

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



In the Matter of:

KEONA MYERS,

ARB CASE NO. 10-144

and

ALJ CASE NOS. 2010-STA-007
2010-STA-008

RUSSELL BAXTER,

DATE:

AUG - 3 2012

COMPLAINANTS,

v.

AMS/BRECKENRIDGE/EQUITY
GROUP LEASING 1,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:

Paul O. Taylor, Esq.; *Truckers Justice Center*; Burnsville, Minnesota

For the Respondent:

Steve Dennis; Esq.; *Reid & Daniels, P.C.*; Dallas, Texas

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*. Judge Brown has filed a concurring opinion.

2012 AUG 6 AM 10 49
US DEPT OF LABOR
ADMIN LAW JUDGES
WASHINGTON, DC

FINAL DECISION AND ORDER

These consolidated cases arise under the employee protection provision of the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2011) (STAA), and its implementing regulations at 29 C.F.R. Part 1978 (July 27, 2012). Complainants Keona Myers (Myers) and Russell Baxter (Baxter) filed complaints alleging that AMS/Breckenridge/Equity

Group Leasing 1 (AMS) retaliated against them in violation of the STAA. The Occupational Safety and Health Administration (OSHA) dismissed the Complainants' claims. On September 10, 2010, after a hearing, the presiding ALJ issued an Initial Decision and Order Awarding Benefits (D. & O.),¹ finding for the Complainants and against AMS (the payroll company). The ALJ found that AMS was vicariously liable as a "joint employer" because it had the "ability to control" the Complainants' work even though it did not "actually" exercise that control. We reverse.

INTRODUCTION

Stated simply, AMS appeals the ALJ's finding that it was liable under STAA for whistleblower discrimination as a joint employer with New Rising Fenix, Inc. (NRF). More specifically, AMS argues that joint employer liability can only occur if AMS knowingly participated in discrimination and not solely based on a contractual ability to control the Complainants' employment. AMS does not dispute that the Complainants engaged in protected activity and that such protected activity contributed to NRF's decision to terminate their employment.

Based on the specific facts of this case, we reverse the finding of liability on a narrow basis. The STAA whistleblower provisions do not provide for joint employer liability *solely* on the basis of a contractual "ability" to affect employment and where the ALJ found that: (1) AMS did not control NRF's trucking operations; (2) AMS committed no act that violated the STAA whistleblower provisions; (3) AMS did not exercise its contractually reserved authority to control the Complainants' work; (4) AMS did not participate in NRF's decision to fire the Complainants; and (5) AMS did not know of the Complainants' protected activity. In addition, the ALJ also implicitly rejected that AMS and NRF were an integrated enterprise. Therefore, AMS was not a "person" that unlawfully discharged, disciplined or otherwise discriminated against the Complainants.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978.² The ARB "shall issue a final decision and order based on the record and the decision and order of the

¹ On September 1, 2010, the ALJ had issued a "Recommended Decision and Order Awarding Benefits." However, the day before, on August 31, 2010, the Department of Labor's new interim final rules had become effective, changing the appellate procedures applicable to STAA claims. Under the amended rules, administrative law judges no longer issued "Recommended" decisions. Consequently, the ALJ amended his order from "Recommended" to "Initial Decision." The interim final rules became final on July 27, 2012. 77 FR 44121-01, 2012 WL 3041790 (F.R.).

² Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.109(a).

administrative law judge.”³ We are bound by the ALJ’s factual findings if those findings are supported by substantial evidence on the record considered as a whole.⁴ The ARB reviews the ALJ’s conclusions of law de novo.⁵

BACKGROUND

The Complainants operated as a team that drove trucks for NRF. AMS was a payroll company for NRF and leased employee services to NRF, but not in the Complainants’ case. D. & O. 23. The Complainants obtained their jobs through the internet by applying directly with NRF. D. & O. 7, 12. NRF ran the day-to-day operations and controlled the Complainants’ assignments.

AMS and NRF executed a Staffing Lease Agreement (the “Agreement”). Cl. Ex. 2: Resp. Ex. 3. It unequivocally provided that NRF had ultimate decision-making authority over the trucking operations and staff. Specifically, the Agreement provided:

[NRF] shall make any and all strategic, operational and other business-related decisions regarding its business. Such decisions and related outcomes shall exclusively be the responsibility of [NRF] and [AMS] shall bear no responsibility or liability for any actions or inactions by [NRF] or by any leased employee. Additionally, [NRF] shall have sole and exclusive control over the day-to-day job duties of leased employees and over the job site at which, or from which, leased employees perform their services is solely and exclusively assigned to [NRF].

Agreement, p. 3, para. 12. The Agreement also provides that:

[NRF] also assumes all liability for wrongful termination/employment practices, compliance with the FMLA and Fair Labor Standards Act, and proper reporting of all hours worked.

Agreement, p. 1, p. 4(a). The Agreement obligated AMS to “furnish selected staffing to [NRF] for [NRF]’s regular business operations, and to process the payroll for the staffing provided. Paragraph 12 proved to be a critical paragraph in this case and provides as follows in relevant parts, that AMS:

³ *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted).

⁴ 29 C.F.R. § 1978.110(b).

⁵ *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

(a) Reserves a right of direction and control over leased employees assigned to [NRF]'s location, but not to the extent of prescribing how the work shall be performed. [NRF] retains sufficient direction and control over the leased employees as is necessary to conduct [NRF]'s business and without which [NRF] would be unable to conduct its business, discharge any fiduciary responsibility that it may have, or comply with any applicable licensure, regulatory, or statutory requirements of [NRF];

* * *

(d) Retains authority to hire, terminate, discipline, and reassign the leased employees. However, [NRF] has the right to accept or cancel the assignment of any leased employee.

Also, under paragraph 12, AMS assumed responsibility for paying wages and payroll taxes, collecting taxes, as well as retaining direction of worker's compensation claims, safety, risk, and hazard concerns for its leased employees at the worksite. See Agreement, paragraph 12(b), (c) and (e). As noted above, despite the reservation of rights granted to AMS, paragraph 12 ended by making it clear that NRF had the ultimate and exclusive control over all strategic, operational, and other business-related decisions, and control of day-to-day job duties of the leased employees. Despite a contractual right to exert some control, AMS "did not actually inject itself into the day-to-day business operations of" NRF. Nor did AMS exercise any control over the trucking staff. D. & O. at 26-28.⁶

On November 13, 2008, NRF dispatched the Complainants to pick up a load in Salinas, California. D. & O. 32; Hearing Transcript (Tr.) at 86. Their assigned truck began

⁶ While the ALJ did not expressly state that AMS exercised no control over the staff, we have no doubt that he implicitly made this finding. We base our inference on numerous factors. First, in his analysis, the ALJ recognized the central issue as AMS's lack of actual control over the staff. D. & O. at 26. Second, the ALJ exclusively focused on AMS's "ability to control" the staff because of the Staff Leasing Agreement, not actual control. D. & O. at 27. Most importantly, we find the ALJ's following statement most telling:

while actually exercising those reserved rights would have been stronger proof of their existence, I find that the uncontroverted Staff Leasing Agreement is nonetheless persuasive evidence that [AMS] maintained the degree of control it carved out for itself in the contract.

D. & O. at 28. Finally, in his analysis of "Discriminatory Discharge/Causation," the ALJ never pointed to anything that AMS did and focused entirely on NRF's actions through its Chief Executive Officer, Daniels. D. & O. 31-33. From these findings, it is reasonable to infer that the ALJ found that AMS could only be liable vicariously through NRF's actions. See *Zink v. U.S.*, 929 F.2d 1015, 1020-1021 (5th Cir. 1991)(an appellate body may draw reasonable inferences by reviewing a trial or hearing court's findings of fact).

malfunctioning that day, including problems with the battery, transmission, and the brakes. D. & O. at 29; Tr. at 86. Myers and Baxter complained to numerous employees at dispatch, who might have been AMS leased employees, and to Randy Ragsdale (the NRF shop supervisor) that the truck was unsafe and experiencing severe problems. D. & O. at 29-30. They ultimately contacted the Arizona Department of Public Safety, who inspected the truck and agreed that it was unsafe to drive. D. & O. at 31; Tr. at 115; Exhibit (Ex.) 18. The truck was serviced in Arizona, and NRF's dispatch ordered the team to return to the NRF yard. D. & O. at 33; Tr. at 122-23. After arriving at the NRF yard on November 22, 2008, Myers and Baxter spoke with Daniel, NRF's Chief Executive Officer, who then fired them. D. & O. 31, 33.

On April 13, 2009, the Complainants filed an amended OSHA complaint (adding and pursuing AMS rather than NRF) pursuant to the STAA's whistleblower provisions, 49 U.S.C.A. § 31105. D. & O. at 2. OSHA rejected the claim because AMS was not a covered "person" (not a commercial motor vehicle carrier as the STAA defines that term). The Complainants requested a hearing, which the ALJ held on April 14, 2010. After a hearing on the merits, the ALJ found that AMS was a joint employer with the Complainants' employer, NRF, and thus vicariously liable for NRF's actions. D. & O. at 28. In addition, the ALJ found that the Complainants were discharged as a result of their protected activity under the Act and awarded back pay with interest and damages for emotional distress. *Id.* at 31, 36. We reverse the ALJ's finding of joint liability.

DISCUSSION

Pursuant to the STAA, "[a] person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because" such employee engaged in protected activity as defined by the STAA. 49 U.S.C.A. § 31105(a). To prevail in a STAA whistleblower claim, a complainant must prove that (1) he or she engaged in protected activity, (2) a "person" discharged, disciplined or discriminated against him or her with respect to pay, terms, or privileges of employment, and that (3) there was a causal connection between the protected activity and such person's adverse employment action.⁷ After 1994 statutory amendments, STAA no longer defined the term "person."⁸ The STAA now relies

⁷ *Minne v. Star Air, Inc.*, ARB Nos. 09-066, 09-082; ALJ No. 2004-STA-026 (ARB Dec. 19, 2011). *Cf. Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir.1987) (citing essentially the same three elements but focusing on the "employer's" adverse action).

⁸ In 1994, Congress deleted 49 U.S.C.A. § 2301(4), which provided that "person means one or more individuals, partnerships, associations, corporations, business trusts, or any other organized group of individuals." Pursuant to the legislative history, Congress eliminated the definition in STAA "as unnecessary because of 1:1 [1 U.S.C. § 1]." H.R. Rep. 103-180, H.R. Rep. No. 180, p. 189 103rd Cong., 1st Sess. 1993. Congress' purpose in passing the 1994 legislation was "to restate in comprehensive form, without substantive change, certain general and permanent laws relating to transportation . . . and to make other technical improvement in [Title 49 of the United States] Code." H.R. Rep. No. 180, 103rd Cong., 2d Sess. 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818.

on the definition of person in 1 U.S.C.A. § 1 (often called the Dictionary Act⁹), which provides that the term “person” includes “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” 1 U.S.C.A. § 1. The definition of “person” in the STAA implementing regulations essentially parallels this general statutory definition except to amplify that “one or more” individuals, business entities or “any group of individuals” can also constitute a person.¹⁰ AMS challenges the ALJ’s finding that its status as a “joint employer” was sufficient to find that AMS was a “person” that unlawfully discriminated against the Complainants within the meaning of the STAA whistleblower provisions.

1. The ALJ’s Ruling

With respect to AMS’s conduct as a corporation, the ALJ found that AMS did not directly violate the whistleblower provisions. D. & O. at 23, 28.¹¹ The ALJ found that NRF controlled the trucking operations. The ALJ found that AMS provided NRF with payroll and tax withholding services for its leased employees, who NRF recruited, hired, managed, and terminated. D. & O. at 23. The ALJ also found that while the Respondent offered a package of services to NRF that included the provision and administration of various benefit plans, including disability insurance, NRF did not take advantage of these services, but provided them to its employees independently. *Id.* The ALJ found that AMS neither hired the Complainants nor participated in the termination of the Complainants’ employment. The Complainants’ protected activity was a source of tension and outright anger from NRF dispatch, who then communicated with Charles Daniel, the CEO of NRF. D. & O. at 31. Daniel terminated the Complainants’ employment. AMS learned of the termination after the fact through NRF’s administrative request to remove the Complainants from the payroll. D. & O. at 23, 31. There is no evidence that Daniel consulted with AMS prior to the discharge, notified AMS of the alleged offenses that predicated the discharge, or that AMS investigated the circumstances behind the discharge. The Complainants do not argue to the contrary.

Next, relying on ARB precedent, the ALJ set out to determine if AMS could be vicariously liable as a “joint employer.” The ALJ explained that the “crucial factor in finding an employer-employee relationship is whether [AMS] acted in the capacity of an employer – that is, exercised control over or interfered with the terms, conditions, or privileges of the complainant’s employment.” D. & O. at 26.¹² He reasoned that control includes the ability to hire, transfer,

⁹ See *U.S. ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 492 (5th Cir. 2001).

¹⁰ The current relevant regulation defines “person” as “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any other organized group of individuals.” 29 C.F.R. § 1978.101(k)(July 27, 2012). This definition retains verbatim the definition formerly contained in STAA before the 1994 amendments. We appreciate that the words “organized” was not in the interim regulations in 2010; it was added in the final rules. We find this change inconsequential and simply reflects the original intent of the definition.

¹¹ See footnote 6.

¹² For support, the ALJ cited to *Lewis v. Synagro Techs, Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-012, 14; slip op. at 8 n.14, 9-10 (ARB Feb. 27, 2004) (environmental whistleblower acts) and

promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant. Relying solely on the contract provisions reserving AMS's right to direct and control employees, the ALJ found that AMS had sufficient "ability to control" the Complainants' employment and, therefore, was vicariously liable as a joint employer. The ALJ rejected the Respondent's contention that the contract language was merely language required by Florida law and therefore insufficient by itself to create joint employer liability. The ALJ rejected the Respondent's contention that actual control was necessary to create joint employer liability. Understandably, the ALJ concluded that "knowing participation" was not needed for joint employer liability based on the ARB's analysis in *Palmer v. Western Truck Manpower*¹³ and *Cook v. Guardian Lubricants, Inc.*¹⁴

On appeal, AMS argues that it is not a joint employer nor can it be liable without knowing participation. AMS argues having the "ability to control" the Complainants' employment was insufficient to find vicarious liability. Respondent's Initial Brief, p. 24. To the contrary, the Complainants argue that the holdings in *Palmer* and *Cook* permit a finding of joint employer liability. Complainants' Brief, p. 9. They also rely on an assortment of facts to argue that they were "direct employees" of AMS. *Id.* at 22. The Complainants do not argue that AMS violated the STAA, but that AMS was vicariously liable because of NRF's actions. *Id.* Whether AMS is liable as a joint employer under STAA must be determined within the terms of the STAA statute and its implementing regulations. Therefore, before we review the case authority

"cases cited therein." Despite the fact the Board has also cited *Lewis* in STAA cases, we now heed that oft-cited caution that we should "be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." See *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008). The claims in *Lewis* were based on six environmental whistleblower statutes all governed by the implementing regulations at 29 C.F.R. Part 24 (2004). Unlike the STAA regulations, pursuant to 29 C.F.R. § 24.2(a), the regulations for the environmental whistleblower statutes expressly focus on "employers" (rather than "persons"). Moreover, half of those environmental statutes expressly refer to "employer" while the other half refer to "persons." See 15 U.S.C. § 2622 (employer); 42 U.S.C. §§ 300j-9(i), 7622 (employer). These factors certainly blur the lines between the term "person" and "employer" in the environmental statutes, but the STAA regulations are not intertwined with the environmental statutes. Besides the *Lewis* case, the ALJ also cited five other cases immediately following his cite to the *Lewis* case, which only go so far as to indicate the basic elements of a STAA whistleblower claim. D. & O. at 25-26. The ALJ also cited *Feltner v. Century Trucking, Ltd.*, ARB No. 03-118, ALJ No. 2003-STA-001, slip op. at 5-6 (ARB Oct. 27, 2004), where the Board found without much analysis that the respondent construction company sufficiently influenced Feltner's employment to place that company under STAA's coverage.

¹³ There were three Department decisions in *Palmer v. Western Truck Manpower*, with the following case numbers: 1985-STA-006 (Sec'y Jan. 16, 1987)(*Palmer I*); 1985-STA-016 (Sec'y June 26, 1990)(*Palmer II*); and 1985-STA-016 (Sec'y Mar. 13, 1992)(*Palmer III*). Although *Palmer I* was originally assigned the case number 1985-STA-006, on remand the case was assigned the 1985-STA-016 case number that it retained thereafter.

¹⁴ ARB No. 97-055, ALJ No. 1995-STA-043 (ARB May 1, 1996).

the ALJ cited and his conclusions based on that authority, we must begin with a review of the words of the statute.

2. *The Statute*

In the STAA whistleblower provisions, the word “employer” appears nowhere in the anti-discrimination clause. 49 U.S.C.A. § 31105(a). As we previously indicated, the STAA anti-discrimination clause provides that no “*person*” may discharge or discipline an employee or discriminate against an employee because of the employee’s protected activity. 49 U.S.C.A. § 31105(a). It is fundamental that we must presume that Congress deliberately chose this very general term rather than the narrower term “employer.”¹⁵ The text of the statute certainly evidences a deliberate use of the term “person” rather than “employer.” Almost a dozen times, Congress used the term “person” whenever it referred to the alleged violator of the whistleblower provisions, *never* using the term “employer” for such references.¹⁶ In the same statute, Congress used the term “employer” in only two limited instances, once in defining “employee” and in another instance as a condition precedent for protection under Section 31105(a)(2).¹⁷ The use of “employer” in Section 31105(a)(2) is significant because it evinces Congress’ deliberate intent to use the term “person” differently from the term “employer;” otherwise, Congress would have simply used either the term “person” or “employer” throughout the entire whistleblower statute. Therefore, to the extent that there is “joint employer liability” under STAA, it must be determined under the gloss of the statutory term “person.”

As collectively defined by the STAA statute and regulations, the term “person” incorporates two important concepts relevant to this case. First, “person” expressly includes “one or more” corporations, meaning a single corporation or a combination of corporations. 29 C.F.R. § 1978.101(k).¹⁸ Second, for two or more corporations to constitute a “person,” the

¹⁵ See *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)(citations omitted)(“courts must presume that a legislature says in a statute what it means and means in a statute what it says there”).

¹⁶ We appreciate that the term “person” is also used in the remedy provision, where reinstatement is listed as a remedy. Obviously, only an “employer” can reinstate its employee. However, it makes no sense to ignore the consistent and multiple uses of the term “person” throughout the statute simply because in one instance the term does not translate neatly. We believe the more sensible resolution is to recognize that “reinstatement” is not an available remedy in every case and that compensatory damages may have to suffice.

¹⁷ 49 U.S.C.A. § 31105.

¹⁸ We appreciate that the regulation mirrors the definition eliminated from STAA in the 1994 amendments, but we are obligated to follow our regulations. See 75 Fed. Reg. 3925 (Jan. 15, 2010)(“The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations . . . and shall observe the provisions thereof, where pertinent, in its decisions.”). Moreover, as we previously explained, the legislative history of the 1994 amendments explain that

statute implicitly requires that those corporations be so interrelated that they can be fairly considered a single “person.” This implication is inferred from the plain meaning of the term “person,” which conjures up a single entity. Neither the statute nor the implementing regulations describe the factors necessary to evidence a sufficient relatedness; however, previous STAA whistleblower cases and other employment cases provide the needed guidance.

3. *Factors Establishing Sufficiently Integrated Corporations*

In *Palmer I*, 1985-STA-006, the Secretary set forth a useful test for determining whether two corporations were so interrelated to justify treating them as one entity. The test involved looking at the following four factors: (1) interrelatedness of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *Palmer I*, 1985-STA-006, slip op. at 3. The ALJ in *Palmer I* determined that “interrelatedness of the operations” was the most important factor¹⁹ under STAA and ultimately found that a “joint employer” relationship existed. *Id.* The Secretary affirmed the ALJ’s ruling that a joint employer relationship existed but reversed and remanded on other issues.²⁰ In response to a remand²¹ from the United States Court of Appeals for the Ninth Circuit, the Secretary determined (*Palmer III*) that “knowing participation” was not required for liability as a joint

Congress eliminated the STAA definition as redundant to 1 U.S.C.A. § 1 and no substantive changes were intended. Therefore, we disagree with AMS that the deletion in STAA of the definition of “person” requires a new construction of that term. See Respondent’s Initial Brief, p. 12. Finally, it is well accepted that the use of the term “includes” in definitions, as was done in 1 U.S.C.A. § 1, demonstrates that the list is most likely illustrative and not exclusive. See *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (“including” is not [a term] of all-embracing definition, but connotes simply an illustrative application of the general principle”). Consequently, we find the Department acted well within its discretion to continue relying on the definition contained in 29 C.F.R. § 1978.101(k).

¹⁹ Because we ultimately determine that the ALJ found that none of the factors existed in this case, we need not and do not decide which, if any, factors are more important than the other under STAA. We agree with the courts that say that the test must be applied on a case-by-case basis and that it is not necessary to establish the existence of all four factors. See *Torres-Negron v. Merck & Co., Inc.*, 488 F.3d 34, 43 (1st Cir. 2007).

²⁰ The Secretary reversed the ALJ’s finding that the respondent established its affirmative defense and remanded for calculation of damages. *Palmer I*, 1985-STA-006, slip op. at 9-10. After the ALJ entered a damage award, the respondent again appealed to Secretary. The Secretary affirmed the ALJ’s damage award. *Palmer II*, 1985-STA-016.

²¹ *Palmer II*, 1985-STA-016, was appealed to the Ninth Circuit Court of Appeals, which remanded for reconsideration of two issues: whether “knowing participation” was required for liability as a joint employer and, if so, whether the respondent knowingly participated. *Western Truck Manpower v. U.S. Dept. of Labor*, 943 F.2d 56, 1991 WL 174622, *1 (9th Cir. 1991)(unpublished opinion).

employer.²² Although the Secretary expressly focused on the issue of “joint employer” in *Palmer I* and *Palmer III*, the four-factor test used in *Palmer I* is the test used to determine the issue of “integrated enterprise” (or “single employer”).²³ Under the integrated enterprise test, the question is whether “two nominally independent entities are so interrelated that they actually constitute a single integrated enterprise.”²⁴ Consequently, under the integrated enterprise, we agree that a corporate entity may be liable without knowing participation because the act of one corporate entity is necessarily the act of both.²⁵ In this case, no party is suggesting that AMS and NRF were an integrated enterprise, nor did the ALJ make such a finding. Rather, the parties focus solely on the question of joint employer liability.

In addition to the integrated enterprise concept, we also find that “joint employer” fits under the definition of “person” in STAA when the test is properly viewed. To explain how the joint employer test differs from the integrated enterprise concept, we adopt the Tenth Circuit Court of Appeals’ explanation:

Although these two tests are sometimes confused, they differ in that the single-employer [“integrated enterprise”] test asks whether two nominally separate entities should in fact be treated as an integrated enterprise, while the joint-employer test assumes that the alleged employers are separate entities. *See Clinton’s Ditch Coop. Co. v. NLRB*, 778 F.2d 132, 137-38 (2d Cir. 1985) (explaining the difference between the two tests); *see also Rivas*, 929 F.2d at 820 n.16 (same).

Courts applying the joint-employer test treat independent entities as joint employers if the entities “share or co-determine those matters governing the essential terms and conditions of employment.” *Virgo*, 30 F.3d at 1360. In other words, courts look to whether both entities “exercise significant control over the same employees.” *Graves*, 117 F.3d at 727 (applying the joint-employer test to determine if state-court clerks were employees of the county as well as the judicial branch); *see also Virgo*, 30 F.3d at 1360 (looking to control to determine whether a hotel and the partnership that owned it were “joint employers” under Title VII).

²² *Palmer III*, 1985-STA-016, *aff’d*, *Western Truck Manpower, Inc., U.S. Dept. of Labor*, 12 F.3d 151 (9th Cir. 1993) (did not address the issue of “knowing participation” because the case could be decided without resolving this issue).

²³ *See Swallows v. Barnes & Noble Book Stores*, 128 F.3d 990, 993 (6th Cir. 1997) (citing same four factors and explaining how integrated enterprise differs from “joint employer”).

²⁴ *Id.* at 993, n.4.

²⁵ With this clarification of the holding in *Palmer*, we decline to accept AMS’ request that we overturn *Palmer II*. See Resp. Initial Brief, p. 7.

Bristol v. Board of Cnty. Comm'rs, 312 F.3d 1213, 1218-1219 (10th Cir. 2002).²⁶ In similar fashion, the Secretary of the Department of Labor has previously ruled that a joint employer relationship existed where one or more companies “exercised the requisite degree of control over [the complainant], through day-to-day assignment of work.” *Cook*, 1995-STA-043.²⁷ Again, the term “person” is broadly defined under STAA through an illustrative list of examples that included “one or more” “associations” or “partnerships.” Consequently, two corporations jointly controlling the terms and conditions of employment as described in *Cook* and *Bristol* also fit within the broad definition of “person,” exposing a corporation to potential liability under STAA as a corporate person as well as a “joint employer” person.

In this case, contrary to the ALJ’s ultimate finding, the ALJ’s factual findings establish that AMS was not a joint employer having actual and sufficient control over the Complainants’ terms and conditions of employment. Relying *solely* on the reservation of rights in the Agreement, the ALJ found that the “ability to control” was sufficient to establish a joint employer relationship under STAA.²⁸ But, in fact, AMS did not exercise its contractually reserved power to control the Complainants’ work. Without exercising actual control, AMS was simply a single corporate “person” under STAA. As we previously discussed, the ALJ did not find that AMS violated the STAA in its own corporate capacity. The ALJ found that AMS did not control NRF’s trucking operations, did not participate in NRF’s decision to fire the Complainants, and did not know of the Complainants’ protected activity. In the final analysis of

²⁶ See also *Swallows*, 128 F.3d at 993, n.4, quoting *NLRB v. Browning-Ferris Ind. of Pennsylvania, Inc.*, 691 F.2d 1117, 1122-23 (3d Cir. 1982)(citations omitted)(also explaining that single employer or integrated enterprise analysis looks at various factors to determine if two nominally independent entities are so interrelated that they actually constitute a single integrated enterprise, while the joint employer concept recognizes that the business entities involved are in fact separate but share or co-determine those matters governing the essential terms and conditions of employment).

²⁷ Although focusing on whether the respondent was an employer, a similar point was made in the “refusal-to-rehire” case of *Muzyk v. Carlsward Transp.*, ARB No. 06-149, ALJ No. 2005-STA-060 (ARB Sept. 28, 2007). In that case the Board held that the crucial factor in finding an employer-employee relationship is whether the respondent acted in the capacity of an employer, that is, exercised control over, or interfered with, the terms, conditions, or privileges of the complainant’s employment. *Muzyk*, ARB No. 06-149, slip op. at 5-6.

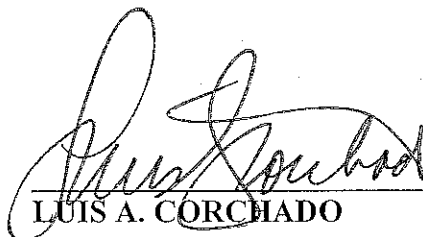
²⁸ The ALJ found that the Agreement was ambiguous and contradictory on this point. For example, a paragraph on page three of seven of the Agreement provided that NRF had the “sole and exclusive control over the day-to-day duties of the leased employees and over the job site at which, or from which, leased employees perform their services is solely and exclusively assigned to [NRF].” See Respondent’s Exhibit 3, p. 3. The ALJ applied a contract interpretation principle to interpret the contract against the drafters. While contract interpretation involves a legal conclusion that could be reviewed de novo, we do not need to review this decision or the application of contract principles in this case. See, e.g., *Greenwood 950, LLC v. Chesapeake Louisiana, LP*, 683 F.3d 666, 668 (5th Cir. 2012)(interpretation of contract terms is de novo on appeal). This issue is inconsequential given our ruling on the merits.

this case, there is no viable basis to assert vicarious liability against AMS as a joint employer and, therefore, we reverse the ALJ's finding of such liability.

CONCLUSION

As we hold that AMS was not a joint employer of the Complainants, and there being no other basis for liability, we reverse the ALJ's finding that AMS is liable for their damages under the Act.²⁹

SO ORDERED.



LUIS A. CORCHADO
 Administrative Appeals Judge



PAUL M. IGASAKI
 Chief Administrative Appeals Judge

E. Cooper Brown, Deputy Chief Administrative Appeals Judge, concurring:

I concur in the majority's decision as far as it goes. I write separately to address the legal basis upon which a joint employer such as AMS, who does not control the terms, conditions, and privileges of an employee's employment, nevertheless can be held liable under STAA.

In the instant case, the evidence of record fully supports the ALJ's determination that AMS and NRF are joint employers. As the majority notes, NRF was the Complainants' immediate employer, with control over the terms, conditions, and privileges of the Complainants' employment. AMS served as the Complainants' "administrative employer" but also, under the terms of the staff leasing agreement, retained for itself certain rights of direction and control viz the Complainants' employment and with respect to employee safety and risk

²⁹ Having found that the ALJ's findings fully resolved the questions of liability and therefore require a dismissal of this case, no remand is necessary because the ALJ's findings lead to only one conclusion, that there was no integrated enterprise or joint employer relationship as a matter of law. See *Dantran, Inc. v. U.S. DOL*, 171 F.3d 58, 73 (1st Cir. 1999)(regarding unnecessary remands).

management. See ALJ D. & O., at 23-24.³⁰ Notwithstanding that this retained authority was never exercised, the ALJ was properly persuaded that AMS's retained "ability to control" Evans' employment (*id.* at 28) was sufficient to hold AMS a joint employer with NRF of Evans. As the Third Circuit stated in *NLRB v. Browning-Ferris*, 691 F.2d 1117 (3rd Cir. 1982), it is enough to establish the existence of a joint employer relationship that one of the entities "has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. The 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment." 691 F.2d at 1123 (citations omitted).

Having found that AMS and NRF constitute joint employers of the Complainants does not, however, automatically lead to the conclusion that AMS is liable for the retaliatory action taken by NRF against the Complainants. Liability does not result, as the ALJ held and the "integrated enterprise" test permits, for imputing liability vicariously to the non-acting employer notwithstanding the latter's lack of knowing participation in the retaliatory action. As the majority has noted, while *Palmer* and *Cook* are cited as authority for holding a joint employer liable in the absence of knowing participation, the four-part test articulated in *Palmer* and cited in *Cook* is the test for liability where an "integrated enterprise" is found to exist.³¹ Neither the Secretary nor the Administrative Review Board has addressed the liability of a company that finds itself in the situation AMS now confronts, where the party is not the employee's immediate employer responsible for day-to-day management and control of that employee, but a joint employer who has neither participated in nor had any knowledge at the time of the other employer's retaliatory action. With no ARB case authority to turn to, I find persuasive the law of joint employer liability that has arisen under the National Labor Relations Act involving facts similar to those before the ARB in the instant case:


[I]n joint employer relationships in which one employer supplies employees to the other, we will find both joint employers liable for an unlawful employee termination (or other discriminatory discipline short of termination) only when the record permits an inference (1) that the non-acting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and (2) that the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist.

Capitol EMI Music, Inc., 311 N.L.R.B. 997, 1000 (1993), *enfd.*, 23 F.3d 399 (4th Cir. 1994).

³⁰ The ALJ noted that no party challenged the staff leasing agreement "or made any effort to show that it should not control the legal relationship of the parties, or that it was ever modified, voided, or shown to be otherwise unenforceable." ALJ D. & O., at 23-24. Nor has either party challenged the staff leasing agreement on appeal, other than to argue that it does not *per se* impose liability on AMS.

³¹ In articulating the test for the existence of a joint employer based on the four factors for establishing an integrated enterprise, the Secretary cited to and relied upon case authority pertaining to an integrated enterprise. *E.g.*, *Radio Union v. Broadcast Servs.*, 380 U.S. 255 (1965).

In the instant case the record before the Board is barren of any evidence suggesting that AMS knew or should have known of NRF's retaliatory action against the Complainants, let alone acquiescence in NRF's action through failure by AMS to protest or exercise its rights under the staff leasing agreement. Accordingly, consistent with the law of joint employer liability under the N.L.R.A., I join with the majority in holding that AMS, as Evans' joint employer, is not liable under STAA for the retaliatory actions taken by NRF against Evans.


E. Cooper Brown
Deputy Chief Administrative Appeals Judge