**U.S. Department of Labor**

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

**In the Matter of:**

**STEPHEN PERKINS,**

**COMPLAINANT,**

**v.**

**CAVICCHIO GREENHOUSES, INC.,**

**RESPONDENT.**

**ARB CASE NO. 2022-0018**

**ALJ CASE NO. 2019-ACA-00005**

**DATE: September 30, 2022**

**Appearances:**

***For the Complainant:***
**Corinne Hood Greene, Esq.; *Green & Hafer, LLC*; Charlestown, Massachusetts**

***For the Respondent:***
**Richard S. Loftus, Esq., and Kathleen A. Berney, Esq.; *Hirsch Roberts Weinstein LLP*; Boston, Massachusetts**

**Before HARTHILL, Chief Administrative Appeals Judge, GODEK and PUST, Administrative Appeals Judges**

## ORDER OF REMAND

GODEK, Administrative Appeals Judge:

This case arises under the employee protection provisions of the Patient Protection and Affordable Care Act (ACA).[1] Stephen Perkins (Perkins) filed a complaint against Cavicchio Greenhouses, Inc., (Cavicchio Greenhouses) alleging Cavicchio Greenhouses terminated his employment because he engaged in conduct protected under the ACA. On December 8, 2021, a Department of Labor Administrative Law Judge (ALJ) issued an Order Granting Respondent's Motion for Summary Decision and Dismissing Claim (Order Granting Summary Decision).[2] Perkins appealed to the Administrative Review Board (ARB or Board). After thoroughly examining the parties' arguments and the record, the Board remands the Order Granting Summary Decision to the ALJ for further consideration consistent with this Order of Remand.

## BACKGROUND[3]

Cavicchio Greenhouses is a comprehensive horticultural grower and distributor that employs seasonal, year-round, and temporary employees.[4] Cavicchio Greenhouses' employee handbook defines temporary employees as "[e]mployees whose assignment has a designated start and finish date. They are not eligible for benefits other than earned sick time."[5] Cavicchio Greenhouses' employee handbook also informs its employees that it offers medical insurance with individual or family coverage depending on the employee's status. Specifically, the employee handbook states:

> Year-round employees are eligible to participate effective their first day as an active Cavicchio employee as long as they work a minimum of 30 hours per week. Seasonal employees are eligible on their 90th day of employment as long as they work a minimum of 30 hours per work week during their season. The premium is shared by the employee and the employer. Employee paid premiums may be deducted from gross wages prior to taxes being withheld if the employee chooses. This plan is COBRA eligible.[6]

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1 29 U.S.C. §218c, as implemented by 29 C.F.R. Part 1984 (2021).

2 *Perkins v. Cavicchio Greenhouses, Inc.*, ALJ No. 2019-ACA-00005 (ALJ Dec. 8, 2021).

3 These facts are taken from the transcript and the parties' pleadings before the ALJ and on appeal to the Board. In reciting this background, the Board does not make any findings of fact.

4 Respondent Cavicchio Greenhouses, Inc.'s Motion for Summary Decision and Incorporated Memorandum of Law's (Motion for Summary Decision), Exhibit (Ex.) 1 at 2-3, 5.

5 Motion for Summary Decision, Ex. 1 at 5.

6 *Id*.

Cavicchio Greenhouses offered Perkins a four-to-twelve-week position with the company to develop and refine records and to improve its accounting systems and records.[7] Perkins accepted Cavicchio Greenhouses' offer and began his employment on or around December 26, 2016.[8] At this time, Perkins signed documents that indicated he was a temporary employee and not eligible for benefits.[9]

In or around February 2017, a Cavicchio Greenhouses accounts payable specialist resigned.[10] According to Perkins, Bob Rosenberg, Cavicchio Greenhouses' business manager, subsequently offered him a permanent position as the accounts payable specialist, which he accepted.[11]

Sometime in March 2017, Perkins met with Rosenberg and stated, "Bob, none of my benefits for the permanent position has been [sic] started." Rosenberg replied, "they were working on it."[12] Similarly, in April 2017, Perkins informed Rosenberg that he was still waiting for benefits. Rosenberg replied that he was looking into it and would talk to "Paul Cavicchio in Human Resources."[13]

In early June 2017, Perkins was injured outside of work.[14] When Perkins arrived at work on June 10, 2017, his supervisor observed he was injured and in pain and told Perkins to leave the office and seek medical attention.[15]

On June 19, 2017, Rosenberg e-mailed Cavicchio Greenhouses' payroll department that Perkins was no longer working "in his capacity as a Temporary Employee" as of June 12, 2017, and that Cavicchio Greenhouses had filled Perkins' position with a "permanent employee."[16] Rosenberg did not identify the new employee in his email. Perkins alleged that he was not notified of the termination of

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7 Complainant's Memorandum in Opposition to Respondent's Motion for Summary Decision (Comp. Opp.) at 2.

8 Comp. Opp. at 2.

9 *Id*. at 2; Motion for Summary Decision Ex. 5 at 1-2.

10 Comp. Opp. at 2.

11 *Id*.

12 *Id*. at 3; Motion for Summary Decision Ex. 3, Perkins Deposition (Dep.) 65:14-16.

13 Comp. Opp. at 3; *see also* Motion for Summary Decision Ex. 3, Perkins Dep. 68:19-24.

14 Comp. Opp. at 3.

15 *Id*.

16 Motion for Summary Decision Ex. 31.

his employment and that he e-mailed Rosenberg on June 22, 2017. The email stated, "can you please give me a response in regards to obtaining healthcare coverage through Cavicchio's insurance?"[17] Rosenberg e-mailed Paul Cavicchio concerning Perkins' health insurance inquiry e-mail.[18] On June 23, 2017, Rosenberg called Perkins and told Perkins that he was not eligible for health insurance as a temporary employee and that Cavicchio Greenhouses would not "bring him back . . . after he recovers from his injury."[19]

On October 1, 2017, Perkins filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employment had been terminated in retaliation for protected conduct under the ACA.[20] On August 27, 2019, OSHA, acting on behalf of the Secretary of Labor, issued findings which concluded that Perkins' allegations did not make a prima facie showing of retaliation under the ACA.[21] Perkins objected to OSHA's findings and requested a hearing before an ALJ.[22] Prior to the hearing, Cavicchio Greenhouses moved for summary decision, arguing that Perkins' conduct was not protected under the ACA. On December 8, 2021, the ALJ issued the Order Granting Summary Decision. On December 22, 2021, Perkins petitioned the Board for review of the ALJ's Order Granting Summary Decision.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under the ACA.[23] The ARB reviews an ALJ's grant of summary decision de novo under the same standard the ALJ applies.[24] Summary decision should be entered where "there is no genuine dispute as to any material fact and

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17 *Id*. Ex. 35.

18 *Id*. Ex. 32.

19 *Id*.

20 Brief for Respondent-Appellee Cavicchio Greenhouses, Inc. (Resp. Br.) at 2.

21 *Id*. at 2-3.

22 *Id*. at 3.

23 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

24 *Oberg v. Quinault Indian Nation*, ARB No. 2019-0036, ALJ No. 2017-ALJ-00003, slip op. at 3 (ARB Feb. 22, 2021) (citing *Neff v. Keybank Nat'l Assoc.*, ARB No. 2019-0035, ALJ No. 2018-SOX-00013, slip op. at 3 (ARB Feb. 5, 2020)).

the movant is entitled to decision as a matter of law."[25] The ARB views the record on the whole in light most favorable to the non-moving party.[26]

## DISCUSSION

### 1. Applicable Law

The ACA's employee protection provision prohibits an employer from discharging or otherwise discriminating against an employee because the employee has engaged in conduct protected by the statute.[27] To prevail on an ACA claim, an employee must demonstrate that: (1) he engaged in activity that the ACA protects; (2) his employer took adverse action against him; and (3) the protected activity was a contributing factor in the adverse action.[28]

Under the ACA, an employee is protected if he provides information or complains to his employer about, or refuses to participate in, conduct that he reasonably believes violates any provision of Title I of the ACA.[29] To be protected, the employee must show that he actually believed, in good faith, that the conduct which he complained about constituted a violation of pertinent law, and that his belief was objectively reasonable.[30] The employee's belief is objectively reasonable if a reasonable person in the same factual circumstances and with the same training and experience would have believed that the conduct about which he complained constituted a violation of the pertinent law.[31]

### 2. The Parties' Pleadings, the Proceedings Before the ALJ, and the Parties' Arguments Before the Board on Appeal

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[25] 29 C.F.R. § 18.72(a).

[26] *Oberg*, ARB No. 2019-0036, slip op. at 4 (citing *Neff*, ARB No. 2019-0035, slip op. at 3).

[27] 29 U.S.C. § 218c(a).

[28] 29 C.F.R. § 1984.109(a).

[29] 29 U.S.C. § 218c(a)(2), (5); 29 C.F.R. § 1984.102(b)(2), (5).

[30] *Oberg*, ARB No. 2019-0036, slip op. at 4 & n.16 (drawing from principles and precedent from analogous statutes, including the Sarbanes-Oxley Act, 18 U.S.C. § 1514A); *see also* Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 81 Fed. Reg. 70,607, 70,611-15 (Oct. 13, 2016) (Final Rule) (referring to standards and precedent under "analogous" provisions in the Sarbanes-Oxley Act); *id.* at 70,611-12 (explaining that a complainant must have both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates one of the enumerated categories of law).

[31] *Oberg*, ARB No. 2019-0036, slip op. at 4-5 (citing *Wong v. Sumitomo Mitsui Banking Corp.*, ARB No. 2018-0073, ALJ No. 2016-SOX-00005, slip op. at 4 (ARB Oct. 26, 2020)).

Before the ALJ, Cavicchio Greenhouses filed a Motion for Summary Decision on the grounds that there was no genuine dispute as to any material fact that Perkins did not engage in protected activity under the ACA.[32] Specifically, Cavicchio Greenhouses claimed that Perkins' alleged activity was asking for coverage under Cavicchio Greenhouses' health insurance, and such a vague, generalized communication was insufficient to constitute protected activity under the ACA.[33] Perkins filed a Memorandum in Opposition to Respondent's Motion for Summary Decision alleging that there was sufficient evidence for a fact finder to determine that he engaged in protected activity, that Cavicchio Greenhouses was aware that he engaged in protected activity, and that his protected activity was a contributing factor in his termination.[34] Cavicchio Greenhouses filed a reply reiterating that Perkins did not engage in protected conduct under the ACA.[35] Cavicchio Greenhouses also argued that Perkins failed to establish that its proffered reasons for terminating his employment were pretext to mask unlawful retaliation.[36]

On October 27, 2021, the ALJ held a conference call with the parties to discuss and rule on Cavicchio Greenhouses' Motion for Summary Decision. After reviewing the parties' pleadings and discussing the case with the parties, the ALJ informed the parties that he had concluded that Perkins did not engage in protected conduct (Bench Decision). Following the conference call, the ALJ issued an Order Granting Summary Decision adopting and incorporating the transcript of the October 27, 2021 Bench Decision.[37]

On appeal, Perkins contends the ALJ erred in granting Cavicchio Greenhouses' Motion for Summary Decision because the ALJ's conclusion that he did not engage in protected activity was an improper factual determination at the summary decision stage.[38] Perkins also argues the ALJ erred by not addressing the remaining elements of his claim.[39] In response, Cavicchio Greenhouses argues the

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32 Motion for Summary Decision at 1.

33 *Id*.

34 Comp. Opp. at 3.

35 Cavicchio Greenhouses, Inc.'s Reply to Complainant's Opposition to Respondent's Motion for Summary Decision (Resp. Reply) at 1-2.

36 *Id.* at 3-5.

37 Order Granting Summary Decision at 1-3; *see also* Bench Decision Transcript (Tr.) at 13-14.

38 Appeal of Complainant, Stephen Perkins, to Summary Decision Dismissal (Comp. Br.) at 2-7.

39 Comp. Br. at 7-9.

ALJ did not err in granting summary decision because: (1) Perkins' "purported 'complaints'" are not protected activity under the ACA;[40] (2) Perkins lacked a "reasonable belief" that his statements concerned a violation of the ACA;[41] (3) Perkins misapprehends the evidence and the ALJ's holding;[42] and (4) Perkins failed to provide any evidence to establish that his termination was unlawful retaliation.[43]

**3. The ACA, Title I, and the Employer Shared Responsibility Provisions**

This is a case of first impression for the Board. The ACA was enacted to reform the healthcare industry by reducing health care costs and providing affordable health insurance to Americans.[44] Title I includes several health insurance and healthcare coverage reforms. These reforms include, but are not limited to, prohibiting lifetime and annual dollar limits on essential health benefits, prohibiting pre-existing condition exclusions, providing for the creation of health benefit exchanges, imposing insurance coverage requirements for individuals, providing tax-credits for insurance premiums, and setting health insurance requirements for employers, also known as the "employer shared responsibility provisions."[45]

Title I's employer shared responsibility provisions require certain employers, called applicable large employers or "ALEs,"[46] to: (1) provide affordable coverage;[47] (2) provide plans with "minimum essential coverage;"[48] (3) pay penalties for not providing affordable, "minimum essential" coverage;[49] (4) not impose enrollment waiting periods that exceed ninety-days;[50] and (5) file annual reports that ensure

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40 Resp. Br. at 8-10, 24-26.

41 *Id*. at 15-21.

42 *Id*. at 28.

43 *Id*. at 29-35.

44 *See* 156 Cong. Rec. E618-04 (daily ed. Apr. 22, 2010) (statement of Rep. Jerry McNerney); 156 Cong. Rec. H1854-02 (daily ed. Mar. 21, 2010) (statement of Rep. Jackson Lee); 155 Cong. Rec. S11907-02 (daily ed. Nov. 21, 2009) (statement of Sen. Max Baucus).

45 Title I of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); *see also* Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 81 Fed. Reg. at 70,608.

46 26 U.S.C. § 4980H(c)(2)(A); 26 C.F.R. § 54.4980H-2.

47 26 U.S.C. § 36B(c)(2)(C)(i); *see also* 26 U.S.C. § 4980H(a).

48 *Id.* § 4980H(a); 26 U.S.C. § 36B(c)(2)(C)(ii).

49 26 C.F.R. § 54.4980H-4, 54.4980H-5.

50 29 C.F.R. § 2590.715-2708.

compliance with the employer shared responsibility provisions.[51] Perkins argues on appeal that his March and April 2017 conversations with Rosenberg, and his June 22, 2017 e-mail to Rosenberg are protected under 29 U.S.C. § 218c(a)(2) and (5) because they directly implicate the employer shared responsibility provisions.[52] Viewing the record on the whole in the light most favorable to Perkins, it appears that Perkins made three complaints to Rosenberg. However, the current record is not sufficiently clear to allow the Board to ascertain whether Perkins' complaints implicated a requirement set forth by the employer shared responsibility provisions.

This uncertainty is particularly highlighted by the parties' disagreement about Perkins' employment status as to whether Perkins was a "permanent employee" or a "temporary employee." In the October 27 conference call, the ALJ used equivocal language to describe Perkins' employment status[53] and yet still reached the conclusion that Perkins did not engage in protected activity.[54] We conclude the ALJ erred in not recognizing Perkins' employment status is a genuine issue of a material fact that must be fully evaluated and determined in light of Perkins' alleged protected activity. The employer shared responsibility provisions set forth responsibilities and consequences for employers based on the number of full-time employees or full-time equivalent employees that it employs.[55] Although Cavicchio Greenhouses' employment handbook provides for its own definitions as to "year-round," "seasonal," and "temporary" employees, the Department of Treasury's Internal Revenue Service (IRS) sets forth specific guidance to identify full-time employees under the ACA for purposes of the employer shared responsibility provisions.[56] Moreover, a designated "temporary employee" under Cavicchio Greenhouses' employment handbook may actually be considered a "full-time employee" under the ACA's employer shared responsibility provisions. Thus, Perkins' employment status under the ACA, when combined with his communications to Rosenberg, could affect whether he reasonably believed that

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51 26 U.S.C. § 6056; 26 C.F.R. § 301.6056-1.

52 Comp. Br. at 3 n.1, 5 n.4.

53 The ALJ stated, "[Perkins] talks about a conversation he might have had with Mr. Rosenberg . . . that there was some allegation or some promise of a more permanent job. Either way, even if I accept those facts as true, it never came to fruition . . . there's all kinds of things that occur when you're a permanent employee, and none of that happened with Mr. Perkins." Tr. at 7.

54 Tr. at 13-14.

55 26 U.S.C. § 4980H.

56 In general, for purposes of the employer shared responsibility provisions, a full-time employee is, for a calendar month, an employee employed on average at least 30 hours of service per week, or 130 hours of service per month. *Id.* § 4980H(c)(4); 26 C.F.R. § 54.4980H-1(21).

Cavicchio Greenhouses' conduct violated one of the requirements set forth in the employer shared responsibility provisions.

Another deficiency with the current record is the parties' pleadings before the ALJ and the Board only briefly discussed the employer shared responsibility provisions, likely due to the stage of the proceedings—one party moving for summary decision and another party responding to that motion. For example, Perkins only mentions in a footnote before the Board that his complaints directly implicate Title I because "[t]he failure to provide insurance directly implicate the 'shared responsibility' provisions . . . of the ACA, which generally require employers of Cav's size to offer compliant insurance to full-time employees or pay a fine."[57] Other than this conclusory statement, the record is not complete enough to determine the extent of Perkins' communications with Cavicchio Greenhouses, how these communications implicated the employer shared responsibility provisions, and Perkins' subjective and objective beliefs at the time these communications were made. The Board concludes that the parties should have an opportunity to fully develop their arguments on these matters through an evidentiary hearing and then, if necessary, address them in subsequent briefing on remand.

As illustrated above, Title I's employer shared responsibility provisions are complicated and extensive. The combination of these Title I provisions with the broad language of the ACA's employee protection provisions suggests that Congress sought to provide employees with actionable retaliation claims arising from ***a wide range of complaints*** about acts they ***subjectively*** and ***reasonably believe*** violated the ACA.[58] For these reasons, the Board concludes the evidentiary record does not provide an adequate basis on which to render a determination regarding the issues on appeal.

In sum, the ALJ must determine: (1) whether Cavicchio Greenhouses was an ALE and subject to the ACA; and (2) whether Perkins was a full-time employee under the ACA. Upon making such determinations, the ALJ should then reassess whether Perkins engaged in ACA protected activity and if necessary, address the other elements of Perkins' ACA claim. Addressing the Board's concerns on remand,

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[57] Comp. Br. at 5 n.4.

[58] The ACA whistleblower protection provision protects employees who provided to their employer "information relating to any violation of, or any act or omission the employee ***reasonably believes to be a violation*** of, any provision of this title;" or "objected to, or refused to participate in, any activity, policy, practice, or assigned task, that the employee . . . ***reasonably believed to be in violation*** of any provision of this title." 29 U.S.C. § 218c(a)(2), (5) (emphasis added). Thus, it appears that an employee is essentially protected from retaliation for any type of complaint relating to conduct the employee reasonably believes violates Title I of the ACA, even if that conduct does not actually violate the ACA.

the ALJ should issue a written decision,[59] based on a full hearing, the parties' arguments, and any supplementary evidence the ALJ may wish to consider.

[59] We note that the ALJ's Order Granting Summary Decision is only a single page in length that refers only to a written transcript of the conference call on October 27, 2017, that "is adopted and incorporated herein by reference as [his] my written findings of fact and conclusions of law." It does not provide a robust legal analysis or explanation of why factual determinations were appropriate at the summary decision stage. As Perkins argues in his brief before the Board, the ALJ improperly weighed evidence and made credibility determinations concerning facts alleged. Comp. Br. at 4-7. For example, in the transcript that the ALJ incorporated into his Order Granting Summary Decision, the ALJ stated, "[i]t's just hearsay – I think it's hearsay, quite honestly . . . so there might be some sort of evidence to overcome hearsay rules on that conversation that [Rosenberg] had with Mr. Perkins or allegedly had . . ." Tr. at 13. Similarly, the ALJ also stated, "you question why he would want to pursue any health insurance alternative with the employer when he's already got a plan in place." Tr. at 8. These statements suggest that the ALJ improperly weighed and discredited evidence while reaching his conclusion, which was not appropriate at the summary decision stage. Instead, the ALJ should have viewed the record on the whole in the light most favorable to Perkins, which includes crediting Perkins' version of the March and April 2017 conversations with Rosenberg. While the Board respects an ALJ's authority to effectively manage its docket to achieve orderly and expeditious dispositions of cases, ALJs should cautiously proceed in issuing decisions and orders that incorporate transcripts as a common practice; incorporating a transcript may expedite matters, but when the transcript contains little analysis and no citations, it leaves the parties and the Board scrambling to divine by guesswork the decision's reasoning and outcome.

## CONCLUSION

For the foregoing reasons, the ALJ's Order Granting Summary Decision is **VACATED**, and the case is **REMANDED** to the ALJ for further proceedings consistent with this opinion.

**SO ORDERED**.

[redacted]
**STEPHEN M. GODEK**
**Administrative Appeals Judge**

[redacted]
**SUSAN HARTHILL**
**Chief Administrative Appeals Judge**

[redacted]
**TAMMY L. PUST**
**Administrative Appeals Judge**