UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Newport News, VA

Issue Date: 27 June 2024

Case No.: **2024-STA-00045**

In the Matter of:

MARCUS FIELDS,
Complainant,

v.

SUPER EGO HOLDINGS,
Respondent.

DEFAULT DECISION AND ORDER

This proceeding arises out of a complaint of discrimination arising out of the employee protection provisions of the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105. On June 10, 2024, I issued an Order to Show Cause.[1] I ordered Respondent to show cause why sanctions should not be imposed for its failure to comply with my orders to file a status report and provide initial disclosures to Complainant. I specifically warned I may enter a default decision and order against Respondent if it failed to file a timely response. Respondent did not file a response – timely or otherwise – to my Order to Show Cause.

[1] I incorporate by reference the procedural history preceding my Order to Show Cause.

Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (the Rules), an administrative law judge may impose sanctions on a party for failing to obey her discovery orders or provide initial disclosures. 29 C.F.R. §§ 18.57(b)(1), (c), (f); *see also* 29 C.F.R. § 18.50(b), (c), 1978.107(a). Sanctions include but are not limited to:

> (i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims;
> (ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
> (iii) Striking claims or defenses in whole or in part;
> (iv) Staying further proceedings until the order is obeyed;
> (v) Dismissing the proceeding in whole or in part; or
> (vi) Rendering a default decision and order against the disobedient party[.]

29 C.F.R. §§ 18.57(b)(1)(i)-(vi).

In this case, Respondent failed to file a simple status report providing the following information: a discovery plan, pursuant to 29 C.F.R. § 18.50(b)(3); proposed deadlines for the submission of dispositive motions, the exchange of hearing exhibits, and the filing of objections to proposed exhibits; and three proposed hearing dates and an appropriate hearing location.[2] My attorney advisor instructed Respondent to file the status report on ***four separate occasions***.[3] Given Respondent's recalcitrance and overall lack of diligence in handling this matter, I strongly suspected that Respondent

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[2] Notice of Assignment, Notice to Pro Se Complainant, and Scheduling Order at 6, ¶ 3 (March 20, 2024).
[3] *First*, on May 16, 2024, my attorney advisor requested the parties file their status report at their "earliest convenience" and provided a courtesy copy of the order. *Second*, on May 17, 2024, my attorney advisor responded to Respondent's counsel's email with instructions to file the status report "as soon as possible" and again provided a courtesy copy of the order. *Third*, on May 28, 2024, my attorney advisor conveyed my frustration to the parties and warned that if they failed to file a status report, the next step would be to issue an order to show cause. *Fourth*, on May 30, 2024, my attorney advisor instructed Respondent's counsel to file a status report and warned that if the parties did not file a status report by Friday, June 7, 2024, I would issue an Order to Show Cause. Order to Show Cause at 2-3.

also failed to provide initial disclosures to Complainant, which were originally due on February 29, 2024.[4] Accordingly, I issued an Order to Show Cause, giving Respondent's counsel the opportunity to explain his conduct thus far. Importantly, I warned that I would consider entering a default decision and order against Respondent if it failed to file a timely response.[5] To my great disappointment, Respondent failed to file any response.

Upon careful deliberation, I elect to enter a default decision and order against Respondent. I readily acknowledge this is a harsh, extraordinary, and rarely imposed sanction, but it is just, appropriate, and warranted under the circumstances. Allowing a party to disregard and repeatedly transgress my orders with impunity demeans this tribunal's authority. I have considered imposing lesser sanctions against Respondent, but I find they would either be toothless or unduly delay the proceeding.

The sanction described by § 18.57(b)(1)(i) does not fit neatly with this situation. "Directing that the matters embraced in the order or other designated facts be taken as established" is more appropriate in situations in which a party propounds a discovery request, the opposing party does not adequately respond to the discovery request, the party successfully obtains an order compelling a response to the discovery request, and then the opposing party fails to comply with the administrative law judge's order. In that scenario, the administrative law judge can reasonably infer from the opposing party's failure to comply with her order that the opposing party is concealing information that

[4] Notice of Docketing at 2 (Feb. 8, 2024).
[5] Order to Show Cause at 5 (June 10, 2024).

would be deeply damaging to its case. This sanction prevents a party from prevailing on a claim or defense by improperly hiding the ball. However, in this case, Respondent has failed to follow even the most basic civil litigation practices and has not participated in any discovery whatsoever. This case does not present this sort of scenario, and it would be unclear what factual matters I could embrace as a sanction for Respondent's malfeasance here.

Imposing the sanctions described by § 18.57(b)(1)(ii) and (iii) would likely be ineffective or unreasonably delay the case. Based on my review of the email correspondence between my attorney advisor and Respondent's counsel, Respondent believes it is not covered by the STAA because it is not an "employer."[6] Specifically, Respondent's email asserted that it was not an employer, but a "leasing company; the statute expressly includes as an employer an entity that "**leases** a commercial motor vehicle…" 49 U.S.C. § 31101(3) (emphasis added).[7] I have considered prohibiting Respondent from

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[6] Order to Show Cause at 2 (email from Respondent's counsel, dated May 17, 2024: "Super Ego Holding is not an employer. Super Ego Holding is a leasing company."), *id.* at 3 (email from Respondent's counsel, dated May 30, 2024: "Super Ego is not the employer, Super Ego does not have employees.").

[7] *In toto*, the STAA states, in relevant part, that "[a] person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because" an employee engaged in protected activity. 49 U.S.C. § 31105(a). The STAA defines the term "employee" as:

> [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—
>
> (A) directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier; and
>
> (B) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.

49 U.S.C. § 31101(2); *see also* 49 U.S.C. § 31105(j) (same). Likewise, "employer" is defined as:

> (A) … 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; but
>
> (B) does not include the Government, a State, or a political subdivision of a State.

submitting evidence to prove this specific factual assertion or striking the defense altogether. But, given this argument lacks merit on its face, the imposition of these sanctions would be toothless.

That leaves me the option of striking Respondent's other potential defenses or forbidding the introduction of Respondent's evidence proving (a) Complainant did not engage in STAA protected activity; (b) Complainant was not subject to an unfavorable personnel action; (c) Complainant's protected activity was not contributing factor to the unfavorable personnel action; and/or (d) Respondent would have subjected Complainant to the same unfavorable personnel action, even had he not engaged in protected activity. Thus far, Respondent's counsel has given me no reason to believe he intends to participate in litigation before this tribunal. Respondent's counsel has repeatedly and without justification ignored my orders and my staff's directives. If Respondent's counsel cannot do rather simple litigation tasks, like file a status report with a discovery plan or provide initial disclosures, there is no reason to believe he will discharge his more-challenging obligations, such as participating in discovery or presenting a case at trial. Even if I set this matter for hearing to allow Complainant to present his case, I have no confidence Respondent's counsel would appear. At this point, Respondent's counsel's behavior has squandered enough of my and my staff's time, and I refuse to unnecessarily delay this case any further.

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49 U.S.C. § 31101(3); *see also Ass't Sec'y & Osborn v. Cavalier Homes of Alabama, Inc.*, No. 89-STA-10 (Sec'y July 17, 1991). Respondent's argument that it is not an "employer" because it is a "leasing company" demonstrates a misunderstanding of the applicable law.

I do not consider imposing the sanctions described by § 18.57(b)(1)(iv) and (v) because they would only harm Complainant. I am not inclined to stay the case on the off-chance Respondent might decide to participate and dismissing the case would only reward Respondent's malfeasance.

I have considered recommending Respondent's counsel to the Chief Administrative Law Judge for attorney disqualification proceedings. *See* 29 C.F.R. § 18.23. Attorneys practicing before this tribunal are expected to "be diligent, prompt, and forthright when dealing with parties, representatives and the judge, and act in a manner that furthers the efficient, fair and orderly conduct of the proceeding." 29 C.F.R. § 18.22(c). Furthermore, an attorney "must not … [u]nreasonably delay, or cause to be delayed without good cause, any proceeding[.]" 29 C.F.R. § 18.22(d)(3). To put it bluntly, Respondent's counsel's performance has fallen well short of these bare-minimum expectations. I decline to refer this matter to the Chief Administrative Law Judge for attorney disqualification proceedings because more likely than not doing so would serve to further delay the litigation, *see* 29 C.F.R. § 18.23(a)(2) (attorney disqualification procedures). If Respondent's counsel handled more cases before the Office of Administrative Law Judges, I might be more inclined to pursue his disqualification and compel Respondent to hire outside counsel in this matter.

Imposing the sanction of entering a default decision and order will adequately protect and preserve this tribunal's authority, deter future misconduct, and advance the interest of providing Complainant with a speedy disposition of his whistleblower retaliation

complaint, which has been pending since August of 2022. This is a harsh sanction, but Respondent's counsel's conduct thus far has been egregious and inexcusable and leaves no other viable option.

I find and conclude Respondent's counsel's refusal to comply with my order has been intentional and that no good cause exists justifying his non-compliance. Respondent was served with the Notice of Assignment, Notice to Pro Se Complainant, and Scheduling Order, on March 20, 2024. My attorney advisor gave Respondent's counsel clear and unequivocal instructions to file a status report on May 16, 17, 28, and 30 – three more occasions than should be necessary to impel an attorney to act on the directions of a judge. *See supra* note 3. Respondent's counsel corresponded with my attorney advisor, demonstrating Respondent's counsel received and knew about my orders and understood my expectations. *Cf. Stalworth v. Justin Davis Enterprises, Inc.*, ARB No. 09-038, ALJ No. 2009-STA-001 (ARB June 16, 2010) (vacating default decision and order against respondent for failing to appear at hearing where notice of hearing was sent to incorrect address). Through my attorney advisor, I set a firm deadline of June 7, 2024, for Respondent to file its status report and warned I would consider sanctions if it failed to do so. Respondent did nothing. Finally, I resorted to issuing an Order to Show Cause, hoping that would serve as a wake-up call, and even warned a failure to respond could result in the entry of a default decision and order against his client. Respondent did nothing. I have granted Respondent's counsel ample time and opportunity and plenty of grace to correct his mistakes without incurring a

penalty. My patience is not boundless, nor should it have to be, particularly with a represented party.

I cannot and will not tolerate a party or attorney intentionally ignoring my orders. Tolerating this sort of behavior, even at this early stage of the litigation, sends a mistaken signal to all parties and representatives who appear and practice before this tribunal that complying with the orders of an administrative law judge is optional – it is not. *See Horizon Shipbuilding, Inc. v. Jackson*, 2024 WL 2876978 at *4-5, No. 3:23 CV 24755 (N.D. Fla. April 26, 2024) (quoting *U.S. v. United Mine Workers of Am.*, 330 U.S. 258, 293-94 (1947) ("[A]n order issued by a court ... must be obeyed by the parties until it is reversed by orderly and proper proceedings ... and until its decision is reversed for error by orderly review ... its orders ... are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.")) The imposition of a default decision and order here and now makes clear: there are serious consequences to flaunting this tribunal's orders, no matter what stage of the proceeding. Respondent flagrantly ignored my orders and did so at its own peril. *Sisfontes v. Int'l Business Software Solutions, Inc.*, ARB Nos. 07-107 & -114, ALJ No. 2007-LCA-014, slip op. at 9 (ARB Aug. 31, 2009) ("[T]he Respondents flagrantly ignored the orders of two ALJs, and they did so at their peril and at the risk of having a default decision entered against them.").

Although not strictly applicable to this tribunal, court orders applying the Federal Rules of Civil Procedure have held that the "decision to enter a default judgment as a sanction

for violation of a discovery order is within the sound discretion of the [trial] court." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). The U.S. Court of Appeals for the Seventh Circuit[8] has held that such an order is an abuse of discretion only if entered "without a showing of willfulness, bad faith or fault on the part of the defaulted party." *Downs v. Westphal*, 78 F.3d 1252, 1257 (7th Cir. 1996), opinion amended on denial of reh'g, 87 F.3d 202 (7th Cir. 1996) (quoting *Patterson v. Coca–Cola Bottling Co.*, 852 F.2d 280, 283 (7th Cir.1988)). As detailed above, Respondent has demonstrated willful disobedience to my orders, despite being given numerous opportunities to comply. Respondent's actions can be interpreted only as bad faith or fault on its own part.

Accordingly, I elect to impose the sanction of entering a default decision and order against Respondent and adopt the allegations as set forth in Complainant's complaint filed with OSHA as true and correct. Therefore, I find and conclude that:

1. Complainant was an "employee" as defined by the STAA. 49 U.S.C. §§ 31101(2), 31105(a), (j).
2. Respondent is a covered entity subject to the STAA. 49 U.S.C. §§ 31101(3), 31105(a).
3. Complainant earned $1,700.00 per week while employed by Respondent.
4. Complainant engaged in protected activity as defined by the STAA. 49 U.S.C. §§ 31105(a)(1), (b)(1), 42121(b)(2)(B)(iii).

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[8] Although Complainant currently resides in Mississippi, Complainant's jobsite was located in Elmhurst, Illinois, within the jurisdiction of the Court of Appeals for the Seventh Circuit.

5. Respondent discharged Complainant on August 29, 2022. 49 U.S.C. §§ 31105(a), (b)(1), 42121(b)(2)(B)(iii).
6. Complainant's protected activity was a contributing factor to Respondent's decision to discharge him. 49 U.S.C. §§ 31105(a), (b)(1), 42121(b)(2)(B)(iii).
7. Respondent did not demonstrate by clear and convincing evidence that it would have discharged Complainant in the absence of protected activity. 49 U.S.C. §§ 31105(b)(1), 42121(b)(2)(B)(iv).
8. Respondent did not prove Complainant failed to mitigate his damages.

ORDER

Based on the foregoing, IT IS ORDERED:

1. Complainant's complaint of discrimination against Respondent is SUSTAINED;
2. Respondent shall take AFFIRMATIVE ACTION to abate the violation;
3. Respondent shall REINSTATE Complainant to his former position with the same pay and terms and privileges of employment; and
4. Respondent shall PAY to Complainant backpay in the amount of $1,700.00 per week, beginning August 30, 2022, to the present and continuing until the date of reinstatement, plus interest calculated pursuant to 26 U.S.C. § 6621, compounded daily.

SO ORDERED.

PAMELA A. KULTGEN
Administrative Law Judge

PAK/PML/jcb
Newport News, Virginia

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.

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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 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. § 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 EFS System, 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.