U.S. Department of Labor

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

IN THE MATTER OF:

CHARLES EVANS BOYD II,

COMPLAINANT,

v.

CITY OF CHELSEA, ALABAMA, ET AL.,

RESPONDENT.

ARB CASE NO. 2024-0029

ALJ CASE NO. 2023-ACA-00001
ALJ JOHN M. HERKE

DATE: February 27, 2026

Appearances:

For the Complainant:
Charles Evans Boyd, II; *Pro Se*; Vestavia Hills, Alabama

For the Respondent:
Mark S. Boardman, Esq. and Grant H. Howard, Esq.; *Boardman, Carr, Petelos, Watkins, Ogle & Howard, P.C.*; Chelsea, Alabama

Before KAPLAN and KIKO, Administrative Appeals Judges

DECISION AND ORDER

This case arises under the employee protection provision of the Patient Protection and Affordable Care Act (ACA) and its implementing regulations.[1] Complainant Charles Evans Boyd, II filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent City of Chelsea, Alabama (City or Respondent) unlawfully retaliated against him for engaging in protected activity. On February 27, 2024, a United States Department of Labor Administrative Law Judge (ALJ) issued a Ruling on Respondent's Motion for Summary Decision (Ruling Granting Summary

[1] 29 U.S.C. § 218c; 29 C.F.R. Part 1984 (2025).

Decision) dismissing Complainant's complaint. Complainant petitioned the Administrative Review Board (ARB or Board) for review of the Ruling Granting Summary Decision. For the following reasons, we affirm.

BACKGROUND[2]

The City of Chelsea Fire & Rescue (CFR) employed Complainant from June 30, 2009, to August 3, 2021.[3] While working for CFR, Complainant also worked for Homewood Fire Department (HFD).[4] HFD was Complainant's primary employer until HFD terminated his employment on September 16, 2020.[5] Prior to his termination from HFD, Complainant received health insurance through HFD, as evidenced by his completion and execution of a declination of insurance form (declination form) for the City in 2017.[6]

In October 2020, Complainant approached CFR's Fire Chief (Fire Chief) about obtaining full-time employment with CFR.[7] The Fire Chief advised Complainant that there were no full-time positions available at his rank, Fire

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[2] These background facts are taken from the Ruling Granting Summary Decision and the parties' briefing before the ALJ and ARB. The Board makes no findings of fact and views the facts in the light most favorable to Complainant, as the non-moving party. The Board recognizes that the ALJ improperly titled his background section as "Findings of Fact." Ruling Granting Summary Decision at 2. "While fact-finding may be necessary and appropriate when adjudicating other types of motions or the merits of a complaint, it is not appropriate when resolving a motion for summary decision." *Adams v. Duke Energy Carolinas*, ARB No. 2022-0043, ALJ No. 2021-ERA-00005, slip op. at 15 (ARB Jan. 31, 2024) (citation omitted). An ALJ may grant summary decision only where there is no genuine dispute as to any material fact and may not weigh the evidence, assess credibility, or resolve conflicting testimony in reaching that determination. *See* 29 C.F.R. § 18.72; *Mawhinney v. Am. Airlines, Inc.*, ARB No. 2020-0067, ALJ No. 2012-AIR-00017, slip op. at 2 (ARB Feb. 4, 2021) (citation omitted). Although the ALJ titled the section as "Findings of Fact," such mistake appears to be harmless as the ALJ did not impermissibly weigh evidence, resolve disputed facts, and/or determine that Respondent's version of events was true. *See, e.g.*, Ruling Granting Summary Decision at 6 n.32. The Board advises the ALJ to use a different heading to describe background facts in future summary decision rulings.

[3] *Id.* at 2. Complainant was initially hired as a firefighter/paramedic and was subsequently promoted to Fire Lieutenant in December 2012 and to Fire Captain in October 2019. Complainant's Response in Opposition to Motion for Summary Decision, Exhibit (Ex.) 1 at 4 (OSHA's Letter to City and CFR).

[4] Ruling Granting Summary Decision at 2.

[5] *Id.*

[6] *See id.* at 2, 6 n.32; Complainant's Chart of Alleged Protected Activities at 1.

[7] Ruling Granting Summary Decision at 2.

Captain.[8] At the time, CFR was approved to hire six full-time, entry-level positions.[9] Complainant made no mention of health insurance during these discussions.[10] Although Complainant inquired about obtaining a full-time position with CFR, he accepted thirty hours per week at CFR, which qualified him for health insurance through the City.[11] However, Complainant believed only "full-time" employees were eligible for health insurance.[12]

In April of 2021, the Alabama Local Government Health Insurance Board (LGHIB) performed an audit and inquired whether certain City employees had coverage through a different entity.[13] To comply with the audit, the City Clerk reviewed employee files to determine if the City had either offered insurance to qualified employees or possessed a declination form for those employees.[14] Complainant was identified on a list of employees for whom the City required a declination form.[15]

On April 20, 2021, the City sent an email to certain employees, including Complainant, requesting that they provide proof of health insurance coverage and sign a declination form.[16] The email also stated that employees could sign up for insurance with the City as they were eligible based on the hours worked.[17] Following this email, Complainant met with the City Clerk on April 27 to inquire into, and obtain information regarding, the City's health insurance.[18] During this meeting, Complainant indicated to the Clerk that he wanted to apply for insurance

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8 *Id*. at 2 n.6.

9 *Id*.

10 *Id*.

11 *Id*.

12 *Id*.

13 *Id*. at 3.

14 *Id*.

15 *Id*.

16 *Id*.

17 *Id*.; Complainant's Chart, Exs. 8A-B. Complainant, through counsel, submitted a chart with several exhibits in response to the ALJ's Notice of Case Assignment and Filing Deadlines. The Board discusses the chart and its contents later in the Decision and Order. Complainant, through counsel, did not cite to these exhibits in responding to Respondent's Motion for Summary Decision. Similarly, the ALJ also did not address these exhibits in the Order Granting Summary Decision. The Board refers to them in this background section for the limited purpose of providing context and clarifying certain details. As noted above, these exhibits will be referenced as "Complainant's Chart, Ex[s]. [number]."

18 Ruling Granting Summary Decision at 3.

coverage.[19] The Clerk told him that in order to obtain health insurance coverage he needed to both complete a declination form and complete an application for insurance.[20] On April 28, Complainant signed a declination form.[21] He also completed an application for health insurance coverage.[22] On May 19, Complainant received a letter from LGHIB advising that his health insurance was reinstated retroactive to October 1, 2020.[23]

On May 26 2021, the Fire Chief recommended terminating Complainant's employment because he believed that Complainant made false statements, engaged in conduct unbecoming of an employee in the public service, and/or engaged in immoral conduct in violation of the Chelsea Fire & Rescue Standard Operating Procedures and the Policies and Procedures Employee Handbook.[24] Specifically, the Fire Chief believed that Complainant had told the City Clerk that the Fire Chief had denied a request by Complainant to obtain health insurance when Complainant and the Fire Chief had never discussed health insurance or coverage.[25]

A Personnel Board hearing was held before the City Mayor to discuss Complainant's recommended termination.[26] On June 21, 2021, the Mayor terminated Complainant's employment with CFR.[27] Complainant appealed the termination decision, and a Personnel Board heard Complainant's appeal.[28] On July 16, 2021, the Personnel Board reversed the termination decision because it "found that there was not enough evidence to demonstrate intentional 'wrong-doing' regarding the information submitted in an insurance declination form to justify termination and the fact that [] no prior disciplinary actions had been taken against

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19 Complainant's Chart, Exs. 5H-K.

20 *Id*. at 5K-M.

21 Ruling Granting Summary Decision at 3. Complainant was told both by the City Clerk and LGHIB to complete the declination form in conjunction with applying for insurance and assured him that he would get insurance in spite of completing the declination form. *See* Complainant's Chart, Exs. 5F-G, 5K-M; Complainant's Response in Opposition to Motion for Summary Decision, Ex. 1 at 5. Throughout this process, Complainant was advised that he may have to wait until open enrollment to receive insurance through the City. Complainant's Chart, Exs. 3A, 5D-F, 8A-B.

22 *Id*. at 9A-G.

23 Ruling Granting Summary Decision at 3.

24 *Id*.; Complainant's Chart, Exs. 15A-B.

25 Complainant's Chart, Exs. 15A-B.

26 Ruling Granting Summary Decision at 3.

27 *Id*.

28 *Id*. at 4.

Mr. Boyd."[29] The Board felt that Mr. Boyd's behavior warranted some form of disciplinary action and left the specific actions other than termination up to his supervisor.[30] Thus, the Fire Chief issued a letter reinstating Complainant's employment and imposing disciplinary action.[31]

On August 2, 2021, the City again terminated Complainant's employment.[32] On August 3, 2021, Complainant filed an OSHA complaint against the City.[33] On July 19, 2022, OSHA issued Secretary's Findings and dismissed the complaint.[34] On August 15, 2022, Complainant filed objections to the Secretary's Findings and requested a hearing before the Office of Administrative Law Judges (OALJ).[35] Complainant was represented by counsel before the OALJ.

On December 27, 2022, the ALJ issued a Notice of Case Assignment and Filing Deadlines, which directed Complainant to complete and file a chart of alleged protected activities and alleged adverse actions (Complainant's Chart).[36] Therein, Complainant, through counsel, listed allegations of protected activity and adverse action taken against him. Respondent subsequently filed its own chart indicating whether it agreed that the activity occurred, whether it had knowledge of the activity, and whether it agreed that the alleged adverse action occurred (Respondent's Chart).

On July 7, 2023, Respondent filed a Motion for Summary Decision.[37] Complainant did not file a response to Respondent's Motion.[38] On August 3, 2023, the ALJ issued a Show Cause Order directing Complainant to establish good cause for why Respondent's Motion should not be granted in light of the lack of a response

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29 Complainant's Chart, Ex. 17A.

30 *Id*.

31 Ruling Granting Summary Decision at 4. Respondent demoted Complainant from Fire Captain to firefighter/paramedic step one, placed Complainant on a 90-day probationary period, restricted Complainant from participation in promotional exams for two years, and wrote Complainant a letter of reprimand for insubordination. *Id.* at 4 n.18.

32 *Id*. at 4 (citing Complainant's Response in Opposition to Motion for Summary Decision, Ex. 9 at 1 (Secretary's Findings)).

33 Ruling Granting Summary Decision at 4.

34 *Id*.

35 *Id*.

36 Notice of Case Assignment and Filing Deadlines at 2.

37 Ruling Granting Summary Decision at 1.

38 *Id*. at 2.

by Complainant.[39] On August 17, 2023, Complainant, through counsel, submitted a Response in Opposition to Motion for Summary Decision, but it did not address the ALJ's Show Cause Order or explain why he failed to file a timely response.[40]

On February 27, 2024, the ALJ issued a Ruling Granting Summary Decision. On March 5, 2024, Complainant timely filed a Petition for Review with the Board. On appeal, Complainant is no longer represented by counsel and appears before the Board pro se. For the reasons discussed below, we affirm.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under the ACA.[41] The Board reviews an ALJ's grant of summary decision de novo, the same standard the ALJ applies.[42]

DISCUSSION

1. New Information and Evidence on Appeal

As set forth above, Complainant was represented by counsel before the OALJ, but is self-represented before the ARB. On appeal, Complainant filed a timely Petition for Review and Opening Brief and Submission of Evidence. Within these filings, Complainant alleges, in part, that: (1) he was unaware his attorney missed deadlines throughout the OALJ proceedings;[43] (2) he possesses evidence that can be submitted to the ARB to substantiate his claims;[44] (3) the Ruling Granting Summary Decision contained "false facts"[45] and excluded key information that could have been used to meet his burden of proof;[46] and (4) his

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39 Show Cause Order at 2.

40 Ruling Granting Summary Decision at 2.

41 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. 13186 (Mar. 6, 2020).

42 *Smith v. Franciscan Physician Network*, ARB No. 2022-0065, ALJ No. 2020-ACA-00004, slip op. at 5 (ARB June 29, 2023) (citing *Perkins v. Cavicchio Greenhouses, Inc.*, ARB No. 2022-0018, ALJ No. 2019-ACA-00005, slip op. at 4 (ARB Sept. 30, 2022)).

43 Petition for Review at 1; Complainant's Opening Brief and Submission of Evidence (Comp. Br.) at 1.

44 Petition for Review at 1; Comp. Br. at 1.

45 The Board recognizes the ALJ's typographical error referring to Complainant as "Mr. Robert Boyd." Ruling Granting Summary Decision at 2.

46 Petition for Review at 1; Comp. Br. at 1.

wife, Sherry Boyd, submitted a complaint on his behalf to the Alabama Office of the Attorney General, which should be considered as an ACA protected activity on appeal.[47] In support, Complainant appears to present a revised timeline of events, proposed "corrections" to the ALJ's statement of facts,[48] evidence not part of the record below,[49] and arguments concerning a newly asserted claim of protected activity. In response, the City argues that the newly filed evidence and arguments presented should not be considered and stricken from the record.[50] The Board agrees with the City.

"Although the Board construe[s] papers filed by *pro se* complainants liberally in deference to their lack of training in the law and with a degree of adjudicative latitude[,] we have a duty to not become an advocate for a pro se litigant."[51] The Board has carefully reviewed Complainant's filings under this liberal standard, and finds that they raise a protected activity claim for the first time on appeal and rely on evidence not previously part of the record before the ALJ. The Board does not generally consider arguments raised for the first time on appeal, nor evidence submitted for the first time on appeal.[52]

When determining whether to consider new evidence, the Board relies on the standard contained in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ's Rules of Practice and Procedure),[53] which provides that "[n]o additional evidence may be admitted unless the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the

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47 Petition for Review at 3-4; Comp. Br. at 27-28, 39, 47.

48 Petition for Review 1-3; Comp. Br. at 2-47. Complainant titled these sections as "Fact Corrections" and "Facts (& Corrections)," respectively.

49 Complainant included an email, dated June 21, 2021, from Ms. Sherry Boyd to the Alabama Office of the Attorney General, within his opening brief. The email is titled, "General Contact," and states, in part, "a local municipality has been exposed by me for violating the [ACA] and not offering insurance to eligible firefighters, like my husband[.]" Comp. Br. at 28.

50 Respondent's Response Brief in Opposition to Complainant's Opening Brief (Resp. Res.) at 1-3.

51 *Smith*, ARB No. 2022-0065, slip op. at 6 (citing *Bart*, ARB No. 2018-0004, ALJ No. 2017-TAE-00014, slip op. at 4 (ARB Sept. 22, 2020) (internal quotations omitted)).

52 *Id*. (citing *Martin v. Paragon Foods*, ARB No. 2022-0058, ALJ No. 2021-FDA-00001, slip op. at 15 (ARB June 8, 2023)).

53 *Morrell v. DLH Holdings Corp.*, ARB No. 2023-0030, ALJ No. 2020-SOX-00005, slip op. at 8 n.64 (ARB Sept. 23, 2024) (citing *Trivedi v. Gen. Elec.*, ARB No. 2022-0026, ALJ No. 2022-SOX-00005, slip op. at 3 (ARB Oct. 28, 2022)).

record closed."[54] Under this standard, the moving party must show: "(1) the evidence was discovered after [the record closed]; (2) due diligence was exercised to discover the evidence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence is such that a new trial would probably produce a different result."[55]

Complainant has not addressed these factors. Complainant has failed to demonstrate that the new evidence he wishes to introduce into the record on appeal could not have been discovered with reasonable diligence or were not readily available prior to the closing of the record below. On the contrary, this evidence was in Complainant's possession, in an email sent by his wife to the Alabama Office of the Attorney General. Additionally, this evidence was readily available prior to the closing of the record below as the email is dated June 21, 2021, well before the start of the OALJ proceedings. Thus, this evidence could have been discovered with reasonable diligence and was readily available prior to the closing of the record. For these reasons, the Board will not consider this evidence on appeal.

With regard to his new protected activity claim, the Board affirmatively disregards this new argument on appeal.[56]

While the Board acknowledges that Complainant may not be personally responsible for missed deadlines or other mistakes by his attorney during the proceedings below, admitting and considering new evidence or arguments on appeal is not the appropriate remedy. The Board has consistently held that parties are ultimately responsible for the acts and omissions of their freely chosen representatives.[57] Accordingly, the Board disregards these new arguments and evidence presented on appeal.

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[54] 29 C.F.R. § 18.90(b)(1).

[55] *Kossen v. Empire Airlines*, ARB No. 2022-0004, ALJ No. 2019-AIR-00022, slip op. at 11 (ARB June 13, 2023) (citation omitted).

[56] The Board elects to disregard the new arguments and evidence presented in the Petition for Review and Opening Brief and Submission of Evidence instead of striking the filings. *See, e.g.*, *Smith*, ARB No. 2022-0065, slip op. at 6-7 (noting motions to strike are generally disfavored and electing to disregard the new arguments and evidence instead).

[57] *Mikami v. Adm'r, Wage & Hour Div., U.S. Dep't of Lab.*, ARB No. 2013-0005, ALJ No. 2012-LCA-00025, slip op. at 3-4 n.9 (ARB June 16, 2014) (citation omitted). "[I]f an attorney's conduct falls below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." *Id.* at 4 n.9 (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 n.10 (1962)).

2. Motion for Summary Decision

A. Summary Decision Standard

Summary decision is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."[58] In considering a motion for summary decision, the Board views the evidence and makes all reasonable inferences in the light most favorable to the non-moving party.[59] If the moving party demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of a genuine issue of material fact that could affect the outcome of litigation.[60] The non-moving party may not rest upon mere allegations, speculation, or denials, but must instead set forth specific facts on each issue upon which the non-moving party would bear the ultimate burden of proof.[61] If the non-moving party fails to show an essential element to their case, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element necessarily renders all other facts immaterial.[62]

B. Governing Law and Burdens of Proof Under the ACA

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.[63] 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) his protected activity was a contributing factor in the adverse action.[64] As stated above, the Board affords Complainant some adjudicative latitude as a pro se litigant. Nevertheless, he bears the same burdens of proving the necessary elements of his case as do litigants represented by counsel.[65]

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58 29 C.F.R. § 18.72(a).

59 *Bush v. Donato's Pizza*, ARB No. 2024-0009, ALJ No. 2022-TAX-00006, slip op. at 6 (ARB Dec. 30, 2025) (citing *Jahanbin v. The Boeing Co.*, ARB No. 2024-0035, ALJ No. 2023-AIR-00023, slip op. at 4 (ARB Mar. 13, 2025)).

60 *Id*. (citation omitted).

61 *Id*. (citation omitted).

62 *Id*. (citation omitted).

63 29 U.S.C. § 218c(a).

64 29 C.F.R. § 1984.109(a).

65 *Smith*, ARB No. 2022-0065, slip op. at 9 (citing *LaQuey v. UnitedHealth Grp., Inc.*, ARB No. 2017-0060, ALJ No. 2016-SOX-00002, slip op. at 13 (ARB Oct. 9, 2020)).

Before the ALJ, Respondent moved for summary decision arguing that none of Complainant's alleged protected activities satisfy the statutory and regulatory definition of protected activity.[66] Specifically, Respondent asserted: (1) Complainant's claim that he was terminated for "unknowingly" disclosing alleged discriminatory practices to the LGHIB is not protected because LGHIB is not among the entities to whom disclosure is protected under the ACA;[67] (2) Complainant did not allege that he personally received a premium tax credit under Section 36B of the Internal Revenue Code;[68] and (3) Complainant did not participate in, object to, or refuse to engage in any proceeding involving an ACA violation.[69]

In response, Complainant argued that he was retaliated against for reporting what he believed to be an ACA violation—namely, that he did not receive health insurance through the City.[70] In support of his position, Complainant identified several alleged factual disputes about whether the City Clerk knew he did not have other coverage, whether the Fire Chief knew that Complainant had lost his job with HFD, and whether his wife appropriately listed HFD as his employer on the 2021 declination form, and stated the reasons for his termination were pretextual and in retaliation for engaging in protected activity.[71]

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66 Ruling Granting Summary Decision at 7-8; Motion for Summary Decision at 9-10.

67 Ruling Granting Summary Decision at 7; Motion for Summary Decision at 9.

68 Ruling Granting Summary Decision at 8; Motion for Summary Decision at 10.

69 Ruling Granting Summary Decision at 8; Motion for Summary Decision at 10.

70 *See* Ruling Granting Summary Decision at 9; Complainant's Response in Opposition to Motion for Summary Decision at 1-2, 5. Under the ACA, an employee may be protected from retaliation when raising concerns to an employer regarding health insurance coverage or compliance with the Act. In this case, however, Complainant, through counsel, advanced only a vague, conclusory assertion, "Complainant maintains the personnel actions taken by Respondent were in retaliation and in response to his complaints as a whistleblower." Complainant's Response in Opposition to Motion for Summary Decision at 1. Notably, Complainant's counsel did not expressly address the context of these "complaints" nor identify any other potential protected acts, aside from a cursory reference to Complainant's Chart. *See id.* at 2. Instead, counsel focused on and cited evidence to "show clear issues of material fact on any claims that the Complainant made any false statements or engaged in any conduct unbecoming of an employee in public service or immoral conduct." *Id.* at 1-2. Generally, "conclusory allegations or denials, without more, are insufficient to preclude granting [a] summary [decision] motion." *Kirschmann v. Hampton Rds. Transit*, ARB No. 2023-0002, ALJ No. 2021-NTS-00006, slip op. at 10 (ARB Feb. 14, 2024) (citation omitted); *see* 29 C.F.R. 18.72(c).

71 Ruling Granting Summary Decision at 9; Complainant's Response in Opposition to Motion for Summary Decision at 2-5.

The ALJ issued a Ruling Granting Summary Decision dismissing Complainant's case because Complainant did not raise a genuine issue of material fact about whether he engaged in protected activity.[72] While the ALJ acknowledged Complainant's assertion that genuine issues of material fact existed, the ALJ ultimately determined that Complainant relied on general assertions and factual arguments unrelated to whether he engaged in protected activity.[73] The ALJ further noted that, even aside from Complainant's failure to rebut Respondent's motion, the fifteen activities identified in Complainant's Chart did not meet the definition of protected activity under the ACA.[74] The Board agrees with the ALJ.

C. Protected Activity Under the ACA

An employee is protected by the ACA if the employee:

> (1) received a credit under section 36B of Title 26 or a subsidy under section 18071 of Title 42;
> (2) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State 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 an amendment made by this title);
> (3) testified or is about to testify in a proceeding concerning such violation;
> (4) assisted or participated, or is about to assist or participate, in such a proceeding; or
> (5) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this title (or amendment), or any order,

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[72] The Board acknowledges that the ALJ also concluded that Complainant failed to timely respond to Respondent's Motion and comply with the Show Cause Order. Ruling Granting Summary Decision at 5. According to the ALJ, Complainant's response was due on July 25, 2023, and Complainant did not file his Response until August 17, 2023. *Id.* Even though Complainant eventually responded to Respondent's Motion, Complainant did not address the Show Cause Order. *Id*. The ALJ determined that Complainant did "not establish excusable neglect in failing to timely answer Respondent's *Motion*, and [did] not establish[] grounds for extending his time to answer." *Id*. As a result, the ALJ held "Complainant failed on two fronts and Respondent's *Motion* ***could be*** granted on those grounds." *Id*. (emphasis added).

[73] *Id*. at 9.

[74] *Id*. at 9-12.

> rule, regulation, standard, or ban under this title (or amendment).[75]

On appeal, Complainant raises numerous factual and timeline concerns.[76] Specifically, Complainant focuses on two of the original fifteen alleged protected activities from Complainant's Chart—completing and signing declination forms in 2017 and in 2021.[77] Complainant asserts:

> The complainant signed a declination form in 2017. Since that time, he was not offered or required to sign another declination form until April 2021. In 2017, those CFR employees who had not signed the form were aggressively instructed to sign or were threatened to be removed from the fire service work schedule, via email from Wayne Shirely.[78]

Additionally, while Complainant set forth his chart of protected activities, he offers no additional argument regarding it or explanation as to how the ALJ erred in his protected activity analysis or conclusion that "completing a standard declination of coverage form for one's employer is not a protected activity within the meaning of the statute."[79] Complainant's allegation is nothing more than an assertion that he engaged in ACA protected activity. These assertions, without citation to evidence or identification of conduct falling within the statutory or regulatory definitions under the ACA, are insufficient to undermine the ALJ's protected activity analysis or establish a genuine issue of material fact.[80] Accordingly, the Board affirms the

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75 29 U.S.C. § 218c(a).

76 Comp. Br. at 47. The Board has already addressed and declined to consider one of these two "legal/material issues" earlier in this Decision and Order. *Supra* note 56. The Board declines to address it again.

77 Comp. Br. at 47.

78 *Id.*

79 Ruling Granting Summary Decision at 10. Viewing the evidence submitted by Complainant to the ALJ, better arguments could have been made about potential protected activity. *See* Complainant's Response in Opposition to Motion for Summary Decision, Ex. 6 (Personnel Board Hearing) and Ex. 8 (Appeal to Personnel Board). However, Complainant's attorney did not make a protected activity argument which cited to supporting evidence in the late response brief in opposition to the Motion for Summary Decision, and Complainant is held to the acts or omissions of his attorney. *Supra* note 5757.

80 *See, e.g.*, *Shah v. Albert Fried & Co.*, ARB No. 2020-0063, ALJ No. 2019-SOX-00015, slip op. at 7-8 (ARB Aug. 22, 2022) (affirming an ALJ's affirmative defense ruling because the Board was unable to discern a cogent argument supporting a complainant's assertion from one sentence and no citations to supporting evidence).

ALJ's conclusion that Complainant failed to establish a genuine issue of material fact that he engaged in protected activity under the ACA.

CONCLUSION

For the reasons stated above, the Board **AFFIRMS** the ALJ's Ruling Granting Summary Decision. Accordingly, Complainant's complaint is **DENIED**.

SO ORDERED.

ELLIOT M. KAPLAN
Administrative Appeals Judge

PHILIP G. KIKO
Administrative Appeals Judge