

U.S. Department of Labor

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



IN THE MATTER OF:

STEPHEN PERKINS,

ARB CASE NO. 2022-0018

COMPLAINANT,

ALJ CASE NO. 2019-ACA-00005

v.

DATE: December 16, 2022

CAVICCHIO GREENHOUSES, INC.,

RESPONDENT.

Appearances:

For the Complainant:

**Corinne Hood Greene, Esq.; *Greene & 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 DENYING RECONSIDERATION

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

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

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.² Perkins appealed the ALJ’s Order to the Administrative Review Board (ARB or Board). On September 30, 2022, the Board issued an Order of Remand in which we vacated the ALJ’s Order and remanded the case to the ALJ for further proceedings.³ On October 11, 2022, Cavicchio Greenhouses filed a Motion for Reconsideration of the Administrative Review Board’s Order of Remand and Request for Hearing (Motion for Reconsideration). Perkins filed his Opposition to Cavicchio Greenhouses, Inc.’s Motion for Reconsideration of the Review Board’s Order of Remand on October 21, 2022 (Comp. Opp.). On October 28, 2022, Cavicchio Greenhouses filed its Reply of Respondent Cavicchio Greenhouses, Inc. to Complainant’s Opposition to Respondent’s Motion for Reconsideration of the Administrative Review Board’s Order of Remand (Resp. Reply).

The Board will reconsider a decision and order only under limited circumstances. These circumstances include whether the movant has demonstrated: (i) material differences in fact or law from those presented to the Board of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the Board’s decision, (iii) a change in the law after the Board’s decision, or (iv) failure to consider material facts presented to the Board before its decision.⁴

Cavicchio Greenhouses asserts that the Board should reconsider its Order of Remand.⁵ Cavicchio Greenhouses argues that the undisputed factual record

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

³ *Perkins v. Cavicchio Greenhouses, Inc.*, ARB No. 2022-0018, ALJ No. 2019-ACA-00005 (ARB Sept. 30, 2022) (Order of Remand).

⁴ *Trivedi v. Gen. Elec. and GE Healthcare*, ARB No. 2022-0026, ALJ No. 2022-SOX-00005, slip op. at 2-3 (ARB Oct. 28, 2022) (Order Denying Reconsideration) (citing *Klein v. Bank of Am.*, ARB No. 2022-0016, ALJ No. 2020-SOX-00039, slip op. at 2-3) (ARB May 19, 2022) (Order Denying Reconsideration)). With respect the ACA, the Board draws principles and precedents from analogous statutes such as the Sarbanes-Oxley Act. *Oberg v. Quinault Indian Nation*, ARB No. 2019-0036, ALJ No. 2017-ACA-00003, slip op. at 4 & n.16 (ARB Feb. 22, 2021) (drawing from principles and precedent from analogous statutes, including the Sarbanes-Oxley Act, 18 U.S.C. § 1514A); 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).

⁵ Alternatively, Cavicchio Greenhouses seeks our permission to allow the ALJ to consider and render a written opinion prior to any evidentiary hearings on the grounds for dismissal that are “completely independent of the factual determinations for which the Board remanded the case to the ALJ.” Resp. Mot. at 2; *see also id.* at 3-4, 16-17. Cavicchio

demonstrates that Perkins failed to introduce any evidence to establish a genuine issue of material fact regarding whether he reasonably believed his complaints concerned a violation of the ACA at the time he made them, rather than a mere violation of the company's health insurance coverage policy.⁶ Cavicchio Greenhouses argues that the Board should affirm the ALJ's Order in its favor because Perkins' complaints are insufficient as a matter of law to constitute protected activity under the ACA's anti-retaliation provisions.⁷ Cavicchio Greenhouses offers several reasons why we should reconsider our decision, including: (1) the burden shifted to Perkins to cite to record evidence sufficient to create a genuine issue of fact on both his subjective belief and whether the belief was objectively reasonable;⁸ (2) Perkins failed to proffer any evidence to establish that, at the time he made his purported complaints, he held either a subjective belief that they were complaints regarding an ACA violation or that such a belief was objectively reasonable;⁹ and (3) to the extent that there is any incompleteness in the record regarding Perkins' subjective belief or whether such a belief was objectively reasonable, it is because Perkins failed to proffer sufficient evidence on the subject.¹⁰

Perkins counters that Respondent's Motion for Reconsideration "is simply an attempt to get a second bite at the apple, using the same arguments made in its Opposition to Perkins' appeal for review to the ALJ."¹¹ Perkins also argues that Cavicchio Greenhouses is not prejudiced by the Board's Order of Remand because it does not contain any final decision as to liability.¹² Perkins argues that the Board's Order of Remand simply requires the ALJ to engage in additional fact-finding and provide a substantive written order before the Board will consider making any final decision on the viability of Perkins' case.¹³

In its Reply, Cavicchio Greenhouses concedes that the arguments in its Motion for Reconsideration do not fall within any of the first three limited circumstances under which we will reconsider a decision and order.¹⁴ Cavicchio

Greenhouses also requests an oral argument before the Board on the issues in its Motion for Reconsideration. *Id.* at 4; *see also id.* at 16-18.

⁶ *Id.* at 1, 15.

⁷ *Id.* at 1-2, 4-5, 8-10.

⁸ *Id.* at 5, 9-10.

⁹ *Id.* at 5, 10-12.

¹⁰ *Id.* at 5, 13.

¹¹ Comp. Opp. at 1.

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ *See* Resp. Reply at 2.

Greenhouses clarifies its argument by stating that the Board “failed to properly consider the material and undisputed fact that Perkins’ complaints were based on a perceived violation of company policy, rather than a violation of the [ACA].”¹⁵ Cavicchio Greenhouses further contends that “this error was compounded by a modification of the applicable burden at the summary decision stage[,] which relieved Perkins of his obligation to cite to record evidence to create a genuine issue of material fact on the requisite element of belief.”¹⁶

Cavicchio Greenhouses’ contentions are premised solely on the Board’s purported failure to consider material and undisputed facts. The record does not support this position. In our prior decision, we previously considered the record on the whole in the light most favorable to the non-movant and found there were disputed material facts that the ALJ needed to consider on remand.¹⁷ Cavicchio Greenhouses’ Motion for Reconsideration merely repeats the same arguments that it raised in its original appeal.¹⁸ Because the Board has already fully considered these arguments, we will not address them again on reconsideration.

We further disagree with Cavicchio Greenhouses’ new contention that the Board erred in not considering whether Perkins’ complaints were based on a perceived violation of company policy instead of the ACA.¹⁹ Indeed, in the Order of Remand, the Board specifically stated that “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.”²⁰ We reiterate our finding in the Order of Remand that the current record does not contain sufficient evidence for us to determine whether Perkins’ complaints were based upon his perceived violation of company policy, his perceived violation of the ACA, or both. Under these circumstances, we concluded in our Order of Remand that the parties should have an opportunity to fully develop their arguments through an evidentiary hearing to address these issues.²¹

Upon review of Cavicchio Greenhouses’ motion, we determine that Cavicchio Greenhouses has not demonstrated any sufficient grounds for the Board to

¹⁵ *Id.* at 2-3.

¹⁶ *Id.* at 4.

¹⁷ *Perkins*, ARB No. 2022-0018, slip op. at 8-9.

¹⁸ *See* Resp. Mot. at 11-12, 15-20.

¹⁹ Cavicchio Greenhouses raised this argument for the first time in its Reply. *See* Resp. Reply at 3, 7.

²⁰ Order of Remand at 9-10.


²¹ *Id.*

reconsider our decision. Accordingly, the Board **DENIES** Cavicchio Greenhouses' Motion for Reconsideration. Because the Board previously instructed the ALJ to hold a hearing for the purpose of allowing the parties to develop their arguments as discussed herein, the Board also **DENIES** Cavicchio Greenhouses' alternative requests to order the ALJ to render a written opinion prior to any evidentiary hearings²² or for the Board to hold an oral argument on its Motion for Reconsideration.²³

SO ORDERED.



STEPHEN M. GODEK
Administrative Appeals Judge



SUSAN HARTHILL
Chief Administrative Appeals Judge



TAMMY L. PUST
Administrative Appeals Judge

²² Resp. Mot. at 16-17.

²³ *Id.* at 17-18. Perkins requests the Board award him legal fees associated with the filing of his Opposition to Cavicchio Greenhouse Inc.'s Motion for Reconsideration of the Review Board's Order of Remand. Comp. Opp. at 2. Perkins argues that "Respondent's Motion is a frivolous attempt by well-resourced business to cause additional unnecessary legal expenses to [him]." *Id.* We deny Perkins' request because it is premature at this stage of the proceedings. The ACA and its implementing regulations provide for an award of reasonable costs and fees only to litigants who are successful on the merits. 15 U.S.C. § 2087(b)(3)(B)(iii) (a Consumer Product Safety Act provision incorporated into the ACA at 29 U.S.C. § 218c (b)(1)); 29 C.F.R. § 1984.110(d).