



Issue Date: 09 May 2017

Case No.: 2016-MAP-1

In the Matter of:
CARLOS VASQUEZ,
Complainant,

v.

**CATERPILLAR LOGISTICS and EA
STAFFING SERVICES,**
Respondents.

**GRANTING RESPONDENTS' MOTIONS FOR SUMMARY DECISION,
CANCELLING HEARING, AND DISMISSING CLAIM**

This case arises under the Motor Vehicle and Highway Safety Improvement Act of 2012, Section 31307 of the Moving Ahead for Progress in the 21st Century Act, 49 U.S.C.S. § 30171 (“MAP-21” or “the Act”), and implementing regulations at 29 C.F.R. Part 1988 (2016). MAP-21 “provides for employee protection from retaliation because the employee has engaged in protected activity pertaining to the manufacture or sale of motor vehicles and motor vehicle equipment.” 29 C.F.R. § 1988.100(a). The purpose of the Act “is to reduce traffic accidents and deaths and injuries resulting from traffic accidents.” 49 U.S.C.S. § 30101.

On March 19, 2015, Carlos Vasquez (the “Complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”), alleging that Caterpillar Logistics terminated him on February 18, 2015. The Complainant stated that he “filed a federal whistleblower complaint electronically” through the U.S. Department of Labor’s website around February 19, 2015.¹ OSHA subsequently referred the complaint to the Indiana OSHA program, which, by letter dated March 23, 2015,² informed the Complainant that it was closing his complaint and “advised him to contact Federal OSHA to determine if coverage may exist at the Federal level.” On September 2, 2015, the Complainant filed a second complaint with OSHA. Thereafter, on June 7, 2016, the Secretary of Labor, acting through the Regional Administrator for OSHA, dismissed the complaint as untimely filed. The Complainant objected to the Secretary’s Findings and requested a hearing before the Office of Administrative Law Judges.

¹ The original complaint is not included in the Complainant’s request for hearing.

² The Secretary’s Findings indicate that Indiana OSHA closed the complaint on approximately April 10, 2015.

This case was docketed on July 6, 2016. On July 22, 2016, Administrative Law Judge Stephen R. Henley issued a Notice of Docketing and Order to Show Cause why this matter should not be dismissed due to the Complainant's failure to file a timely complaint. On November 14, 2016, after receiving responses from Caterpillar Logistics and EA Staffing Solutions (the "Respondents") and the Complainant, Judge Henley issued an Order Finding Good Cause to Proceed to Hearing. This case was reassigned to Administrative Law Judge John P. Sellers, III on December 7, 2016. On February 7, 2017, the undersigned issued a Notice of Hearing and Prehearing Order.

On April 12, 2017, Caterpillar Logistics filed a Motion for Summary Decision. In support of its motion, Caterpillar Logistics alleged that it is not covered by MAP-21 because it is not a motor vehicle manufacturer, part supplier, or dealership within the meaning of the Act. Moreover, it alleged that even if MAP-21 did apply to Caterpillar Logistics, the Complainant cannot establish that his complaint constituted protected activity under MAP-21.

On April 24, 2017, EA Staffing Services, the staffing agency that employed the Complainant on a temporary assignment at Caterpillar Logistic, also filed a Motion for Summary Decision. It argued that it did not terminate its employment relationship with the Complainant; rather, Caterpillar Logistics terminated the Complainant. Moreover, like Caterpillar Logistics, EA Staffing Solutions argued that Caterpillar Logistics is not covered by MAP-21 and that the Complainant's safety complaint did not constitute protected activity under MAP-21.

On May 4, 2017, the Complainant filed a motion for a sixty-day extension of time to respond to Caterpillar Logistics' motion, to "gather more evidence," and "to obtain legal counsel in this matter." (Complainant's Motion for Extension at 1.) The Notice of Hearing and Prehearing Order issued on February 7, 2017 provided that responses to dispositive motions must be filed by the party opposing such motion no later than fourteen (14) workdays after receipt of the motion. In consideration of the Complainant's *pro se* status, the undersigned has already given the Complainant more than fourteen workdays to respond to Caterpillar Logistics' motion. Moreover, the Complainant has had ample time to seek counsel and conduct discovery. This matter has been pending before the Office of Administrative Law Judges since July 2016. During a conference call in December 2016, the undersigned specifically raised the topic of whether the Complainant was represented, and the Complainant stated that he could not afford an attorney. The Complainant then agreed to the date set for hearing, which was settled upon after seeking input from all parties. At no point in the months after the conference call did the Complainant request to continue the hearing in order to hire an attorney. With the hearing only a few weeks away, the Complainant is now seeking an extension of time, but he has not indicated what steps he has taken to secure counsel. I find that the Complainant has already been given ample time to seek counsel, conduct discovery, and request a continuance. Balancing the equities in this case, and noting that the Respondents have abided by the discovery deadlines and prepared for a hearing at the end of the month, I hereby deny the Complainant's motion for an extension of time.³

³ It is noted that according to the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. § 18.93, a party may file a motion for reconsideration of a decision and order no later than 10 days after service of the decision on the moving party.

For the reasons set forth below, I find that the Respondents have established that there are no genuine issues of material fact that must be addressed at a hearing. Therefore, the Respondents are entitled to summary decision as a matter of law.

APPLICABLE LAW

MAP-21 provides that “[n]o motor vehicle manufacturer, part supplier, or dealership may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee” engaged in certain protected activities. 49 U.S.C.S. § 30171(a). In order to prevail on his claim, the Complainant must demonstrate by a preponderance of the evidence that he engaged in protected activity under MAP-21, that the Respondents took an adverse employment action against him, and that his protected activity was a “contributing factor” to the adverse personnel action. 49 U.S.C.S. § 30171(b)(2)(B); *Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB No. 16-035, slip op. at 16-17 (ARB Sept. 30, 2016). 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.” *Williams v. Domino’s Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011). To prove by a preponderance of the evidence means that the Complainant must show that his protected activity “more likely than not” contributed to his termination. *Palmer*, ARB No. 16-035, slip op. at 17. The fact finder may consider all the relevant, admissible evidence to determine whether the Complainant has met that burden. (*Id.*) If the Complainant establishes that the protected activity was a contributing factor in the Respondents’ decision to take adverse action, the Respondents may avoid liability if they demonstrate “by clear and convincing evidence” that they “would have taken the same unfavorable personnel action in the absence of that behavior.” 49 U.S.C.S. § 30171(b)(2)(B). “Clear and convincing” evidence is evidence showing that it is “highly probable” that the employer would have taken the same adverse action in the absence of the protected activity. *Palmer*, ARB No. 16-035, slip op. at 57.

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges provide that an administrative law judge “shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to summary decision as a matter of law. The judge should state on the record the reasons for granting or denying the motion.” 29 C.F.R. § 18.72(a) (2015). A material fact is one whose existence affects the outcome of the case. *Reddy v. Medquist, Inc.*, ARB No. 04-123, slip op. at 4 (Sep. 30, 2005) (SOX) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The regulations provide that “[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by” citing to materials in the record, “including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;” or “[s]howing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” 29 C.F.R. § 18.72(c)(i)-(ii) (2015). If the undersigned finds that there is a genuine issue of material fact, the case must proceed to hearing. In reviewing a request for summary decision, the undersigned must view all of the evidence in the light most favorable to the nonmoving party. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).

DISCUSSION

In its Motion for Summary Decision, Caterpillar Logistics alleged that is not covered by MAP-21 because it is not a motor vehicle manufacturer, part supplier, or dealership. (Caterpillar Logistics' Motion for Summary Decision at 10.) Specifically, Caterpillar Logistics explained that it does not receive, store, or ship parts for motor vehicles as defined by MAP-21. (*Id.*) Rather, Caterpillar Logistic "is a supply chain solutions company that receives inbound material, stores, that material, and compiles kits of that material for shipping to Caterpillar, Inc." (*Id.*) It added that "[n]one of the parts received and stored by Caterpillar Logistics are for vehicles manufactured primarily for use on public streets, roads, and highways." (*Id.* at 10-11.)

Furthermore, Caterpillar Logistics emphasized that the purpose of MAP-21 is "to reduce traffic accidents and deaths and injuries resulting from traffic accidents," but the "[e]ngines used in generator power and off-highway machines are not the type of motor vehicle equipment whose regulation would limit the number of traffic accidents, because these vehicles are not primarily operated on public streets, roads, and highways." (Caterpillar Logistics' Motion for Summary Decision at 11; 49 U.S.C.S. § 30101.) Consequently, as Caterpillar Logistics does not receive, store, or ship motor vehicles or parts for motor vehicles as defined by MAP-21, Caterpillar Logistics alleged that, by definition, it cannot be a manufacturer, part supplier, or dealership for motor vehicles. (Caterpillar Logistics' Motion for Summary Decision at 13.)

In support of its argument, Caterpillar Logistics submitted a Declaration of Thomas M. Ropp, who has been the Logistics Operations Manager IV at Caterpillar Logistics since 2007. (Caterpillar Logistics' Exhibit ("CLE") A). He attested that Caterpillar Logistics "provides supply chain solutions to Caterpillar, Inc. by receiving inbound material, storing material, and picking equipment parts for bulk shipping at its Warehouse." (CLE A at 1.) He added that the Warehouse has only one "customer," which is Caterpillar, Inc. (*Id.*) Moreover, he stated that the "material received, stored, and picked for shipping at the Warehouse is for certain engines used in generator power and off-highway machines that Caterpillar, Inc. manufactures, none of which are primarily used on public streets, roads, or highways." (*Id.*)

In further support of its position, Caterpillar Logistics emphasized that in *Koehring Co. v. Adams*, 605 F.2d 280 (7th Cir. 1979), the Seventh Circuit Court of Appeals upheld a lower court's decision to hold that "mobile construction equipment which is designed to perform work on a construction site and which normally uses the public streets, roads or ways only for travel between job sites, is not a vehicle which has been manufactured primarily for use on public streets, roads and highways, and that therefore Congress has not delegated rulemaking authority to the defendants in respect to such equipment." *Koehring Co. v. Adams*, 452 F. Supp. 635 (E.D. Wis. 1978). The construction equipment in question in *Koehring* included mobile cranes, mobile excavators, and mobile well drills, which Caterpillar Logistics stated "is the same type of earth moving equipment ultimately manufactured by Caterpillar Inc." (*Id.*, Caterpillar Logistics' Motion for Summary Decision at 12.) Thus, Caterpillar Logistics argued, "If the equipment does not constitute a motor vehicle primarily for use on public streets, roads, and highways, then it follows that the storage and handling of the parts which make up that equipment are not regulated themselves." (*Id.*)

Furthermore, Caterpillar Logistics emphasized that “[v]ehicles and equipment manufactured primarily for off-road use, including construction equipment, are not ‘motor vehicles’ as defined by statute.” (Caterpillar Logistics’ Motion for Summary Decision at 11.) In 2011, the U.S. District Court for the District of Puerto Rico held that all-terrain vehicle (“ATVs”) were “manufactured primarily for off-road use,” rather than “primarily for use on public streets, roads, and highways” under the statutory definition of a “motor vehicle” at 49 U.S.C.S. § 30102(a)(6). Moreover, the Court opined that “[n]o rational factfinder, given that factual stipulation and the statutory language which it so closely tracks, could find that the ATV’s named in the complaint were manufactured primarily for the purposes necessary to make them “motor vehicles” within the scope of the statutory scheme that the government relies on to justify their forfeiture. (*Id.*)

The Respondents have put forth unrefuted evidence establishing that Caterpillar Logistics is not a motor vehicle manufacturer, part supplier, or dealership. As Mr. Ropp attested in his sworn declaration, Caterpillar Logistics is a supply chain solutions company that receives and stores material that is used “for certain engines used in generator power and off-highway machines that Caterpillar Inc. manufactures, none of which are primarily used on public streets, roads, or highways.” (*Id.*) Nothing in the record disputes Mr. Ropp’s statements regarding the nature of Caterpillar Logistics’ business. As the Court in *Koehring* held, the use of mobile construction equipment on public highways is not the primary purpose for which mobile construction equipment was designed. (*Id.*) *Koehring*, 452 F. Supp. at 635. Similarly, I find that the off-highway machines that Caterpillar, Inc. manufactures are not primarily for use on public streets, roads, and highways, and, as such, are not “motor vehicles” as defined by the Act. Therefore, I find that Caterpillar Logistics, which merely receives, stores, and handles materials that are shipped to Caterpillar, Inc., is also not covered by the Act.

Because Caterpillar Logistics does not receive, store, or ship motor vehicles or parts for motor vehicles as defined by MAP-21, Caterpillar Logistics is not a manufacturer, part supplier, or dealership for motor vehicles. There is no allegation that EA Staffing Solutions is anything other than a staffing agency. For the same reasons that the Complainant’s complaint against Caterpillar Logistics has failed, its complaint against EA Staffing Solutions must also fail. As the Respondents are not covered by the Act, they have established that there is no genuine dispute as to any material fact and they are entitled to summary decision as a matter of law.

CONCLUSION

Having reviewed the Respondents’ motions and evidence attached thereto, I find that the Respondents have established that Caterpillar Logistics is not a motor vehicle manufacturer, part supplier, or dealership as defined by MAP-21. Consequently, because they are not covered by the Act, the Respondents have established that there is no genuine dispute as to any material fact and they are entitled to summary decision as a matter of law.

ORDER

The Respondents are entitled to summary decision as a matter of law. The claim of Carlos Vasquez is hereby **DISMISSED** and the hearing scheduled to begin in Lafayette, Indiana on May 31, 2017 is **CANCELLED**.

SO ORDERED.

JOHN P. SELLERS, III
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. § 1988.110(a). Your Petition should 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. § 1988.110(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 the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1988.110(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. §§ 1988.109(e) and 1988.110(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. § 1988.110(b).