



**Issue Date: 31 October 2017**

CASE No.: 2017-TSC-00002

*In the Matter of:*

**CHRISTOPHER GREEN,**  
*Complainant,*

*v.*

**OPCON, INC.**  
*Respondent,*

*and*

**VSGI, LLC CONSTRUCTION SERVICES SERIES**  
*Respondent.*

### **SUMMARY DECISION AND ORDER DENYING COMPLAINT**

In the interest of judicial economy, I ordered Complainant to show cause why his request for hearing should not be denied for failure to establish that he was an employee of either Respondent. I directed that the response will include affidavits, declarations, or other evidentiary proof to establish the factual basis for all assertions. Complainant was to submit a memorandum of points and authority in support of his position, incorporating and addressing any federal decisional authority on point. The parties responded as described below. For the reasons noted, I deny the complaint.

#### Procedural History and Background

1. On July 9, 2014, Complainant filed with the Occupational Safety and Health Administration (OSHA) complaints of retaliation by Respondents arising under the employee protection provisions of the Clean Air Act (CAA),<sup>1</sup> the Solid Waste Disposal Act (SWDA),<sup>2</sup> and the Toxic Substances Control Act (TSCA).<sup>3</sup>

---

<sup>1</sup> 42 U.S.C. § 7622.

<sup>2</sup> 42 U.S.C. § 6971.

2. On June 30, 2017, OSHA dismissed the complaints because Complainant had not provided sufficient evidence that he was a covered employee under the applicable statutes.
3. On July 10, 2017, Complainant requested that a hearing concerning the denial of his complaints under the CAA, SWDA, and the TSCA.<sup>4</sup>
4. On September 5, 2017, I issued an Order to Show Cause why his request for hearing should not be dismissed for the basis cited by OSHA.
5. On September 15, 2017, Complainant filed a Response to Order to Show Cause, demurring and providing the following documents as evidence:
  - a. Unsigned letter, dated November 17, 2014, consisting of two pages, purporting to be from Michael Rebeck, President, Priority Construction and Roofing Company [hereinafter Priority], to an otherwise unidentified individual apparently affiliated with OSHA, complaining about Respondent OPCON, in which letter Mr. Rebeck refers to Complainant as “my operations supervisor at the time”;
  - b. Unsigned document, dated July 4, 2014, consisting of four pages, purporting to be the contents of an email from Complainant to the Contracting Officer at the Milwaukee VA Center, complaining about Respondent OPCON, in which document Complainant states that he works “with Priority Construction and Roofing Co. out of Elmhurst Illinois,” and that Respondent OPCON is the general contractor for the project on which Priority is a sub-contractor.
  - c. Signed document styled “Subcontractor Agreement,” dated July 10, 2013, consisting of 14 pages and 18 pages in various appendices, between Respondent OPCON as the Prime Contractor and Priority as Subcontractor, purportedly signed by Mr. Clayton Graham on behalf of Respondent OPCON and Mr. Rebeck on behalf of Priority Construction, for Bldg 6 Roof Project [hereinafter the “roof project”];
  - d. Unsigned document styled “Standard Form of Agreement between Contractor and Subcontractor,” dated May 7, 2014, between Respondent VSGI, LLC

---

<sup>3</sup> 15 U.S.C. § 2622.

<sup>4</sup> Complainant also refers in certain filings to the Occupational Safety and Health Act, codified at 29 U.S.C. 660(c), but neither the Act itself nor its implementing regulations provide for review of the denial of a complaint arising under that Act by an Administrative Law Judge. Accordingly, I do not address the merits of that complaint in this Order.

Construction Services Series, as Contractor, and Mr. Michael Rebeck on behalf of Priority as Subcontractor, for Project “V14-10 Bldg 6 Correct FCA Deficiencies” [hereinafter the “window project”];

- e. Signed document styled as an “agreement,” consisting of two pages, dated June 15, 2014, between Priority and Complainant, apparently signed on June 16, 2014, by Mr. Rebeck on behalf of Priority and Complainant, stating that Complainant agreed to work with Priority on the roof project in return for “the full right to retain all scrap metal including copper from building 6 roof project,” \$200 weekly fuel and meal allowance, lodging for three months, and the use of a vehicle provided by Priority for the duration of the project;
  - f. Signed undated document, addressed “To whom it may concern,” signed by an otherwise unidentified individual apparently on behalf of Marks Recovery LLC, stating that said company had a contract with “Priority Roofing” and Complainant to purchase all scrap copper recovered from “Building 6 Milwaukee VA center,” but that the agreement was “terminated due to a contract dispute between the general contractor and Priority Roofing and Construction Company”; and
  - g. Signed undated document styled “Employment Agreement,” between Tactical Construction Corporation [hereinafter Tactical] and Complainant, stating that Tactical hired Complainant to perform all work relating to the Building 6 window project in return for \$3,000 weekly and 70% of the overall profits from the project;
  - h. Various unexplained legal documents apparently submitted by Respondents in connection with this matter.
6. On October 3, 2017, Respondent OPCON filed a letter in opposition to Complainant’s response to the Show Cause Order, renewing its position before OSHA that Complainant was not an employee of OPCON and disputing Complainant’s various factual allegations.
7. Respondent VSGI did not respond to the original Order or the submissions by Complainant or Respondent OPCON.

## Special Findings of Fact<sup>5</sup>

### *Concerning Jurisdiction*

8. Complainant filed written request for hearing with the Chief Administrative Law Judge via facsimile transmittal on July 10, 2017, which is within 30 days of the receipt of OSHA's findings and order.
9. Complainant mailed a copy of the request for hearing at the same time to the other parties of record, i.e., Respondents OPCON and VSGL, as well as the Regional Administrator for OSHA in Chicago and his Assistant.
10. Complainant did not mail a copy of the request for hearing to the OSHA official who issued the findings and order, the Assistant Secretary, or the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

### *Employment Status*

11. On July 10, 2013, Respondent OPCON, as the Prime Contractor for the Building 6 roof project on behalf of "VA Milwaukee," the project owner, signed a "Subcontractor Agreement" with Priority Construction, which agreement was signed by Mr. Clayton Graham on behalf of Respondent OPCON and Mr. Michael Rebeck on behalf of Priority. Complainant is not a signatory to this document, nor is he mentioned anywhere in the text.
12. The Subcontractor Agreement provided that Priority "shall furnish all necessary labor, materials, supervision, engineering, equipment and incidentals required to complete all items of work covered by this agreement, unless specifically modified herein."
13. On or before April 21, 2014, Tactical, an Illinois corporation, hired Complainant as project manager for all work related to the window project, for which work Complainant was to receive \$3,000 weekly from Tactical and 70% of the overall profits received from the project. The document is styled as an "Employment Agreement," and it reserves to Tactical "the right of cancellation of this agreement if

---

<sup>5</sup> For the purpose of this summary decision, I have construed all facts and reasonable inferences in Complainant's favor. See *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 928, (7th Cir. 2017).

workmanship standards are not adequate.” Neither Respondent is a signatory to this agreement, nor is either mentioned anywhere in the text.<sup>6</sup>

14. On June 16, 2014, Complainant agreed to work with Priority on the roof project in return for “the full right to retain all scrap metal including copper from building 6 roof project,” \$200 weekly fuel and meal allowance, lodging for three months, and the use of a vehicle provided by Priority Construction for the duration of the project.<sup>7</sup> Neither Respondent is a signatory to this agreement, nor is either mentioned anywhere in the text.

15. It is uncontroverted that Complainant has worked at least four years for Priority as a Construction Manager.

16. At some point on or shortly after July 5, 2014, Respondent OPCON informed Priority that Complainant would not be allowed back on the job site.<sup>8</sup>

### Conclusions of Law

#### *Concerning Jurisdiction*

17. I have jurisdiction to adjudicate this matter, as the complaint arises out of subject-matter over which I have jurisdiction and Complainant’s request for hearing was timely submitted. 29 C.F.R. § 24.105(c).<sup>9</sup>

---

<sup>6</sup> There is no evidence provided by either party upon which I can rely to make a finding of fact as to the existence of a contractual relationship between Tactical Construction and either Respondent. The only potentially relevant evidence is a document provided by Complainant styled “Standard Form of Agreement between Contractor and Subcontractor,” dated May 7, 2014, between Respondent VSGL, LLC Construction Services Series, as Contractor, and Priority Construction and Mr. Michael Rebeck as Subcontractor, for Project “V14-10 Bldg 6 Correct FCA Deficiencies.” The document is unsigned, and thus without legal effect, and is therefore irrelevant to this instant decision even construing all facts and reasonable inferences in Complainant’s favor. The existence of a draft contract does not make it more or less likely that the contract was ever put into effect, let alone with the particular provisions contained in the unsigned draft. But even if the draft agreement was implemented in the same form as the draft agreement provided by Complainant, I find that Complainant was not a party to the agreement, and the draft contains no provision allowing Respondent VSGL to exercise control as an employer over Priority employees in general or Complainant in particular.

<sup>7</sup> Complainant tenders an unsigned letter, dated November 17, 2014, consisting of two pages, purporting to be from Michael Rebeck, President, Priority Construction and Roofing Company, to an otherwise unidentified individual apparently affiliated with OSHA, complaining about Respondent OPCON, in which letter Mr. Rebeck refers to Complainant as “my operations supervisor at the time.” As neither Respondent contests the authenticity or admissibility of the document, I will consider the document to the extent that it identifies Complainant as occupying a position as “operations supervisor” for Priority Construction during the roof project. See 29 C.F.R. § 18.72(e)(2).

<sup>8</sup> I make no finding as to the basis for that decision, as a finding is not necessary for the resolution of the issue of whether Complainant was an employee of either Respondent.

## *Employment Status under the TSCA & CAA*

18. The Toxic Substances Control Act (TSCA) and the Clean Air Act (CAA) both prohibit “employers” from engaging in certain types of unlawful discrimination against their “employees.” See 15 U.S.C. § 2622(a); 42 U.S.C. § 7622(a).
19. However, neither statute nor the applicable implementing regulations define the term “employee.” See *id.*; 29 C.F.R. Part 24.<sup>10</sup>
20. In the absence of any provision either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results, it is appropriate to adopt the common-law test for determining whether Complainant qualifies as an “employee” under the statutes applicable to his complaint. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992)(citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)); *Nischan v. Stratosphere Quality*, 865 F.3d 922, 929 (7<sup>th</sup> Cir. 2017).
21. Accordingly, to determine whether Complainant had an employer-employee relationship with Respondents, I must consider the “(1) extent of the [purported] employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the work-place, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, work-place, and maintenance of operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations.” *Nischan*, 865 F.3d at 929 (citation omitted).
22. The first factor, which considers the extent of Respondent’s control and supervision over Complainant, does not support the existence of an employer-employee relationship. Respondents did not specifically hire Complainant to work on either project, but Complainant argues that Respondents effectively terminated his employment by excluding him from the worksite, and as such had the constructive power to fire him. I am not so persuaded. The fact that one or both Respondents

---

<sup>9</sup> Complainant did not properly serve the hearing request upon all the individuals identified for service by regulation, but such omission is harmless in light of my disposition of this matter. 29 C.F.R. § 24.106(a).

<sup>10</sup> The significance of this omission is apparent when one considers that all non-environmental whistleblower programs have statutory or regulatory definitions of employee. See 29 C.F.R. Subtitle B, Chapter XVII. Congress knows how to define “employee” for the purposes of a retaliation statute, and the fact that it has failed to do so in the case of the environmental whistleblower programs supports reliance by factfinders on the common law of agency on this point.

requested and obtained Complainant's removal from the job site does not transform him into Respondents' employee. See *Nischan*, 865 F.3d at 929 (citing examples of this principle in operation).

23. To the contrary, the evidence tendered by Complainant in response to the Show Cause Order establishes that, at all relevant times, primary control and supervision of his work were exercised by Priority as to the roof project and Tactical as to the window project. Complainant had signed an employment agreement with each, and he had preexisting relationships with each entity, i.e., previous employment with Priority, and Tactical was apparently owned and operated by a family member.
24. It is also significant that Respondent OPCON considered Priority to be its subcontractor rather than a subsidiary entity, as evidenced by the description in their "Subcontractor Agreement." A subcontractor is, by definition, not an employee, and it would be illogical to conclude—in the absence of any evidence of an independent employment relationship—that either Respondent would or did consider an employee working for one of its subcontractors to also be an employee of the prime contractor.
25. The next factor, which considers Complainant's occupation and the nature of skill required, also favors Respondents. There is no evidence that either Respondent had any role in the development of Complainant's construction management skills or provided any direct training to Complainant during his work on the roof and window projects. Complainant's multi-year work experience with Priority favors Respondents in this regard, as well, as it tends to establish that Complainant developed his skills during employment with Priority rather than with Respondents.
26. The Subcontractor Agreement between Respondent OPCON and Priority places responsibility for the costs of operation upon Priority, which factor also favors Respondent OPCON's position that Priority was its subcontractor, and by extension, that an employee of a subcontractor is not an employee of the prime contractor.
27. There were no payments or benefits flowing from either Respondent to Complainant during the roof and window projects, further supporting Respondent's assertion that Complainant was not their employee. Complainant's agreements with Priority and Tactical both contain provisions concerning payment and other benefits, indicating that Complainant was an employee of each.
28. There is no evidence of any job commitment or expectations between Complainant and Respondents, but the agreements between Complainant and Priority and

Tactical for the roof and window projects, respectively, both indicate that the contracts were limited to the duration of the respective projects, making it very unlikely that the indirect and temporary relationships Complainant had with Respondents during the instant projects was that of employer-employee.

29. Notwithstanding this analysis, Complainant argues that independent contractors may be covered employees under the employee protection provisions of TSCA and CAA. In support, Complainant cites to a single decision by the Secretary of Labor from 1994 in which the Secretary observes that “[i]ndependent contractors . . . may be covered employees under the employee protection provisions of the ERA [Energy Reorganization Act] and analogous statutes.” *Crosier v. Portland General Electric Co.*, OALJ No. 91-ERA-2, 1994 WL 897334, at \*3 n.2 (Off. Adm. App. Jan. 5, 1994). For the reasons stated below, I do not find this citation to be persuasive.

30. As a threshold matter, the sentence from a footnote in *Crosier* quoted by Complainant was most certainly dicta in that case, as the Secretary noted that there was no dispute that Complainant in that case was a covered employee or that the Respondent was an employer covered by the statute at issue. *Crosier*, 1994 WL 897334, at 3. Moreover, the employee protection provisions of the ERA are broader than those under any of the statutes at issue in this case, in that the ERA expressly protects employees from the actions of contractors and subcontractors of a covered employer,<sup>11</sup> whereas the TSCA and CAA do not contain any similar expansion of protection for employees, and should therefore be read in a more restrained fashion.<sup>12</sup> The conclusory nature of the Secretary’s assertion further diminishes its persuasive authority, particularly in that it failed to consider the effect of recent decisions by the Supreme Court of the United States that the common law of agency should control such determinations in the absence of congressionally supplied definitions. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992)(citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). Even if the Secretary’s dicta was accepted as controlling in this matter, it could be relied upon in support of a conclusion that Priority is a proper complainant under the circumstances, but Complainant has not provided any legal authority as to how Priority’s potential cause of action would also devolve to him as an employee of a subcontractor, or, perhaps more significantly, why the proper respondent for his complaint is not Priority or Tactical.

---

<sup>11</sup> 42 U.S.C. § 5851(a)(2)(C)-(E).

<sup>12</sup> The argument being that Congress knows how to extend the reach of employee protection provisions of environmental statutes such as the ERA to contractors and subcontractors, and its failure to do so in the TSCA and CAA has interpretive significance as to the reach of the latter statutes. To use the Secretary’s language, TSCA and CAA are not “analogous” to the ERA as to the scope of covered employers.

31. Weighing the totality of the relevant factors, I conclude that Complainant was not an employee—as that term is used in either the TSCA or CAA—of either Respondent at any time relevant to this action.

#### *Employment Status under the SWDA*

32. The Solid Waste Disposal Act (SWDA) prohibits any person from engaging in certain types of unlawful discrimination against an employee. 42 U.S.C. § 6971(a). As was the case with the TSCA and CAA, the SWDA does not define the term employee, necessitating recourse to the same common law analysis noted above, and leading to the same conclusion of law: Complainant was not an employee—as that term is used in the SWDA—of either Respondent at any time relevant to this action. But a unique aspect of the SWDA requires further conclusions of law to fully resolve this matter.

33. While the TSCA and CAA prohibit an “employer” from unlawfully discriminating against an employee, the SWDA prohibits “any *person*” from doing so, as noted above. See *id* (emphasis added). Under the SWDA, “[t]he term ‘person’ means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States.” *Id.* § 6903(15). Although not asserted by Complainant, it would appear that both Respondents would qualify as “persons” under the SWDA, and as such may be subject to the statute’s anti-retaliation provisions in a broader sense than allowed under the TSCA and CAA. But after closer examination of the SWDA anti-retaliation provisions, this is not the conclusion that I reach.

34. The SWDA anti-retaliation provisions clearly anticipate application in an employment setting, notwithstanding the use of the broader term “person” rather than “employer.” The plain text of the statute provides that “[n]o person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees” for engaging in protected activities. 42 U.S.C. § 6971(a). The use of the term “employee” implies employment by the “person,” and firing and discriminating are actions an employer takes against an employee, not an employee of a legally distinct “person.”

35. That being noted, the SWDA does purport to prohibit a “person” from *causing* an “employee” to be fired or discriminated against because of activity protected by the SWDA. See *id*. This would seem to extend the protective reach of SWDA to an

employee whose termination or adverse personnel action was caused by a “person” other than the employee’s actual employer because of protected activity. But the statutory use of the term “employee,” without further elaboration or limitation, implies the existence of an employment relationship with the “person” affecting the employee’s work. If Congress had intended to extend the reach of the SWDA to individuals other than those employed by the “person” causing the action, it would have used a term other than “employee” to describe the protected individual.

36. A conclusion that “person” under the SWDA is synonymous with “employer” as used in the TSCA and CAA is also supported by the interpretation of the Secretary evidenced in the implementing regulations for the SWDA at 29 C.F.R. § 24.102, where “employer” is used instead of “person” in describing the activities prohibited by the statute.

37. In the absence of evidence or argument to the contrary, I conclude that the use of the term “person” in the SWDA is functionally equivalent to the use of the term “employer” in the TSCA and CAA. Accordingly, I reiterate my conclusion that Complainant was not an “employee”—as that term is used in the SWDA—of either Respondent at any time relevant to this action.

#### *Summary Decision*

38. I “shall grant summary decision if there is no genuine dispute as to any material fact and the prevailing party is entitled to decision as a matter of law.” 29 C.F.R. § 18.72(a).

39. To avoid summary decision in light of the Order to Show Cause, Complainant must have pointed to some evidence that he was an employee of Respondents. But in light of the evidence tendered by Complainant and the facts found above, and construing all facts and reasonable inferences in Complainant’s favor, there is no evidence that Complainant was an employee of either Respondent, an element on which Complainant would bear the burden of proof at trial. 29 C.F.R. § 24.109(b)(2).

40. When “a party . . . fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial . . . there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the [Complainant’s] case necessarily renders all other facts immaterial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In such a circumstance, the opposing party is entitled to judgment as a matter of law due to this failure of proof. *Id.* at 323.

41. Accordingly, I conclude that there is no genuine dispute as to the material fact as to whether Complainant was an employee of Respondents at any relevant time, and as such, Respondents are entitled to a decision in their favor as a matter of law.

Order

42. The Complaint is hereby **DENIED**.

**SO ORDERED.**

**WILLIAM T. BARTO**  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this 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](mailto:Boards-EFSR-Help@dol.gov)

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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 a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.