**In the Matter of:**

**DANIEL S. SOMERSON,** **ARB CASE NO. 03-042**

**COMPLAINANT,** **ALJ CASE NO. 03-STA-11**

**v.** **DATE: October 14, 2003**

**MAIL CONTRACTORS OF AMERICA, FRIDAY, ELDREDGE, & CLARK, AND OSCAR DAVIS, ESQ.**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***
**Edward A. Slavin, Jr., Esq.,** ***St. Augustine, Florida***

***For the Respondents:***
**Oscar E. Davis, Esq.,** ***Friday, Eldridge & Clark, Little Rock, Arkansas***

## FINAL ORDER STRIKING THE COMPLAINANT'S BRIEF AND DISMISSING THE COMPLAINT

### BACKGROUND

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A § 31105 (West 1997). The Complainant, Daniel Somerson, filed a complaint alleging that the Respondents, Mail Contractors of America (MCOA); the law firm of Friday, Eldredge & Clark (a law firm representing MCOA), and Oscar Davis (an attorney representing MCOA), violated the STAA by seeking a Protective Order and Witness Interview Restriction in a prior case, *Somerson v. Mail Contractors of America,* ALJ No. 2002-STA-44 (ALJ Dec. 16, 2002),

before Administrative Law Judge Edward Terhune Miller.[1] In response, the Respondents filed a Motion to Dismiss arguing that the complaint failed to assert a prima facie allegation of an adverse employment action.

On January 10, 2003, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order Dismissing Complaint and Referring Matter to the Tennessee Supreme Court's Board of Professional Responsibility (R. D. & O.). The ALJ found that "[t]he present complaint . . . is completely specious" and "fails to allege the essential elements of a violation of the whistleblower protection provisions of the STAA." R. D. & O. at 2. Evaluating Attorney Slavin's representation of Somerson, the ALJ also concluded,

> This continuum of attacks, intimidation and harassment under the guise of representing a client constitutes an abuse of the administrative process. It wastes this Office's time and the valuable time of OSHA investigators. It perverts the use of an employee protection statute, the STAA. It violates an attorney's rules of professional responsibility, and constitutes a breech of the duty that an attorney owes his client.

R. D. & O. at 4 (citations omitted). Accordingly, the ALJ granted the Respondents' motion to dismiss and stated that the Tennessee Supreme Court's Board of Professional Responsibility would be notified of Attorney Slavin's conduct in representing Somerson for a determination whether Slavin's conduct violated its Code of Professional Responsibility. *Id.* at 4.

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[1] The motion for protective order asserted that Somerson transmitted anonymous, implicitly threatening, e-mails to persons named as witnesses in the prior proceeding and established anonymous websites directed at MCOA's counsel which contain vulgar, abusive and implicitly threatening messages. The motion sought a protective order against the abusive e-mails and websites, and requested restrictions on Somerson's contact with prospective witnesses. In response to this motion for a protective order, the Administrative Law Judge found that Somerson had engaged in such an "extreme manifestation of misconduct" that he dismissed the complaint outright, and certified the facts to the U.S. District Court with a request for an appropriate remedy. *Somerson v. Mail Contractors of America, Inc.*, 2002-STA-44 (ALJ Dec. 16, 2002). In an Order issued September 8, 2003, the United States District Court, Middle District of Florida, found that "Somerson's e-mails and websites are of a harassing nature, and are hostile and crude to say the least. His messages do not instill dignity and respect for the administrative proceedings, nor for the witnesses or counsel involved." *In re: Daniel S. Somerson*, Case No. 3:02-cv-1158-J-20TEM. The court adjudged Somerson to be in civil contempt and ordered him, inter alia, to pay a $5000.00 fine.

Pursuant to 29 C.F.R. § 1978.109 (2002), an Administrative Law Judge is required to immediately forward his or her decision under the STAA to the Administrative Review Board (ARB or Board), the Secretary of Labor's designee,[2] to issue a final order. The regulation further provides that the parties may file briefs in support of or in opposition to the Administrative Law Judge's decision within thirty days of the date on which the Judge issued the decision. 29 C.F.R. § 1978.109(c)(2). Accordingly, pursuant to 29 C.F.R. § 1978.109, review of the ALJ's R. D. & O. in this case was automatic and any briefs in support of or in opposition to the R. D. & O. were due on February 10, 2003, without further order of the Board.[3]

On January 15, 2003, Somerson filed a Petition for Review of the R. D. & O. As indicated above, such a petition was unnecessary because all STAA Administrative Law Judge decisions are forwarded automatically to the ARB to issue a final decision. On February 3, 2003, the ARB issued a standard Notice of Review and Briefing Schedule reminding the parties that pursuant to 29 C.F.R. § 1978.109(c)(2), any briefs in support of or in opposition to the R. D. & O. were due on February 10, 2003.

Somerson did not timely file a brief in opposition to the ALJ's R. D. & O. Nevertheless, because he did file a petition for review within the thirty-day period and appeared to misapprehend the proper procedure, the Board treated his petition for review as a motion for enlargement of time to file a brief and in an order dated February 13, 2003, permitted the parties to file simultaneous briefs within 30 days of the date of the order.

In the February 13th order, the Board also responded to Somerson's request that this case be consolidated with *Somerson v. Mail Contractors of America*, ARB No. 03-055, for briefing and oral argument. Because Somerson failed to specify any ground supporting consolidation or oral argument, the Board denied Somerson's motion, but indicated that if at some future date the Board found consolidation or oral argument to be warranted, the Board would so notify the parties.

On March 14, 2003, Somerson filed a request for a further extension of time. The Board granted the motion in an order issued March 24, 2003, and stated that "[t]he brief will be accepted as filed if received by the Board on or before **March 31, 2003."**

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[2] *See* Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002)(delegating the Secretary's authority to issue final decisions under the STAA to the Administrative Review Board).

[3] February 9, 2003, the thirtieth day, was a Sunday.

## MOTION TO STRIKE SOMERSON'S BRIEF

The Board did not receive Somerson's brief on or before March 31, 2003. On April 10, 2003, the Board received a single document titled "Complainant's Omnibus Opening Brief in ARB Case Nos. 03-042 & 03-055, His Response to ARB Show Cause Order in ARB Case No. 03-068, His Motion for Consolidation and His Motion for Summary Reversal and Remand to a New ALJ" (Omnibus brief). In response, MCOA filed Respondent's Motion to Strike Complainant's Combined Omnibus Opening Brief (03-042 & 03-055), Response to ARB Show Cause Order (03-068), Motion for Consolidation and Motion for Summary Reversal and Remand to New ALJ. In this motion, MCOA argued that the Board should strike Somerson's brief because Somerson had failed to comply with the Board's Order Granting the Enlargement of Time.

Somerson responded to MCOA's Motion to Strike, stating:

> Mr. Somerson's brief was signed and mailed on March 31, 2003, several hours *before* mail receipt of the Board's Order (not received by fax on that or any earlier date). Respondent's, "driving under the inference" of their extreme animus, as always assume the worst about Complainant, never letting mere facts stand in the way of their angry, ill-informed ad hominem assertions.
>
> Surely there can be no "*blatant disregard*" on the part of either Mr. Somerson or his counsel by not being clairvoyant of the contents of a mailed order that was not received until later in the day on March 31, 2003.

Complainant's Response to Respondent's April 7, 2003 Motion to Strike Brief at 1 (emphasis in original). Based on this assertion that the Board's March 24, 2003 Order was not received until after Somerson filed his Omnibus brief, Somerson asked the Board to accept his brief as timely.

The Respondents replied to Somerson's response pointing out that the first sentence of the Omnibus brief states, "In response to the Board's March 24, 2003 Orders, Mr. Somerson hereby respectfully combines his briefs in two cases (ARB Nos. 03-42 & 03-055) and responds to the Order to Show Cause in the third case (ARB No. 03-68)." The Respondents contended that this statement obviously belies Somerson's averment that his counsel received the Board's March 24th Order Granting Enlargement of Time after he filed the Omnibus brief because Somerson's counsel could hardly file a brief in response to an Order of which he was unaware.

Somerson's assertion, by counsel, that he filed the Omnibus brief before receiving the Board's March 24th Order is patently false. Such falsehoods by attorneys appearing before the Board will not be tolerated and may subject the offending attorney to sanctions. Moreover, making such false statements to the Board undermines Attorney

Slavin's ability to effectively represent his clients because the Board will be reluctant to accept at face value any statement counsel makes that is not confirmed by independent collaborating evidence.

Furthermore, the Omnibus brief was not filed in accordance with the Board's March 24, 2003 Order. This Order unequivocally provided that Somerson's brief would be accepted **if** "received by the Board on or before **March 31, 2003**." Additionally, in filing an Omnibus brief, which consolidated the briefing for ARB Nos. 03-042 and 03-055, Somerson ignored the Board's order denying his motion for such consolidated briefing. Accordingly, we **GRANT** MCOA's Motion to Strike Somerson's Omnibus brief.

Nevertheless, because as provided in 29 C.F.R. § 1978.109(c)(1), the Board is required to "issue a final decision and order based on the record and the decision and order of the administrative law judge," we are required, even in the absence of Somerson's brief, to review the record and R. D. & O. to determine whether the R. D. & O. is supported by substantial evidence and is in accordance with law.

## STANDARD OF REVIEW

We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies, which is prescribed in 29 C.F.R. § 18.40 (2002), also governs our review. The standard for granting summary decision under § 18.40 is essentially the same as that found in Fed R. Civ. P. 56, the rule governing summary judgment in the federal courts. Summary decision is appropriate under § 18.40(d) if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact is one, the resolution of which, "could establish an element of a claim or defense and, therefore, affect the outcome of the action". *Bobreski v. United States EPA*, No. 02-0732(RMU), 2003 WL 22246796, at *3 (D.D.C. Sept. 30, 2003).

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law. *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002- STA-25, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 00-STA-52, slip op. at 2 (Dec. 13, 2002). "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'" *Bobreski*, at *3 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party." *Bobreski*, at *3.

Furthermore, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific

facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co.*, No. 93-ERA-42, slip op. at 4-6 (Sec'y July 17, 1995).

## DISCUSSION

The STAA's employee protection provision provides in pertinent part:

> (a) Prohibitions. (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –
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> > (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety 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.A. § 31105(a) (West 1997). To prevail under the STAA, a complainant must prove that he or she made a protected complaint, that a "person" who was aware of the complaint discharged, disciplined or discriminated against him or her with respect to pay, terms, or privileges of employment, and that there was a causal connection between the protected activity and the adverse employment action. *Accord BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Metheany v. Roadway Package Systems, Inc.*, ARB No. 00-063, ALJ No. 2000-STA-11, slip op. at 7 (ARB Sept. 30, 2002).

In recommending that Somerson's complaint be dismissed, the ALJ concluded that Somerson had failed to allege the essential elements of a violation of the STAA's whistleblower protection provisions. R. D. & O. at 2. In the first instance, the ALJ stated that "[t]o prevail under the STAA, it is necessary to prove that the Complainant was an employee of a covered **employer** . . . ." *Id.* (emphasis added). The ALJ ultimately

concluded that because the law firm and attorneys representing MCOA were not employers as defined by 49 U.S.C.A. § 31101(3)(A),[4] the complaint against them must be dismissed. Thus, the ALJ's dismissal of the complaint against MCOA's legal representatives was based initially on his determination that a "person" under 49 U.S.C.A. § 31105(a) must be an "employer" under 49 U.S.C.A. § 31101(3)(A). However, a "person" is defined under the STAA's interpretive regulations as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any group of persons." 29 C.F.R. § 1978.101(i). Thus the definition of "person" does not exclusively restrict its coverage to "employers," and in fact, specifically includes "legal representatives." It is indisputable that the provision includes employers and that in most cases a "person," who is in the position to discharge, discipline or discriminate against an employee, will be an employer. However, to dispose of Somerson's complaint, we need not, and do not, decide here whether a "person" as provided in 49 U.S.C.A. § 31105(a) must be an "employer" as defined in 49 U.S.C.A. § 31101(3)(A).

As indicated above, to prevail in this matter Somerson would have to prove by a preponderance of the evidence that the filing of a request for a protective order constituted "discipline or discriminat[ion] against an employee regarding pay, terms, or privileges of employment." In response to the Respondents' motion to dismiss the complaint on the grounds that Somerson had failed to allege an adverse action, Somerson failed to identify any factual issues in dispute relevant to this issue or to even address the Respondents' averment that the filing of the motion for a protective order was not "discipline or discriminat[ion] against an employee regarding pay, terms, or privileges of employment." Instead, as the ALJ found,

> Attorney Slavin's response to Respondent's motion to dismiss fails to address the arguments therein, a clear indication that he does not believe that there is any merit to the complaint. Rather, he sets forth a vicious attack on Mail Contractors of America's attorneys, an attack completely irrelevant to any issue here.

R. D. & O. at 3. After reviewing the record and the facts in the light most favorable to Somerson, we agree that Somerson has failed to rebut the Respondents' motion to dismiss with a demonstration of a dispute in material fact and that he has failed to allege and to adduce evidence in support of an essential element of his complaint, i.e., that the filing of the request for a protective order constituted "discipline or discriminat[ion] against an employee regarding pay, terms, or privileges of employment." Accordingly,

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[4] This provision defines an employer, in pertinent part, 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.A. § 31101(3)(A).

we hold that the ALJ's R. D. & O. is in accordance with law, and we **DISMISS** Somerson's complaint.

Finally, the Respondents have requested that the Board enter an award of costs and attorneys' fees against Somerson or remand the case to the ALJ to consider such an award. The Secretary of Labor has held that there is no authority to award attorney's fees and costs against a complainant under the STAA. *Abrams v. Roadway Express, Inc.*, 84-STA -2, slip op. at 1-2 (May 23, 1985). Accordingly, the Respondents' request for such fees and costs is **DENIED.**

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**
**Chief Administrative Appeals Judge**

**OLIVER M. TRANSUE**
**Administrative Appeals Judge**