

OSHA
OSHC-1: 2-4173-19-025
Yebesi, Acting Director

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of April, two thousand twenty.

Present:

Susan L. Carney,
Richard J. Sullivan,
Joseph F. Bianco,
Circuit Judges.

David Wyche,

Petitioner,

v.



19-3194

Occupational Safety and Health Administration,

Respondent.

Respondent moves to dismiss this petition for review for lack of jurisdiction. Upon due consideration, it is hereby ORDERED that Respondent's motion is GRANTED and the petition for review is DISMISSED. *See New York Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 331 (2d Cir. 2003) (“[A]n agency’s decision not to invoke an enforcement mechanism provided by statute is not typically subject to judicial review.”).

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of June, two thousand twenty,

Present: Susan L. Carney,
Richard J. Sullivan,
Joseph F. Bianco,

Circuit Judges,

David Wyche,

Petitioner,

v.

Occupational Safety and Health Administration,

Respondent.

ORDER

Docket No. 19-3194

Appellant David Wyche filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court

The block contains a handwritten signature, "Catherine O'Hagan Wolfe", written in cursive. The signature is written over a circular official seal of the United States Court of Appeals for the Second Circuit. The seal features the words "UNITED STATES", "SECOND CIRCUIT", and "CITY OF NEW YORK" around its perimeter.

MANDATE

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FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

Catherine O'Hagan Wolfe

Catherine O'Hagan Wolfe

MANDATE ISSUED ON 06/18/2020

U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration
New York Regional Office
201 Varick Street, Room 670
New York, NY 10014



July 10, 2019

David Wyche
1 Towne Center, Apt. 621
Cliffside Park, NJ 07010

Via Email: davebyran@gmail.com

RE: K&M Systems, Inc./Wyche/2-4173-19-025

Dear Mr. Wyche:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by you (Complainant) against K&M Systems, Inc. (Respondent), under the employee protection provisions of Section 11(c) of the Occupational Safety and Health Act (the Act), 29 U.S.C. § 660(c).

The complaint was timely filed. Complainant was terminated on November 16, 2018. Complainant filed a complaint alleging a violation of the Act on November 26, 2018, within the 30-day statutory filing period.

Complainant and Respondent are covered by the Act.

Complainant worked as a Radio Frequency Field Test Engineer for Respondent. Complainant alleges engaging in protected activity by complaining to management that he was not properly trained to do his job. On November 5, 2018, Complainant contacted Human Resources and reported that it was raining and he felt it was unsafe working in a bucket truck in those weather conditions. Complainant was terminated on November 16, 2018, and he believes it was in retaliation for engaging in protected activities.

Respondent denies taking retaliatory action against Complainant, and claims they made a legitimate business decision in his termination. Respondent contends on November 5, 2018, Complainant called Human Resources because he felt uncomfortable working in the rain. Respondent allowed Complainant to sign out and stop working that day. Respondent further contends they received complaints from their client about Complainant's difficulty producing and completing tasks. Furthermore, Respondent contends from the start of Complainant's employment up to his termination, Respondent continuously attempted to train Complainant in the job tasks. After approximately 90 days and multiple complaints, Respondent determined Complainant was not able to learn the job and made the decision to terminate his employment.

The evidence shows, absent Complainant's protected activities, Respondent would have taken the same adverse employment action. Therefore, OSHA does not have reasonable cause to believe Respondent violated the Act.

There is no reasonable cause to believe Respondent violated the Act.

Consequently, this complaint is dismissed.

This case will be closed unless Complainant files a request for review by sending a letter to:

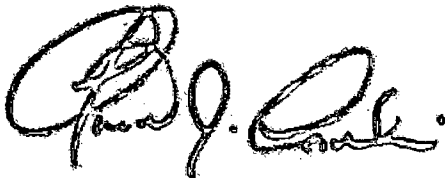
Director
Directorate of Whistleblower Protection Programs
U.S. Department of Labor – OSHA
200 Constitution Avenue, N.W., Room N-4618
Washington, D.C. 20210

With a copy to:

Teri M. Wigger
Assistant Regional Administrator
U.S. Department of Labor-OSHA
201 Varick Street Room 670
New York, NY 10014
212-337-2368

A Complainant has 15 calendar days after receiving these findings to request a review of the decision to dismiss from the Directorate of Whistleblower Protection Programs (DWPP). Otherwise, this case will be closed. If a review is requested, DWPP will review the case file to ascertain whether the investigation dealt adequately with all factual issues and whether the investigation was conducted fairly and in accordance with applicable laws. The outcome will be either to return the case to the investigator for further investigation or to affirm the decision to dismiss, after which the case is closed.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Carlin", with a stylized flourish at the end.

Christopher Carlin
Regional Supervisory Investigator

cc: K&M Systems, Inc. (via email: katie.hunt@kmswireless.com)
DWPP

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210



AUG 21 2019

David Wyche
1 Towne Center Apt 621
Cliffside Park, NJ 07010

RE: K&M Systems, Inc. / Wyche / 2-4173-19- 025

Dear Mr. Wyche:

This letter is in response to your July 19, 2019, request for review of the decision to dismiss your complaint against K&M Systems, Inc. (Respondent). In your letter, you expressed concern with not receiving proper training.

The investigative records reflect that you filed a complaint against Respondent on November 26, 2018, alleging that Respondent terminated your employment in retaliation for engaging in protected activity, specifically, for reporting concerns of not receiving proper training and not being able to work in the rain on November 5, 2018. The New York Regional Office conducted an investigation and determined that your protected activity was not the reason for the adverse action alleged. Consequently, your complaint was dismissed on July 5, 2019.

The Directorate of Whistleblower Protection Programs (DWPP) has completed a review of the investigative case file and has determined that there is insufficient evidence to support that Respondent violated Section 11(c) of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §660(c). Rather, the evidence demonstrates that Respondent terminated your employment due to performance issues, and not for engaging in protected activity.

Regarding your additional concerns noted above, the respondent allowed you to discontinue working on November 5, 2018, due to inclement weather.

Please note that this is the final determination of the Secretary of Labor; your case is now closed.

Sincerely,

Francis Yebesi
Acting Director
Directorate of Whistleblower Protection Programs

cc: Regional Office
Respondent

**Additional material
from this filing is
available in the
Clerk's Office.**