon Generation Co., LLC*, ARB No. 12-034, ALJ No. 2010-ERA-012, slip op. at 5 (ARB Aug. 22, 2013) (stating analysis for failure to hire cases). Respondent does make four arguments for summary decision. It avers that there is no evidence that Complainant himself engaged in any protected activity, instead relying on his brother's protected activity, but that the record contains no evidence of any protected activity by Darren Schindler. (RMSD, p. 9.) Respondents also argue that Complainant cannot establish either the knowledge or contribution elements. Mr. Harper did not know that Complainant had applied until after he directed Mr. Lancaster to hire no new employees. Further, there is no evidence of contribution because the adverse action was a direct, sole result of the hiring freeze that was implemented by Darigold. (RMSD, pp. 9-10.) Finally, Respondent argues that even if Complainant could make out his case for retaliation, it has produced clear and convincing evidence that it would have taken the same action absent the protected activity because of the hiring freeze that was not in its control. (RMSD, p. 10.) These last three arguments all relate to causation: Complainant's showing of contribution and Respondent's affirmative defense showing are both causal showings, though they operate differently. In this motion, the crucial issue for both is whether there was a hiring freeze. In addition, when "knowledge" is a distinct element, it is knowledge of the protected activity. That isn't the knowledge that Mr. Harper denied—he denied knowing who Complainant was, which would also bear on causation.

Complainant's theory of the case is that his brother engaged in protected activity of some sort, this caused Mr. Harper to develop animus, or a "vendetta" against his brother, Mr. Harper knew that Complainant was related to Darren Schindler because of the last name, and so Mr. Harper fired/unhired/stopped the hiring process for Complainant, in part because of the protected activity by Darren Schindler. (COSD, p. 2.) Mr. Harper's declaration raises problems for this theory: it suggests that Mr. Harper didn't know who Complainant was and that the only reason for the adverse action was that a hiring freeze was implemented. Responding, Complainant argues that there are a number of points suggestive of contribution: he had already been effectively hired and had been given a gate card and cell phone so the hiring freeze shouldn't have even applied, no one ever told Complainant about the alleged hiring freeze, and the same last name would have made it clear to the decision-makers that Complainant and his brother

[2] For instance, that Mr. Harper declared that "[o]nce Estenson hires a driver, the driver must complete a drug test and a physical." (HD ¶ 4.) Complainant went well beyond the drug test and physical in the process, so it would follow that in Mr. Harper's vies Estenson *had* hired him.

were related. (COSD, p. 6.) Moreover, Complainant testified at his deposition that his brother told him that two individuals had been hired after his job was eliminated.[3] (CD, p. 23.)

Complainant has the burden of showing contribution. Respondent has submitted material that would prevent such a showing. Complainant has not directly addressed Mr. Harper's declared lack of knowledge of who Complainant was. Yet, Mr. Harper and Mr. Lancaster were both decision-makers and Mr. Lancaster certainly knew that Complainant was related to Darren Schindler. Mr. Lancaster may have backed out of the hiring process and/or failed to seek an exception for Complainant from the hiring freeze in part because he knew of Mr. Harper's animus against Darren Schindler. This is somewhat speculative. But as to the existence and nature of the hiring freeze, there remain disputes of material fact. The submissions do not make out the details of the hiring freeze—none of the dates are pinned down. The sudden reversal is highly suspect: Respondent invested resources in hiring and orienting Complainant and even had him move in order to take the job, but then did a complete turn-around, per Complainant's testimony, without any explanation. Further, Complainant's testimony that hires were being made after he was separated/unhired raises questions about the existence and nature of the hiring freeze. If a hiring freeze was in place, why was there continued hiring? If exceptions were being made, why wasn't one made for Complainant? On a motion for summary decision, I must accept evidence proffered by the non-moving party as true and make inferences in his favor. Given the remaining disputes about a hiring freeze, I find that summary judgement is not appropriate on either Complainant's showing of contribution or Respondent's affirmative defense.

The other facet of Respondent's Motion is the existence of protected activity. Complainant admits that he engaged in no protected activity, instead relying on the protected activity of his brother, Darren Schindler. (COSD, p. 5.) There are two issues in play. The first is whether a third-party retaliation claim can be made under the STAA—that is, whether Complainant's affiliation with someone else who engaged in protected activity is sufficient to provide him with a cause of action founded on that protected activity. The second is whether Complainant's brother engaged in any protected activity.

Protected activity under the STAA is defined in 49 U.S.C. § 31105(a)(1). Subsection (A)(i) protects the filing of complaints or bringing/testifying at proceedings related to transportation safety by "the employee, or another person at the employee's request." Subsection (A)(ii) expands the protection to include employees who are perceived to be doing the activities in (A)(i). Subsection B protects refusal "to operate a vehicle because" it would violate a regulation etc. related to "commercial motor vehicle safety, health, or security" or because "the employee has a reasonable apprehension of serious injury to the employee or the public…" Subsection (C) protects accurate reports of hours by the employee. Subsections (D) and (E) protect employees who either do or are perceived to cooperate with government agency safety and security investigations or furnish information to government agencies. Complainant didn't do any of these things. The "prohibition" in the STAA that precedes each of these enumerations specifies that "A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because…" *Id.* at § 31105(a)(1). Each of the enumerations begins with "the employee." *Id.* at

[3] This particular testimony, taken to establish that hires were being made, is hearsay. However, in hearings under the STAA "[f]ormal rules of evidence will not apply..." 29 C.F.R. § 1978.107(d).

§§ 31105(a)(1)(A)-(E). Thus, in order for there to be a violation, the adverse action must be taken against "an employee" because "the employee" engaged in protected activity. Complainant's brother might have a complaint, but seemingly Complainant would not.

In *Thompson v. N. Am. Stainless, LP*, the Supreme Court held that third-party retaliation actions are available under Title VII in a case where it was alleged that after an employee filed an EEOC complaint the employer retaliated by firing her fiancé. 562 U.S. 170 (2011). The relevant "prohibition" provision of Title VII at issue in *Thompson* provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees…because he has" engaged in the defined protected activity. 42 U.S.C. § 2000e-3. This creates the same connection as the STAA—the person suffering the adverse action must be the same person who engaged in the protected activity. Nonetheless, third-party retaliation actions are available. This is so because the definition of adverse actions in the Title VII anti-retaliation provision is quite broad, prohibiting "discrimination" without restricting which sorts of discrimination are prohibited. *Thompson*, 562 U.S. at 173-74. So the violation in that case, properly understood, was that the employer discriminated against the employee who filed the complaint by terminating her fiancé, *not* that it retaliated against the fiancé.

Given this analysis of the nature of the complaint, the next question was whether the fiancé could bring an action for a violation committed against the employee who engaged in the protected activity. The fiancé had suffered the direct harm, but that harm was only actionable under the statute as an adverse action taken against the employee who engaged in the protected activity. The Court found that the terminated employee had a cause of action under Title VII, relying on statutory language providing a cause of action "by the person claiming to be aggrieved." *Id.* at 175 (quoting 42 U.S.C. § 2000e-5(f)(1)). Nothing in the statute required the person aggrieved to be the same person who engaged in the protected activity, so third-party retaliation complaints are available under Title VII. *Id.* at 175-76.

This case involves the STAA, not Title VII. I have found only one instance in which the Administrative Review Board ("ARB") has addressed the availability of third-party retaliation claims. In *Nelson v. Energy Northwest*, a case arising under the Energy Reorganization Act, 42 U.S.C. § 5851, *et. seq.*, the ARB was presented with the issue, but "reserve[d] for another day a careful discussion of this theory of liability" because the complainant's alleged protected activity failed on other grounds.[4] ARB No. 13-075, ALJ No. 2012-ERA-002, slip op. at 8-9 (ARB Sept. 30, 2015).

In the relevant sections, the STAA is not as broadly worded as Title VII. But the point made in *Thompson* still carries over. In Title VII, the protected activity and cause of action were

[4] Concurring in part and dissenting in part, Judge Royce argued that such actions are available, stressing both the broad purpose of the statute that would be "ill-serve[d]" absent such actions and the broad statutory language prohibiting retaliation against "any employee" who engages in protected activity and allowing "any employee" who has suffered an adverse action to file a complaint. *Id.* at 12-14 (Royce, J., concurring in part and dissenting in part) (citing 42 U.S.C. §§ 5851(a)(1)(F), (b)(1)). The language in the STAA does not refer to "any employee," it refers to "the employee" or "an employee." 49 U.S.C. §§ 31105(a)-(b). But the difference is immaterial—whether one says that "a resident of Las Vegas may…" or "any resident of Las Vegas may…" the same people are permitted to engage in the action. Nonetheless, Judge Royce's analysis isn't precedential and doesn't directly answer the question of whether a complaining party may bring a retaliation complaint on behalf of another.

separately defined, with the cause of action lying with "the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1) Under the STAA, the individual filing the complaint must be "[a]n employee" under the Act. 49 U.S.C. § 31105(b)(1). Nothing in the provision providing for who may file a complaint requires that the complainant be the same employee that engaged in protected activity and suffered the adverse action. General principles of standing would restrict which employees, as defined by the Act, but so long as one employee has standing, the statute would allow for bringing a complaint in the place of another. Put otherwise, 49 U.S.C. § 31105(a)(1) creates a requirement that the adverse action be taken against the same employee who engaged in the protected activity, but 49 U.S.C. § 31105(b)(1) doesn't similarly limit the filing of a complaint to that employee.

On Complainant's theory of the case, then, Respondent retaliated against his brother, not him. This requires recasting the adverse action in terms of the harm done to Darren Schindler, rather than the more direct harm to Complainant. But since Complainant admits that he never engaged in protected activity, an adverse action as to Darren Schindler is the only potential violation that could have occurred. Complainant has standing, since he suffered an adverse action based on the same complained of retaliatory act. Complainant is also an employee under the meaning of the STAA, which defines the term broadly, *see* 49 U.S.C. § 31105(j), and in the implementing regulations explicitly includes "an applicant for such work." 29 C.F.R. § 1978.101(h)(3). As "an employee" with standing, Complainant can then bring an action for retaliation based on the violation committed by Respondent against his brother.

There is one wrinkle. The first question in *Thompson* was whether the anti-retaliation language was broad enough to encompass adverse actions taken against the third-party who was bringing the complaint. The STAA, unlike the anti-retaliation provision in Title VII, does not include an unqualified discrimination prohibition. Rather, "[a] person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment…" 49 U.S.C. § 31105(a)(1). This language is closer to the substantive antidiscrimination prohibition in Title VII that the Supreme Court at least suggested would not permit a third-party action. *Thompson*, 562 U.S. at 173-74 (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006); 42 U.S.C. § 2000e-2(a)). Nonetheless, the ARB has drawn on the reasoning in *White* regarding the Title VII anti-retaliation provision to hold that in whistleblower claims the starting point for an adverse action is any action that "would dissuade a reasonable employee from engaging in protected activity." *Menendez v. Halliburton*, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, slip op. at 20 (ARB Sept. 13, 2011).

Under *Menendez*, then, despite the exact language, a broad array of adverse actions can suffice to establish a whistleblower complaint. *Menendez*, however, was a case under Sarbanes-Oxley and the anti-retaliation provision in that statute provides that none of the enumerated actors "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of" the subsequently enumerated protected activity. 18 U.S.C § 1514A(a). This language is different from both the language in the STAA and the anti-retaliation language in Title VII. The ARB read it broadly along the lines of Title VII's anti-retaliation language instead of Title VII's substantive anti-discrimination language. The question is whether STAA's "discriminate against an employee regarding pay, terms, or privileges of employment" is functionally similar to Sarbanes-Oxley's "in any other manner discriminate against an employee in the terms and conditions of

employment." Initially the two provisions appear quite similar—except that STAA's language mirrors Title VII's substantive anti-discrimination language that the Supreme Court has held is narrower than the anti-retaliation language used in *Menendez* as an analogue to the Sarbanes-Oxley anti-retaliation provision. So either there is a genuine difference between the prohibition in STAA and Sarbanes-Oxley or the expanded scope of adverse actions is a result of the nature of the statute (anti-retaliation) rather than the exact statutory language.

The reasoning in *Menendez* suggests the latter: the ARB explains that traditionally a broad array of adverse actions sufficed under the whistleblower statutes generally, but in recent years there had been wrongful reliance on Title VII cases to narrow the scope; *White* was important because it properly stated a broad definition of adverse action in anti-retaliation contexts, which is why it can be "a useful starting place" for defining adverse actions under Sarbanes-Oxley. ARB No. 09-002 at 19-20. The ARB has consistently included a wide array of adverse actions within the scope of whistleblower statutes. *See, e.g. Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035 (ARB Nov. 24, 2015) (misclassifying a work-related injury as not work-related) ; *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010) (placement of a written warning in complainant's personnel file);' *Vernace v. Port Auth. Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-018 (ARB Dec. 21 2012) (issuance of a charging letter). This broad definition of an adverse action has recently been adopted in at least one case under the STAA. *See Dick v. Tango Transport*, ARB No. 14-054, ALJ No. 2013-STA-060, slip op. at 10 (ARB Aug. 30, 2016). Moreover, the implementing regulations of STAA include "any other manner retaliate against" language that would incorporate a wide range of adverse actions. *See* 29 C.F.R. § 1978.102.

The issue of third-party retaliation complaints has not been fully briefed and goes beyond the precedential case law, but based on the above analysis, summary judgment would not be appropriate on these grounds. This leaves the second issue: to make out his case, Complainant must show that his brother engaged in protected activity. Respondent argues that after discovery, no evidence of any protected activity has been produced. (RMSD, p. 9.) In response, Complainant has only offered his deposition testimony. The closest the deposition comes to defining the protected activity is a statement that Mr. Harper had "a personal vendetta against my brother" and that is why he quashed the hiring of Complainant.[5] (CD, pp. 19-20.)

This is insufficient. No evidence of record explains *why* Mr. Harper might dislike Darren Schindler. There could be many reasons for the alleged vendetta. It might be the result of protected activity. Or it might just be, as Complainant stated, a *personal* vendetta. The STAA does not protect against unreasonable or unfair vendettas or animus. To establish his case, Complainant must show that his brother engaged in protected activity. Based on the record and drawing all reasonable inferences in Complainant's favor, I cannot reach that conclusion because no evidence tells me what that protected activity might have been.

[5] Though this is, again, likely hearsay based on something Darren Schindler told Complainant, the formal rules of evidence do not apply, so the testimony could create a disputed material issue of fact. 29 C.F.R. § 1978.107(d).

In his opposition to Respondent's motion for summary decision, Complainant states that:

> There is a material dispute about whether or not Darren Schindler was, at the time of Respondent's actions against Complainant, was [sic] engaging in protected activities. In fact, Darren Schindler intends to testify at [the] time of hearing on this matter that he has been and is currently in protected whistleblowing activities and that he was engaged in such activities at [the] time Respondent hired and then 'unhired' Complainant.

(COSD, p. 5.) Earlier he represents that Darren Schindler "has had pending, current contentious OSHA whistleblowing complaints against Respondent." (*Id.* at 2.) This still leaves significant gaps in the case. Is Complainant alleging that the protected activity is the same as the protected activity alleged in his brother's complaints? Or is he alleging that the protected activity was the making of those complaints? If the first, then to make out his case here, Complainant must establish the protected activity alleged by his brother in the referenced complaint or complaints. This potential problem would not emerge on the second, but then timeline problems arise—it must be the case that Darren Schindler had filed the complaints, and Respondent knew about it before Complainant was told he no longer had a job.

The real deficiency is in the evidentiary submissions. Even if the pleading made clear exactly what Complainant was alleging, none of the evidence provided tells me what the protected activity is. The issue didn't arise in Complainant's deposition at all. There is only a bare claim when what is needed, since Complainant will bear the burden of establishing protected activity at the hearing, is some evidence that if believed, would establish protected activity that could undergird the retaliation complaint (i.e. of the sort that Respondent would know about with the potential for and some indication of contribution). Anticipating this deficiency, Complainant points out and argues that "Respondent did not depose Darren Schindler," he intends to call his brother at the hearing, and "[b]y granting Summary Judgment, it would deprive Complainant the opportunity to submit [Darren Schindler's] testimony, under oath, with examination by Respondent's counsel." (COSD, p. 5.)

The contention about Respondent's failure to depose Darren Schindler is irrelevant. Complainant has the burden of proof on the issue, and so is expected to procure some evidence to establish it. It is not Respondent's obligation to disprove that Darren Schindler engaged in protected activity. Nor is the plea for an opportunity to present the evidence at hearing compelling. Summary decision is a device "to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp.*, 477 U.S. at 323-24. It is a tool "by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Id.* at 327. As such, it "enable[s] a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990). If this can't be produced, then summary judgment is appropriate. *Beard v. Banks*, 548 U.S. 521, 529 (2006).

Complainant has not produced even a declaration of his own or by his brother that would attest to facts related to the occurrence of any protected activity. He avers that he will provide such evidence at the hearing, and complains that summary decision would "deprive" him of the

opportunity to do so. (COSD, p. 5.) But permitting a party to defeat summary decision merely by a promise to eventually produce evidence would swallow the rule whole.[6] As the Seventh Circuit has rather starkly put the point, "summary judgment is 'not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events.'" *Steen v. Myers*, 486 F.3d 1017, 1022 (7th Cir. 2007) (quoting *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)). To defeat the motion, Complainant must provide some evidence that when viewed in the light most in his favor, shows that there are genuine issues of material fact—that is, issues controlling the outcome of the case where there is sufficient evidence that could lead a reasonable fact-finder to find in his favor. *See Far Out Productions, Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001) (citing *Anderson*, 477 U.S. at 248-49). As to the existence of protected activity by his brother, Complainant has failed to do so. Thus, summary decision is appropriate.

VII. Conclusion

Based on the submissions, Respondent treated Complainant quite poorly. It went through a hiring process, had him move from Las Vegas to Seattle, put him through orientation, gave him a firm start date, but then at the last moment un-did the whole process. There may have been many reasons contributing to this: an unexpected hiring freeze, miscommunication between Mr. Lancaster and Mr. Harper, a poorly designed hiring process, or even some animus against Complainant's brother. But based on the submissions, Complainant has not produced evidence that would show that one of the reasons was the protected activity of his brother because no evidence has been produced indicating what that protected activity was.

"[A]fter adequate time for discovery and upon motion," summary decision is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. Complainant bears the burden of establishing protected activity, but has produced no evidence that would meet that burden.

[6] If a non-moving party is not yet in a position to provide facts essential to its opposition, it may seek relief under 29 C.F.R. § 18.72(d), modelled on Fed. R. Civ. P. 56(d), by presenting an affidavit or declaration stating why the facts are as yet unavailable. The ALJ may then defer consideration or allow additional time to prepare affidavits or declarations or to seek discovery. Complainant has not requested such relief, so I have addressed the motion based on the submissions presented, as permitted by 29 C.F.R. § 18.72(e) and Fed. R. Civ. P. 56(e).

VIII. Order

Respondent's Motion for Summary Judgment is GRANTED. The May 18, 2017, hearing in this case is VACATED.

Digitally signed by Jennifer Gee
DN: CN=Jennifer Gee,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

JENNIFER GEE
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 (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).