UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Pittsburgh, PA

CASE NO.: 2023-STA-00091

In the Matter of:

ROBERT KEZER,
Complainant

v.

POWER ENGINEERS, INC.,
Respondent

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 ("STAA" or "the Act"), 49 U.S.C. § 31105, and the regulations published at 29 C.F.R. Part 1978. The STAA "protects employees from retaliation because the employee has engaged in, or is perceived to have engaged in, protected activity pertaining to commercial motor vehicle safety, health, or security matters." 29 C.F.R. § 1978.100. A videoconference hearing in the above-captioned matter is currently scheduled to be held before the undersigned beginning on Monday, March 18, 2024, and continuing, as necessary, on Tuesday, March 19, 2024.

On July 19, 2022, Respondent terminated Complainant's employment, and on July 25, 2022, Complainant filed an Occupational Safety and Health Administration ("OSHA") complaint against Respondent. According to the complaint, Complainant claimed to have been terminated, suddenly and without warning, on July 19, 2022, for non-performance of his duties. (*See* Complainant's July 25, 2022 Complaint Letter). Complainant later explained to OSHA that he believed he was fired for questioning how Respondent's agents were operating, not for non-performance. (Complainant Case Summary, pp. 2-3). On May 9, 2023, OSHA issued a letter regarding their completed investigation; OSHA noted that on May 4, 2023, Complainant had requested it terminate its investigation and issue a determination. The agency's Deputy Regional Administrator determined that Respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101 because it "provides a variety of agricultural and transportation services," and is "engaged in interstate commerce when transporting products on highways via a commercial motor vehicle, that is, a vehicle with a gross vehicle weight rating of 10,001 pounds or more." (Secretary's Findings, pp. 1-2). However, as of that date, OSHA was unable to conclude that there was reasonable cause to believe a violation of the Act had occurred. The case was docketed with the Department of Labor's Office of Administrative Law Judges ("OALJ") on July 7, 2023, and assigned to the undersigned on November 6, 2023.

On December 4, 2023, I issued a Notice of Assignment, Notice of Hearing, and Pre-Hearing Order, and set this case for hearing on March 18, 2024, and continuing, as necessary. On January 8, 2024, I held an on-the-record, pre-hearing videoconference with the parties.[1] The parties agreed to the aforementioned timeline of activities, including employment, termination, filing of the complaint, and OSHA's determination. (PHC Tr. at 12). Complainant confirmed that the safety issues he raised with OSHA, including evacuation processes, long working hours, and heat-related injuries, as well as suggestions for additional safety equipment, were not allegations, but rather, warnings for improved safety and working conditions. (PHC Tr. at 13-14). In addition, Respondent's Counsel confirmed that Respondent is an engineering and environmental consulting firm contracted to provide oversight and inspection services. (PHC Tr. at 18). He was not aware of Respondent being a motor carrier, and noted that Respondent's employees used pickup trucks to transport people between their lodging site and the job site. *Id.*

On February 15, 2022, Respondent filed a Motion for Summary Decision, with supporting details, as well as declarations from Kevin Franklin and Respondent's Counsel. In its motion, Respondent contends that Complainant failed to state a claim against Respondent because Complainant admitted he did not engage in protected activity as required under the Act. Moreover, Respondent argues that it is an engineering and consulting firm, and Complainant is not an "employee" covered by the Act because he did not drive a commercial motor vehicle or directly affect commercial motor vehicle safety.

On February 26, 2024, Complainant submitted his response to the Motion for Summary Decision. Complainant notes that he did not present issues regarding vehicles and protected activities as part of his initial claim; rather, those issues arose during investigative discussions between OSHA and Respondent. Instead, Complainant subsequently suggested to OSHA, but did not assert, that his firing could have been due to other reasons, including safety, contractual, or liability issues. Thus, Complainant requests OALJ exercise "wide latitude to pursue fairness and justice regardless of the legal process." (Response to Respondent's Motion for a Summary Decision, p. 1). Complainant requests that the hearing proceed so that he can demonstrate that he adequately engaged in his duties daily and should not have been fired for non-performance.

Respondent filed its Reply in Support of Motion for Summary Decision on March 1, 2024. Respondent, through Counsel, reiterated its position that Complainant was not an employee under the Act, and that he again confirmed he did not engage in protected activity. Thus, Respondent renewed its argument in favor of summary decision.

SUMMARY DECISION

Pursuant to 29 C.F.R. § 18.72(a), "[a] party may move for a summary decision, identifying each claim or defense . . . on which summary decision is sought." Summary decision may only be ordered if "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." 29 C.F.R. § 18.72(a). The moving party bears the burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The

[1] References to the pre-hearing videoconference transcript will be identified as "PHC Tr.", followed by the page number.

burden of showing the absence of a material fact is a heavy one. *Pitts v. Shell Oil Co.*, 463 F.2d 331 (5th Cir. 1972).

The non-moving party must designate certain facts to dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247-48. (*emphasis* in original). A fact is material where it might impact the outcome of the case under the relevant legal authority. *Id.* at 248. A dispute is genuine where there is sufficient evidence to allow a reasonable trier of fact to decide in favor of the nonmoving party. *Id.*[2] In determining whether a genuine issue of material fact exists, the evidence must be viewed in the light most favorable to the nonmoving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The Administrative Review Board has offered specific guidance on the issue of summary decision. In *Reddy v. Medquist, Inc.*, No. 04-123 (ARB September 30, 2005), the Board announced the following procedure for adjudicating such motions:

> Once the moving party has demonstrated an absence of evidence supporting the nonmoving party's position, *the burden shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation. The nonmoving party may not rest upon mere allegations, speculations, or denials in his pleadings, but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof.* If the nonmoving party fails to sufficiently show an essential element of his case, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Id. at 4-5. (*Emphasis* added). The Board added that the summary decision ruling shall not include a weighing of the evidence or determination of the truth of the matters asserted. *Id*. at 5. Rather, an administrative law judge 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. Thus, an administrative law judge's summary decision ruling "it is not an assessment on the merits of any particular claim or defense." *Abbs v. Con-Way Freight, Inc.*, ARB Case No. 12-016, 2012 WL 5391429, at *2 (DOL Admin. Rev. Bd. Oct. 17, 2012).

Therefore, the Board has put forth a two-step, burden-shifting process, whereby summary decision may only be granted if, given the parameters stated above, the moving party meets its burden and the nonmoving party fails to meet its own. Conversely, if either the moving party fails

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[2] In *Reddy v. Medquist, Inc*., No. 04-123 (September 30, 2005), the Administrative Review Board ("Board") mirrored this meaning of "genuine issue of material fact." The Board stated, "[a] 'material fact' is one whose existence affects the outcome of the case. A 'genuine issue' exists when the nonmoving party produces sufficient evidence of a material fact so that a fact-finder is required to resolve the parties' differing versions at trial. Sufficient evidence is any probative evidence." *Id*. at 4.

to meet its burden, or the nonmoving party succeeds in meeting its burden, summary decision must be denied.

APPLICABLE LAW

The STAA protects employees who engage in certain activities from adverse employment actions. The Act provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," 49 U.S.C. § 31105(a)(1)(A); has "refuse[d] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health," 49 U.S.C. § 31105(a)(1)(B)(i); or has "refuse[d] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition," 49 U.S.C. § 31105(a)(1)(B)(ii). To be protected, a refusal must be based on a reasonable concern about a condition that impairs the driver's ability to operate safely and employees must communicate that the impaired condition exists to the employer. *Wrobel v. Roadway Express, Inc.*, ARB No. 2001-0091, ALJ No. 2000- STA-00048, slip op. at 3 (ARB July 31, 2003); *Garcia v. AAA Cooper Transp.*, ARB No. 1998-0162, ALJ No. 1998-STA-00023, slip op. at 4-5 (ARB Dec. 3, 1998); *Barr v. ACW Truck Lines, Inc.*, No. 1991-STA-00042, slip op. at 3 (Sec'y Apr. 22 1992).

A commercial motor vehicle is defined as "a self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle:

> (A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater;
> (B) is designed to transport more than 10 passengers including the driver; or
> (C) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103.

49 U.S.C. § 31101(1). The statute describes an "employee" as a commercial motor vehicle driver, including an independent contractor when personally operating a commercial motor vehicle, a mechanic, a freight handler, or anyone who directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier. *See* 49 U.S.C. § 31101(2)(A). Additionally, the Act defines an "employer" as "a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce". 49 U.S.C. § 31101(3)(A).

STIPULATED FACTS

On December 26, 2023, Respondent's Counsel e-mailed Complainant a list of six proposed stipulated facts, and asked for Complainant's concurrence, as well as any additional proposed facts. (Declaration of Counsel, Appendix A). In its pre-hearing statement, Respondent offered those six proposed stipulated facts. (Declaration of Counsel, Appendix B). On December 30,

2023, Complainant responded by e-mail and stated that the proposed stipulated facts "seems correct." (Declaration of Counsel, Appendix A).

The proposed stipulated facts, as agreed to by the parties, include:

(1) Respondent is an engineering and environmental consulting firm. Respondent is the "Owner's Engineer" on the Gateway South Transmission Project ("the Project"), which involves construction of a 420-mile-long transmission line that travels across several states. The owner of the Project is PacifiCorp, which hired a general contractor, Quanta Infrastructure Solutions Group ("Quanta"), for the construction of the Project.

(2) As the Owner's Engineer, Respondent's general role on the Project is to provide field inspection and field engineering services to monitor conformance of construction to the Project's engineering design specifications and drawings. Respondent is not responsible for the actual construction of the Project. Quanta, the general contractor, is responsible for all aspect[s] of construction of the Project, including all physical labor performed on the Project. By contrast, Respondent provides inspection and reporting services.

(3) The Project is divided into four separate "Elements," which are geographical sections of the transmission line. Each element has a crew of Respondent employees, made up of field engineers and inspectors who help ensure the Project is being built according to specifications in that Element. Each of these four crews are led by a Construction Manager. The Construction Managers report to Kevin Franklin, who is the overall Project Construction Manager for Respondent and is responsible for oversight of Respondent's inspection services on all four Elements.

(4) Respondent made an offer of employment to Complainant in approximately April 2022. Respondent [*sic*] started his employment in approximately May 2022.

(5) Respondent [*sic*] served as the Construction Manager over Element A of the Project, which is located in Wyoming. As part of his job duties, Complainant was responsible for managing a crew of six individuals – three field engineers and three inspectors.

(6) On July 19, 2022, Respondent terminated Complainant's employment.

(Declaration of Counsel, Appendix A).

DISCUSSION

I. Jurisdiction

In his July 25, 2022 complaint, Complainant references being part of a Department of Transportation non-CDL program, and hauling UTV trailers on the highway to access various right-of-ways. (*See* Complainant's Complaint, p. 3). Kevin Franklin, Respondent's Construction Manager of the relevant transmission line project at issue, stated that he was not aware of any instance where Complainant or his crew drove a commercial motor vehicle, as he understood the law. Rather, he asserted that Complainant and his crew each had three-quarter ton pickup trucks, which they drove to, from, and around the job site. Complainant was assigned and drove "a 2022 Dodge Ram 2500 4x4 Crew Cab pickup truck"; his crew members drove similar trucks. (Declaration of Kevin Franklin, p. 3). According to the manufacturer sticker on the door frame, Complainant's assigned vehicle had a gross vehicle weight rating of 10,000 pounds. *Id.*; *see also*, Declaration of Kevin Franklin, Appendix A. These trucks were neither designed for, nor could legally transport, 10 passengers. The vehicles did not have Department of Transportation numbers, and Complainant and his crew were not authorized to haul trailers.

None of the parties or declarants in this case have provided any evidence that Respondent was anything other than an engineering and consulting firm. In fact, to the contrary, the parties' stipulation establishes that Respondent was to provide engineering, inspection, and consulting services, and Complainant was hired as a Construction Manager and oversaw a team of six individuals, three engineers and three inspectors. Respondent provided Complainant and his crew with pickup trucks to use as they traveled to, from, and around the various job sites.

Thus, there is no support in the evidentiary record to substantiate the OSHA finding that Respondent "provides a variety of agricultural and transportation services," and is "engaged in interstate commerce when transporting products on highways via a commercial motor vehicle, that is, a vehicle with a gross vehicle weight rating of 10,001 pounds or more." (Secretary's Findings, pp. 1-2). Thus, I find that Respondent is not a commercial motor vehicle carrier within the meaning of the Act. Similarly, there is no evidence that Complainant drove a vehicle with the required gross vehicle weight rating, transported 10 or more passengers, or transported hazardous material. Thus, I do not find that Complainant would be considered an employee within the meaning of the Act.

Accordingly, I find that summary decision is appropriate on jurisdictional grounds, as Complainant and Respondent do not appear to be proper parties under the Surface Transportation Assistance Act. However, given that there is some dispute regarding whether Respondent's employees hauled a trailer, and whether such activity would meet the jurisdictional test, I will next consider the substantive arguments regarding summary decision.

II. Protected Activity

In his complaint, Complainant references numerous, seemingly legitimate, safety concerns regarding Respondent's business, especially given his experience as a journeyman power linesman and emergency medical technician. However, during the pre-hearing conference, Complainant

acknowledged he did not allege safety violations to OSHA regarding Respondent's business practices. Rather, he made safety-related suggestions to Respondent, and subsequently OSHA, recognizing the difficult working conditions he and his crew would be facing over the course of a multi-year project. Likewise, in his response to Respondent's summary decision motion, Complainant again confirmed that he made suggestions to OSHA that he was not fired for non-performance, and instead was potentially fired for other, safety-related reasons; Complainant explained that he did not present those allegations as facts.

Complainant asserts that he did his job adequately, and performed his tasks each day he was Respondent's employee. There is no evidence in the record developed thus far to dispute that assertion. On the contrary, Complainant contends that his personal daily log will establish that he performed his duties and met his job expectations every day. Thus, Complainant is justifiably disturbed by the characterization that that he was fired for non-performance.

However, Complainant's contention that the undersigned has "wide latitude to pursue fairness and justice" is not accurate. Unfortunately for Complainant, this is not a court of equity. Rather, I am constrained to apply the facts to the requirements of the law under which the claim was raised. Complainant's argument over whether or not he performed his assigned duties and was properly fired for non-performance is a dispute, but it is not a genuine dispute of a material fact relevant to the requirements of the STAA.

Based on his own acknowledgment, Complainant has not engaged in protected activity under the Act. Thus, he cannot establish an essential element required to succeed on this claim. Moreover, there is no genuine dispute of a material fact in this regard. Accordingly, after considering both parties' positions, and considering the facts most favorably to the non-moving party, I find that summary decision is appropriate in this case.

CONCLUSION

Respondent submitted a Motion for Summary Decision, asserting that Complainant was not an employee as defined by the Act, and that Complainant had not engaged in protected activity. Based on the parties' stipulated facts, as well as Complainant's statements during the pre-hearing conference and his response to Respondent's summary decision motion, I find there is no genuine dispute of a material fact. As such, summary decision is appropriate in this case.

Because it does not appear that Respondent is a commercial motor vehicle carrier or that Complainant was an employee under the meaning of the Act, dismissal is appropriate on jurisdictional grounds. Moreover, because Complainant has repeatedly agreed that he never engaged in protected activity, he cannot establish an essential element required for an award. Therefore, Respondent is entitled to judgment as a matter of law.

ORDER

Based on the foregoing, Respondent's Motion for Summary Decision is **GRANTED**. **IT IS HEREBY ORDERED** that this case is **DISMISSED**.

IT IS FURTHER ORDERED that the hearing, scheduled to begin on March 18, 2024, is **CANCELED**.

SEAN M. RAMALEY
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 the administrative law judge's decision.

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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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).

FILING AND SERVICE OF AN APPEAL

1. Use of EFS System
The Board's Electronic Filing and Service (EFS) system allows parties to initiate appeals electronically, file briefs and motions electronically, receive electronic service of Board issuances and documents filed by other parties, and check the status of appeals via an Internet-accessible

interface. Use of the EFS system is free of charge to all users. To file an appeal using the EFS System go to https://efile.dol.gov. All filers are required to comply with the Board's rules of practice and procedure found in 29 C.F.R. Part 26, which can be accessed at https://www.ecfr.gov/current/title-29/subtitle-A/part-26.

A. Attorneys and Lay Representatives:

Use of the EFS system is mandatory for all attorneys and lay representatives for all filings and all service related to cases filed with the Board, absent an exemption granted in advance for good cause shown. 29 C.F.R Part § 26.3(a)(1), (2).

B. Self-Represented Parties:

Use of the EFS system is strongly encouraged for all self-represented parties with respect to all filings with the Board and service upon all other parties. Using the EFS system provides the benefit of built-in service on all other parties to the case. Without the use of EFS, a party is required to not only file its documents with the Board but also to serve copies of all filings on every other party. Using the EFS system saves litigants the time and expense of the required service step in the process, as the system completes all required service automatically. Upon a party's proper use of the EFS system, no duplicate paper or fax filings are required.

Self-represented parties who choose not to use the EFS system must file by mail or by personal or commercial delivery all pleadings, including briefs, appendices, motions, and other supporting documentation, directed to:

Administrative Review Board
Clerk of the Appellate Boards
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220
Washington, D.C., 20210

2. EFS Registration and Duty to Designate E-mail Address for Service

To use the Board's EFS system, a party must have a validated user account. To create a validated EFS user account, a party must register and designate a valid e-mail address by going to https://efile.dol.gov, select the button to "Create Account," and proceed through the registration process. If the party already has an account, they may simply use the option to "Sign In."

Once a valid EFS account and profile has been created, the party may file a petition for review through the EFS system by selecting "eFile & eService with the Administrative Review Board" from the main dashboard, and selecting the button "File a New Appeal - ARB." In order for any other party (other than the EFS user who filed the appeal) to access the appeal, the party must submit an access request. To submit an access request, parties must log into the EFSSystem, select "eFile & eService with the Administrative Review Board," select the button "Request Access to Appeals," search for and select the appeal the party is requesting access to, answer the questions as prompted, and click the button "Submit to DOL."

Additional information regarding registration for access to and use of the EFS system, including for parties responding to a filed appeal, as well as step-by-step User Guides, answers to frequently

asked questions (FAQs), video tutorials and contact information for login.gov and EFS support can be found under the "Support" tab at https://efile.dol.gov.

3. Effective Time of Filings

Any electronic filing transmitted to the Board through the EFS e-File system or via an authorized designated e-Mail address by 11:59:59 Eastern Time shall be deemed to be filed on the date of transmission.

4. Service of Filings

A. Service by Parties

• **Service on Registered EFS Users:** Service upon registered EFS users is accomplished automatically by the EFS system.

• **Service on Other Parties or Participants:** Service upon a party that is not a registered EFS user must be accomplished through any other method of service authorized under applicable rule or law.

B. Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail (unless otherwise required by law). If a party unrepresented by counsel files their appeal by regular mail, that party will be served with Board-issued documents by regular mail. Any party may opt into e-service at any time by registering for an EFS account as directed above, even if they initially filed their appeal by regular mail or delivery.

5. Proof of Service

Every party is required to prepare and file a certificate of service with all filings. The certificate of service must identify what was served, upon whom, and manner of service. Although electronic filing of any document through the EFS system will constitute service of that document on all EFS-registered parties, electronic filing of a certificate of service through the EFS system is still required. **Non EFS-registered parties must be served using other means authorized by law or rule.**

6. Inquiries and Correspondence

After an appeal is filed, all inquiries and correspondence related to filings should be directed to the Office of the Clerk of the Appellate Boards by telephone at 202-693-6300 or by fax at 202-513-6832. Other inquiries or questions may be directed to the Board at (202) 693-6200 or ARB-Correspondence@dol.gov.