



In the Matter of:

BRYAN FLOREK,

ARB CASE NO. 07-113

COMPLAINANT,

ALJ CASE NO. 2006-AIR-009

v.

DATE: May 21, 2009

EASTERN AIR CENTRAL, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Thomas E. Kenney, Esq., *Pierce & Mandell, P.C.*, Boston, Massachusetts

For the Respondent:

Bahig F. Bishay, pro se, Norwood, Massachusetts

FINAL DECISION AND ORDER

Bryan Florek filed a complaint with the United States Department of Labor alleging that Eastern Air Center, Inc. (EAC) violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)¹ when EAC terminated his employment after he raised concerns about air safety issues. After a hearing, a Labor Department Administrative Law Judge (ALJ) concluded that EAC violated AIR 21 and awarded Florek reinstatement, back pay, and attorney's fees. We affirm.

¹ 49 U.S.C.A. § 42121 (West 2008). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2008).

BACKGROUND

EAC is a small air carrier that provides on-demand charter services as well as aircraft repair, sales, storage, and fuel out of the Norwood, Massachusetts, airport.² It leases a corporate jet to its primary customer, Boston MedFlight (BMF), which is owned by seven Boston hospitals.³

Florek started work as a line crewman at EAC on September 16, 2003.⁴ His duties included towing, fueling, and preparing the company's charter jets for flight.⁵ His supervisor, Paul Spearin, showed him how to wash the plane's exterior, wipe down the interior, and collect and dump the trash and debris left behind by the passengers.⁶

On Sunday, July 4, 2004, Florek went to a company hangar and noticed the BMF-leased jet's aisle carpet lying on the hangar floor.⁷ His weekend supervisor, Jeff Burke, helped him tow the plane to the boarding area, and Florek entered the plane to clean.⁸ He immediately noticed a stench of vomit or urine—the toilet was full of feces, and one seat in the plane was stained.⁹ Florek complained to Burke about the plane's condition and cleaned up as best he could.¹⁰

The next day, Florek talked to Spearin, who explained that the plane had transported a liver cancer patient to Florida for a possible transplant and that the man was in "rough shape."¹¹ Florek spoke again with Spearin about the plane's interior condition

² Respondent's Exhibit (RX) 6.

³ Hearing transcript (TR) at 442.

⁴ RX 13; TR at 82.

⁵ TR at 82.

⁶ TR at 173-75.

⁷ TR at 86-87.

⁸ TR at 87-88.

⁹ TR at 88-89.

¹⁰ TR at 89-90.

¹¹ TR at 90-91, 186-88.

on July 6. Florek testified that Spearin told him that BMF would come and clean the plane.¹²

On July 14, 2004, after the plane had been used for three charters, Florek called BMF and asked its chief operations manager, Andrew Farkas, if he knew about the soiled plane.¹³ Farkas said no and told Florek that EAC should be taking care of the cleaning.¹⁴

Farkas then called Stu Piasecki, a senior accountant at EAC, and informed him of Florek's telephone call.¹⁵ Later, Farkas wrote a memorandum of the telephone call, noting that Florek said the plane was contaminated with human waste, that EAC employees had "no specific training on cleaning up this type of mess," that he questioned whether the patient had hepatitis, and that EAC could receive some fines because he (Florek) was going to call the Federal Aviation Administration (FAA).¹⁶ Farkas sent this memo to Piasecki at EAC.¹⁷

Florek called the FAA in Lexington, Massachusetts on July 14 and complained that the charter plane was unsanitary and had not been properly cleaned after a liver transplant patient had soiled it.¹⁸ Florek was off from work for the next few days, but Burke called him at home on July 16 to report that the FAA had visited EAC that day, and that the facilities manager, Leonard Carroll, was "running around here like a chicken with his head cut off."¹⁹ The purpose of the FAA visit was to investigate a complaint concerning the "improper disposal of Bio hazard waste from med flight aircraft" involving a patient who had been transported.²⁰

On July 18 Florek reported for work, but his security badge did not work, and he could not punch in.²¹ Carroll handed him a letter terminating his employment, effective

¹² TR at 91-92, 188-89.

¹³ TR at 93-94.

¹⁴ TR at 95.

¹⁵ TR at 43-45.

¹⁶ Complainant's Exhibit (CX) 1-2; TR at 39-45.

¹⁷ TR at 45-47.

¹⁸ TR at 99-100.

¹⁹ TR at 102-03, 196-99.

²⁰ CX 5.

²¹ TR at 108.

immediately. The letter stated: “This action is a result of your actions not in compliance with Eastern Air Company Manual concerning fraudulent statements to our customers and others.”²²

Florek timely filed a complaint with the Labor Department’s Occupational Safety and Health Administration (OSHA), which dismissed his complaint on January 26, 2006.²³ Florek requested a hearing, which the ALJ held on October 26-27, 2006. The ALJ determined that EAC had violated AIR 21 in firing Florek. She ordered reinstatement and awarded Florek \$7,498.00 in back pay. She also ordered EAC to pay \$25,852.76 in attorney’s fees and costs. EAC appealed the ALJ’s Recommended Decision and Order (R. D. & O.) to the Administrative Review Board (ARB or Board).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the ARB.²⁴ In cases arising under AIR 21, we review the ALJ’s findings of fact under the substantial evidence standard.²⁵ Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²⁶ Thus, if substantial evidence in the record supports the ALJ’s findings of fact, they shall be conclusive.²⁷ The Board reviews the ALJ’s legal conclusions de novo.²⁸

²² CX 6.

²³ RX 16.

²⁴ See Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1979.110.

²⁵ 29 C.F.R. § 1979.110(b).

²⁶ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

²⁷ *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4-5 (ARB Dec. 30, 2004).

²⁸ *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

DISCUSSION

The Legal Standard

AIR 21 prohibits an air carrier, or contractor or subcontractor of an air carrier from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided an employer or the federal government information relating to any violation or alleged violation of any FAA order, regulation, or standard or any other provision of federal law related to air carrier safety.²⁹

To prevail in an AIR 21 case, a complainant like Florek must prove by a preponderance of the evidence that (1) he engaged in protected activity; (2) his covered employer knew that he engaged in the protected activity; (3) he suffered an adverse personnel action; and (4) the protected activity was a contributing factor in the adverse action.³⁰

Protected activity under AIR 21 has two elements: (1) the complaint must involve a purported violation of a regulation, order, or standard relating to air carrier safety, though the complainant need not prove an actual violation; and (2) the complainant's belief that a violation occurred must be objectively reasonable.³¹ The information provided to the employer or federal government must be specific in relation to a given practice, condition, directive, or event that affects aircraft safety.³²

Florek can prove his case through circumstantial evidence.³³ And if he proves discrimination, he is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action absent the protected activity.³⁴

²⁹ 49 U.S.C.A. § 42121(a).

³⁰ *Rooks*, slip op. at 5. The parties stipulated that EAC is an air carrier within the meaning of AIR 21, that Florek was an employee, and that he received \$6,502.00 in unemployment benefits. Joint Exhibit 1.

³¹ *Rooks*, slip op. at 5.

³² *Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 5 (ARB Mar. 14, 2008); *Rougas v. Southwest Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-003, slip op. at 9 (ARB July 31, 2006).

³³ *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006).

³⁴ 49 U.S.C.A. § 42121(b)(2)(B)(iv).

Florek Engaged in Protected Activity and EAC Knew About It

The ALJ found that Florek was concerned about his own health and the health of passengers because he reasonably believed that he and others could be exposed to bio-hazards and blood-borne pathogens due to the unsanitary condition of the plane on July 4, 2004, and thereafter. She therefore concluded that Florek engaged in protected activity when he reported his concerns about exposure to health hazards to his supervisors and the FAA.³⁵

The ALJ appears to have assumed that Florek's concerns about the contaminated plane's potential health consequences to himself and others implicated the safety of the aircraft. But neither the parties nor the ALJ pinpointed a violation of any specific FAA order, regulation, or standard or any other law relating to air carrier safety. Furthermore, EAC did not contest the issue of protected activity below or before us.³⁶

A party's failure to present argument on an issue or contest an element of a claim will result in a waiver of the issue.³⁷ Inasmuch as EAC has waived argument on this element of Florek's complaint, we will assume without deciding that Florek engaged in protected activity.

The ALJ determined that Florek's supervisor and EAC management were aware of his protected activity prior to his discharge on July 18, 2004.³⁸ Substantial evidence supports this finding because (1) Florek's testimony that he informed his supervisor, Spearin, of his concerns was not challenged;³⁹ (2) Florek testified without contradiction that Spearin told him that he had talked to Carroll who said that BMF would send a team

³⁵ R. D. & O. at 21-22.

³⁶ See n.12, R. D. & O. at 21; Respondent's Brief, Attachment 3 (Petition for Review). In its brief, EAC asks the ARB to affirm OSHA's findings in its January 26, 2006 dismissal of Florek's complaint. Brief at 26. We note that OSHA found that Florek engaged in protected activity. RX 16 at 2. In any event, OSHA's findings are not subject to review by the ALJ because he must conduct a de novo hearing on the merits. 29 C.F.R. § 24.109(c). See *Powers v. PACE*, ARB No. 04-111, ALJ No. 2004-AIR-019, slip op. at 7 (ARB Order Dec. 21, 2007) (ALJ erred in relying on OSHA's findings to dismiss respondents).

³⁷ *Walker v. American Airlines*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 7 (ARB Mar. 30, 2007); *Hall v. United States Army*, ARB Nos. 02-108, 03-013, ALJ No. 1997-SDW-005, slip op. at 6 (ARB Dec. 30, 2004).

³⁸ R. D. & O. at 23.

³⁹ TR at 90-92.

to clean the plane;⁴⁰ (3) three days after the incident, Carroll circulated a memorandum scheduling a training session on special cleaning procedures;⁴¹ and (4) on July 14, 2004, prior to Florek's firing, Bishay, an EAC executive manager, and Carroll both saw the Farkas memorandum that indicated Florek's intention to call the FAA.⁴²

Florek's Protected Activity Contributed to EAC's Decision to Terminate His Employment

Florek's termination is an adverse action under AIR 21.⁴³ Florek's burden, therefore, is to prove by a preponderance of the evidence that his complaints about the airplane to his supervisors and the FAA were a contributing factor in his firing.⁴⁴ A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision."⁴⁵

Based on the timing of Florek's firing—about two weeks after he complained to his supervisor, four days after he called BMF and the FAA, and two days after the FAA visited EAC to investigate—the ALJ found it "reasonable to conclude" that Florek's protected activity was a contributing factor in his discharge. The ALJ stated that the close temporal proximity between Florek's complaints and his firing created "a powerful inference of illegal motivation."⁴⁶ Substantial evidence supports such an inference.

The ALJ also analyzed whether EAC's reasons for discharging Florek—improper contact with BMF and fraudulent statements he made to BMF's Farkas during the July 14 phone call—were legitimate or merely a pretext for discriminating against Florek. EAC claimed that these actions interfered with EAC's contractual relationship with BMF and violated its company manual.⁴⁷ Proof that an employer's "explanation is unworthy of

⁴⁰ TR at 235-41.

⁴¹ CX 10, CX 11-12 (OSHA Infection Control Education and Training).

⁴² On July 16, 2004, the FAA responded to Florek's telephone call by sending two employees to EAC to investigate the improper disposal of biohazard waste. CX 5. Subsequently, Florek's complaints were forwarded to OSHA, which asked EAC to investigate and respond. CX 14-15.

⁴³ 49 U.S.C.A. § 42121 (a).

⁴⁴ 49 U.S.C.A. § 42121 (b)(2)(B)(iii).

⁴⁵ *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (interpreting the Whistleblower Protection Act, 5 U.S.C.A. § 1221(e)(1)).

⁴⁶ R. D. & O. at 24.

⁴⁷ *Id.* at 25.

credence” is persuasive evidence of discrimination because “once the employer’s justification has been eliminated, discrimination may well be the most likely alternative explanation” for an adverse action.⁴⁸

The Farkas Memorandum

Farkas memorialized his telephone call with Florek on July 14, 2004, and faxed his memo to Piasecki at EAC. The memo identified Florek’s four concerns about the unsanitary condition of the leased jet.⁴⁹

First, the memo indicated that Florek told Farkas that EAC *had* received some fines. EAC asserts that this statement was fraudulent. But Florek testified that he told Farkas he was going to the FAA with his concerns and that EAC *could* receive fines.⁵⁰ And Farkas corroborated this version when he testified that Florek did not say that EAC had received fines, but that it could receive fines for what Florek believed were violations.⁵¹ Thus, substantial evidence supports the ALJ’s finding that Florek’s comment was not a falsehood, but a statement of his opinion that EAC could be fined.⁵²

Second, the memo referred to the liver transplant patient urinating in the aircraft and included the phrase, “? Had hepatitis.” EAC claimed that Florek falsely told Farkas that the patient being transported had hepatitis. Yet Farkas himself explained that the “hepatitis” notation did not mean that Florek told him the transported patient had hepatitis, but that Florek was questioning whether the patient did in fact have this infectious disease.⁵³ Further, Carroll testified that he did not know what the phrase meant and admitted that he did not call Farkas for an explanation.⁵⁴ And, though Bishay testified that the phrase meant that the patient had hepatitis, he later acknowledged that the phrase meant that Florek was “putting doubts” in Farkas’s mind as to whether the patient had the disease.⁵⁵ Thus, the record supports the ALJ’s finding that, read in context, the phrase could mean only that Florek was questioning whether the patient, the

⁴⁸ *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000).

⁴⁹ CX 2.

⁵⁰ TR at 95, 98-99.

⁵¹ TR at 42, 69-71.

⁵² R. D. & O. at 25.

⁵³ TR at 47-49.

⁵⁴ TR at 219-23.

⁵⁵ TR at 387-88, 416-18.

source of the bio-waste contamination in the plane he cleaned, was infected with hepatitis, and that therefore Florek did not say that the patient did, in fact, have hepatitis.⁵⁶

The third allegedly fraudulent statement in the Farkas memo is that “line staff had no specific training on cleaning up this type of mess.” The ALJ discredited Carroll’s and Bishay’s statements that “this type of mess” was just normal plane debris, which Florek had been trained to handle.⁵⁷ Substantial evidence supports the ALJ’s finding that Florek was referring to the urine-soiled plane as the “type of mess” which he had not been trained to clean. Bishay admitted he did not know whether Florek had received training in the clean-up of bio-hazards such as human waste.⁵⁸ And the ALJ dismissed as “absurd” Carroll’s testimony that he did not know Florek was referring to human waste as a “mess.”⁵⁹

The memo’s fourth statement was that the plane was used for air medical missions (which are outside its FAA certification). EAC claimed that this statement was fraudulent, but the ALJ noted that Bishay did not check with Farkas to see if Florek had made this accusation.⁶⁰ Substantial evidence supports the ALJ’s finding that Florek only asked Farkas if he was aware of a patient on the plane because Farkas testified that Florek never said that EAC was flying without an FAA certificate.⁶¹

In sum, we agree with the ALJ that the testimony of EAC’s own witnesses, Carroll and Bishay, undermined their contention that Florek was fired because of his fraudulent statements to Farkas. Substantial evidence fully supports the ALJ’s findings that the so-called fraudulent statements EAC proffered as the basis for firing Florek were instead his expressed opinions and questions in trying to rectify what he considered to be a safety and health hazard.

The Employee Manual

EAC also claimed that it fired Florek because his false or fraudulent statements to Farkas violated certain sections of its employee manual, including those covering dishonesty or misrepresentation to a customer, slandering or making false or malicious

⁵⁶ R. D. & O. at 26.

⁵⁷ *Id.*

⁵⁸ TR at 421-23.

⁵⁹ R. D. & O. at 26; TR at 224-26. After July 4, 2004, EAC sent out two memos and scheduled training in “infection control” for just such “messes.” CX 10-13.

⁶⁰ R. D. & O. at 26.

⁶¹ TR at 40, 97.

statements concerning the company's services, willful interference with company operations, failure to comply with company rules regarding conduct, and damaging EAC's reputation or good will.⁶²

The ALJ found (1) no dishonesty or misrepresentation to a customer in Florek's statements; (2) no slandering or false or malicious statements by Florek; and (3) no interference with or damage to the relationship between EAC and BMF.⁶³ Again, substantial evidence supports the ALJ's findings. As discussed, the record shows that Florek made no dishonest, false, slanderous, or malicious statements to BMF's Farkas. Rather, he simply raised questions and concerns regarding possible exposure to infectious disease. Furthermore, Farkas testified that Florek's telephone call on July 14, 2004, did not place EAC's relationship with BMF in jeopardy; instead, BMF terminated its contract with EAC in 2006 for other reasons.⁶⁴ Bishay testified that he perceived from the memo that Florek had decided to "bad-mouth" EAC; however, he admitted that even though he spoke with Farkas two or three times a week for seven months, he never questioned Farkas about the effect of the memo on their business relationship.⁶⁵

The employee manual also provides that in discharging an employee, EAC will give notice of the problem and an opportunity to correct the situation, and that if this is unsuccessful, EAC will give notice before terminating.⁶⁶ The ALJ found additional evidence of pretext because, while EAC relied on Florek's alleged violations of the manual to fire him, the company disregarded the pre-termination procedures contained in that same manual when it discharged Florek.⁶⁷ Substantial evidence supports the ALJ's finding since it is undisputed that Florek was fired without any notice on July 18, 2004. The ALJ gave little weight to Bishay's "self-serving" statement that EAC did not comply with the manual because Florek's problem "could not be corrected."⁶⁸

In sum, the ALJ found that EAC's articulated reasons for firing Florek were pretexts. The ALJ thus concluded that Florek proved by a preponderance of the evidence

⁶² R. D. & O. at 26-27; RX 6. EAC claimed Florek also violated the section about falsifying or omitting information on an employment application, medical record or other company records. RX 6 at 16. The ALJ did not discuss another section, but EAC does not contest this omission.

⁶³ R. D. & O. at 26-27.

⁶⁴ TR at 49-51.

⁶⁵ TR at 386.

⁶⁶ RX 6 at 7.

⁶⁷ R. D. & O. at 27.

⁶⁸ TR at 446-48.

that his protected activity was a contributing factor to his firing.⁶⁹ Substantial evidence in the record as a whole supports this conclusion.

EAC Did Not Carry its Clear and Convincing Evidence Burden

EAC can avoid liability if it can prove by clear and convincing evidence that it would have fired Florek absent his protected complaints to supervisors and the FAA.⁷⁰ EAC argues that Florek's improper, unauthorized, and fraudulent communication with BMF, its largest customer, was sufficient basis for his discharge and that Florek's "unlawful acts" were "nothing less than malicious interference with a contractual relationship" with BMF.⁷¹

Reiterating her findings that Florek's statements to Farkas were not false but merely questions and opinions, and that Florek's call did not damage EAC's relationship with BMF, the ALJ concluded that EAC presented no evidence to show that it would have fired Florek absent his protected activity.⁷² Since we have already held that substantial evidence supports these findings, we concur that EAC did not prove by clear and convincing evidence that it would have discharged Florek absent his protected activity.

Remedies, Attorney's Fees, and Rule 11 Motion

AIR 21 provides that if a violation of AIR 21 has occurred, the ALJ shall order the person who committed such violation to (1) take affirmative action to abate the violation; (2) reinstate the complainant to his former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his employment; and (3) provide compensatory damages.⁷³

Having found that EAC violated the whistleblower protection provision of AIR 21, the ALJ ordered reinstatement.⁷⁴ The ALJ calculated that Florek was entitled to \$14,000.00 in back pay from July 18, 2004, the date of his firing, until March 18, 2005, when he began work for General Safety Services (GSS). She properly offset this amount

⁶⁹ R. D. & O. at 28.

⁷⁰ See 49 U.S.C.A. § 42121(b)(2)(B)(iv).

⁷¹ Respondent's Brief at 8-21.

⁷² R. D. & O. at 29.

⁷³ 49 U.S.C.A. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b)..

⁷⁴ The ALJ properly ordered reinstatement, but Florek declined the company's offer, and both parties agree that reinstatement is no longer an issue. Respondent's Brief at 25, n.1; Complainant's Reply Brief at 2, n.1.

by \$6,502.00 in unemployment benefits Florek received during that time. She therefore awarded of \$7,498.00 for back pay.⁷⁵ She decided that Florek was not entitled to additional back pay after he quit GSS in May 2005 because he had failed to seek work between then and the date of the hearing.⁷⁶ The record supports the ALJ's back pay award. The remedies the ALJ ordered are consistent with AIR 21 and not specifically contested by either party. Therefore, we affirm the ordered relief.

Attorney's Fees

A successful AIR 21 complainant is entitled to receive all costs and expenses, including attorney's fees, reasonably incurred in bringing the complaint.⁷⁷ The ALJ awarded Florek \$25,852.76 in attorney's fees and costs. The regulations governing AIR 21 also provide for the award of attorney's fees incurred by a complainant who prevails in appealing his or her case to the ARB.⁷⁸

An attorney requesting fees bears the burden of proof that the claimed hours of compensation are adequately demonstrated and reasonably expended.⁷⁹ The burden is also on the attorney to demonstrate the reasonableness of his hourly fee by producing evidence that the requested rate is in line with fees prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.⁸⁰

EAC argued that Florek's counsel were not entitled to attorney's fees at all because they failed to support their requests with specific details of services rendered and time spent.⁸¹ EAC noted that the ALJ's attorney fee award was 400 percent of the damages awarded.⁸²

⁷⁵ R. D. & O. at 31.

⁷⁶ *Id.* at 30.

⁷⁷ 49 U.S.C.A. § 42121(b)(3)(B).

⁷⁸ 29 C.F.R. § 1979.110(d) ("If the Board concludes that the party charged has violated the law, . . . the Board shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred.").

⁷⁹ *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 2 (ARB Mar. 7, 2006).

⁸⁰ *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161, ALJ No. 2003-STA-055, slip op. at 2 (ARB Apr. 3, 2008).

⁸¹ Respondent's Brief at 25-26, Attachment 4.

⁸² *Id.*

Two law firms represented Florek. His principal attorney, Thomas E. Kenney, submitted an affidavit but did not itemize his hours or services as required. His affidavit described in general terms his legal experience and the services he performed in litigating Florek's complaint. Attorney Kenney sought fees totaling \$42,900.00 for 143 hours of service at a rate of \$300.00 per hour.⁸³

Despite the absence of itemization, the ALJ determined that she would "attempt to decide what is an objectively reasonable amount of time spent performing each task identified in the affidavits."⁸⁴ Based on the averments in the Kenney affidavit, the ALJ found that Kenney reasonably spent a total of 76 hours providing Florek with the following services: meeting with Florek and reviewing documents; participating in discovery requests and pre-hearing conferences; preparing, taking, and defending depositions; opposing EAC's motion for summary judgment; preparing for the two-day hearing at which six witnesses testified; taking part in the hearing; and preparing a post-hearing brief. The ALJ found Kenney's rate of \$300.00 an hour to be reasonable for an attorney with his experience in the Boston, Massachusetts, area and awarded Kenney \$22,800.00 in attorney's fees and \$2,767.76 in costs.⁸⁵

While the ARB has long held that requests for attorney's fees must be adequately documented, substantial evidence supports the ALJ's conclusion that Kenney's affidavit contained sufficient specificity to show that his services in litigating Florek's complaint were reasonably or necessarily incurred. Kenney does not contest the ALJ's adjustments of the number of compensable hours, and EAC does not contest the ALJ's method of calculation or Kenney's hourly rate.⁸⁶ Therefore, we affirm the ALJ's award of \$25,852.76 to Kenney.

Similarly uncontested is the ALJ's handling of the fee request from the law firm of Joseph & Herzfeld. A legal assistant in that firm submitted an affidavit on behalf of two attorneys and herself, but she too did not itemize.⁸⁷ Charles Joseph sought \$1,487.50 for 3.5 hours of work at \$425.00 an hour. Rebecca Height sought \$5,250.00 for 21 hours at \$250.00 an hour.⁸⁸ The ALJ declined to award any fees to the two attorneys because

⁸³ Affidavit of Thomas E. Kenney.

⁸⁴ R. D. & O. at 34.

⁸⁵ *Id.* at 34-35.

⁸⁶ *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (court may reduce the fee award where the documentation of hours is inadequate); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, -095, ALJ No. 2002-STA-035, slip op. at 19 (ARB Aug. 6, 2004) (ARB affirms unopposed attorney's fee request).

⁸⁷ Affidavit of Soline McLain.

⁸⁸ *Id.*

neither detailed the tasks performed, the dates, and the time spent or provided a personal affidavit or other evidence of the rates claimed.⁸⁹ The ALJ reduced the number of hours sought by the legal assistant from 31.5 to 3 and awarded her \$285.00. We affirm the ALJ's findings as uncontested.⁹⁰

Finally, attorney Kenney has submitted an affidavit and requested fees for services on appeal before the ARB. He seeks a total of \$2,250.00 for 7.5 hours of work at \$300.00 an hour. EAC has not opposed this request. While Kenney has again not itemized his services and hours, his affidavit generally supports the hours spent and the amount requested, and the request is reasonable. Therefore, the ARB orders EAC to pay an additional \$2,250.00 to Kenney.

Rule 11 Motion

EAC asks the ARB to assess sanctions against Florek pursuant to its Fed. R. Civ. P. 11 motion filed with the ALJ on October 12, 2006.⁹¹ That rule says that when attorneys present pleadings, motions, or other papers to a court, they certify that these items are not presented for an improper purpose such as harassment, that the claims or defenses contained therein are warranted under existing law, and that the contentions therein have evidentiary support.⁹² The basis of EAC's motion was Florek's "blatant fraud" upon the court.⁹³

The ALJ declined to rule on the motion, noting that "the fact that there are separate views [of the parties] does not mean that Rule 11 sanctions are appropriate." She did not address the motion in her July 30, 2007 recommended decision.⁹⁴ Nor will we as it is well established that the ARB may not impose Rule 11 sanctions.⁹⁵ Therefore, we deny EAC's request.

⁸⁹ R. D. & O. at 34.

⁹⁰ *Roberts*, slip op. at 19.

⁹¹ Respondent's Brief at 26.

⁹² Fed. R. Civ. P. 11.

⁹³ Respondent's Motion at 1. Florek stated in his affidavit that he had been unable to obtain secure, full-time employment, but in fact he had worked full-time for General Safety Services in early 2005 and had left voluntarily. TR at 111-114.

⁹⁴ TR at 12; Oct. 4, 2006 Order at 4, n.3.

⁹⁵ *Israel v. Schneider National Carriers, Inc.*, ARB No. 06-040, ALJ No. 2005-STA-051, slip op. at 14 (ARB July 31, 2008) (citations omitted).

CONCLUSION

Substantial evidence supports the ALJ's conclusion that Florek's protected activity was a contributing factor in EAC's decision to discharge him. Further, the ALJ's remedies regarding reinstatement, back pay, and attorney's fees are in accordance with law. Therefore, we **AFFIRM** the ALJ's recommended decision. In addition we **AWARD** attorney Kenney \$2,250 in attorney's fees for his services on the appeal before the ARB.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge