In the Matter of:

JOHN NAGLE,	**ARB CASE NO. 11-004**
COMPLAINANT,	**ALJ CASE NO. 2009-AIR-024**
v.	**DATE: March 30, 2012**

UNIFIED TURBINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Lisa M. Werner, Esq., *Clark, Werner & Flynn, P.C.*; Burlington, Vermont

For the Respondent:
John L. Franco, Jr., Esq., *Law Offices of John L. Franco, Jr.*; Burlington, Vermont

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge;* E. Cooper Brown, *Deputy Chief Administrative Appeals Judge;* Joanne Royce, *Administrative Appeals Judge.*

DECISION AND ORDER OF REMAND

John Nagle filed a complaint alleging that his employer, Unified Turbines, Inc., retaliated against him in violation of the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 2007) and its implementing regulations, 29 C.F.R. Part 1979 (2011). On September 27, 2010, a Department of Labor Administrative Law Judge (ALJ) concluded in a Decision and Order (D. & O.) that Nagle's claim should be dismissed because Unified Turbines did not subject him to any adverse action. For the following reasons, we reverse and remand.

BACKGROUND[1]

Unified Turbines is a contractor of an air carrier under AIR 21 and repairs, overhauls, and modifies components for various airline manufacturers. It is privately owned by two partners, Richard Karnes and Karl Deavitt. Unified Turbines employed Nagle as a welder beginning in October 2007.

In August of 2008, Nagle began to notice a change in the quality of one of his co-worker's work (hereinafter referred to as "M")[2] and became aware that M was taking prescription pain medication. Nagle thought that M's work was deteriorating and that he seemed to be "high."

At some point during this time period, Nagle told Deavitt that the quality of M's work was poor, that he had seen M taking three or four pain pills at a time, and that M seemed high. Deavitt told him that he knew that M was taking prescription medication, but he was unaware that he was abusing it.

After this conversation, in September or October of 2008, Nagle saw M open the drawer of an absent co-worker. Nagle knew that this co-worker stored prescription pain pills in the tool drawer on his bench. Nagle later removed the bottle of pills, gave them to Karnes or Deavitt, and told them that he believed that M had an interest in the pills and that he did not want to be implicated if the pills went missing since he was working at the absent co-worker's bench.

On December 16, 2008, Nagle saw what he believed was M selling pills on the street outside of the work shop. He told Deavitt that he saw M selling pills and that M had problems. Deavitt told Nagle that he could not do anything unless he witnessed M doing something improper. On the same day, Nagle made a complaint to the Winooski, Vermont Police Department, that he saw M selling prescription drugs on the street.

M later confirmed that he was abusing prescription opiates during the fall of 2008 when Nagle made complaints to his superiors. M's job performance deteriorated during this time period.

On the morning of December 24, 2008, Nagle and M engaged in a minor shoving match that ended without any third-party intervention. It is not clear who began the altercation or who pushed whom first. Following the altercation, M told Deavitt about the incident and said that he

---

[1] Unless otherwise indicated, the Background Statement is excerpted from the ALJ's findings of fact contained in the ALJ's Decision and Order (D. & O.) at pages 3-13.

[2] The ALJ used the initial "M" in his Decision and Order to identify the co-worker, instead of the co-worker's name, because of the sensitive nature of the testimony concerning the individual's conduct. The Board uses the same initial designation for this individual.

could not work with Nagle anymore and that Deavitt had to do something about it. Shortly thereafter, Deavitt spoke to Nagle, informed him that he had "gone too far," instructed him to leave, and told Nagle to think things over during the upcoming holiday weekend. Deavitt did not say that Nagle was fired.

Nagle believed he was fired, so he went back into the shop to retrieve his welding helmet and left. M was not sent home after the incident and continued to work for the remainder of the day. The workday on December 24, 2008, Christmas Eve, ended at noon.

On December 27, 2008, Nagle called his co-worker, Dan Hubbert, to discuss the incident. Nagle told Hubbert that he believed he was fired based of what was said even though Deavitt did not use the words "you're fired." Hubbert suggested that Nagle go into work the following Monday or at least call Deavitt or Karnes.

That same day, Nagle followed Hubbert's suggestion, telephoned Karl Deavitt's personal cell phone, and left a voicemail message on the cell phone during the Christmas holiday asking for a return call. Karl Deavitt did not return Nagle's call.

Unified Turbines paid Nagle for Christmas Eve, for Christmas Day, and for "Boxing Day" (Friday, December 26, 2008). Nagle did not return to work on Monday, December 29, 2008, or any time thereafter. Unified discontinued paying Nagle beginning on December 29, 2008. At some point during the week of December 29, 2008, Hubbert told Deavitt about his phone conversation with Nagle on December 27, 2008, and Nagle's belief that Deavitt had fired him.

Nagle filed an AIR 21 complaint with the Occupational Safety and Health Administration (OSHA) on February 13, 2009, challenging the termination of his employment. After OSHA denied the complaint, Nagle requested an ALJ hearing. After the hearing, the ALJ issued a D. & O. dismissing the complaint because he found that Nagle had voluntarily resigned and that Nagle's belief that he had been terminated and his decision to not report to work were objectively unreasonable – thus, the ALJ found that there was no adverse action.

Nagle timely appealed the ALJ's D. & O. to the Administrative Review Board (ARB or the Board).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to this Board to issue final agency decisions in AIR 21 cases. 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. § 1979.110(a).

AIR 21's implementing regulations provide, "[t]he Board will review the factual determinations of the administrative law judge under the substantial evidence standard." 29 C.F.R. § 1979.110(b). The Board reviews the ALJ's legal conclusions de novo. *Rooks v. Planet*

Airways, Inc., ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006) (citing *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 Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4 (ARB Dec. 30, 2004)).

DISCUSSION

1. *AIR 21 Whistleblower Provision*

AIR 21's whistleblower protection provision, 49 U.S.C.A. § 42121, provides at subsection (a):

> No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . provided . . . to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.

To prevail under AIR 21, a complainant must prove by a preponderance of the evidence that his protected activity was a contributing factor to the alleged adverse action. *See* 49 U.S.C.A. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.109(a).[3] If the complainant proves that the respondent violated AIR 21, the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. *See* 49 U.S.C.A. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1979.109(a).

2. *ALJ Findings of Fact and Conclusions of Law*

The sole issue raised on appeal is whether Unified Turbines engaged in adverse action against Nagle. Nevertheless, with respect to other elements of the claim, we note that substantial evidence fully supports the ALJ's finding that Nagle engaged in protected activity when he complained about M's drug abuse on the job. FAA regulations contain extensive drug testing provisions and prohibitions pertaining to illegal drug use by aviation industry workers who perform "safety-sensitive" functions, as did both Nagle and M. The record before us

---

[3] A complainant's failure to prove by a preponderance of the evidence any one of the above listed elements of his complaint warrants dismissal. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 7 (ARB Nov. 30, 2005).

demonstrates that while Nagle had no detailed knowledge of FAA regulations, he was an experienced welder, familiar with Unified Turbines substance abuse policy, who was concerned that M's drug use could result in injury to co-workers and potentially compromise aircraft parts. Nagle reasonably believed that M's ongoing abuse of prescription drugs was in violation of FAA safety regulations. D. & O. at 14-15. The ALJ further correctly concluded Nagle proved employer knowledge of protected activity because it was undisputed that Unified Turbines knew about Nagle's reports of M's drug abuse. *Id.*

Turning to the question of whether Unified Turbines engaged in adverse action against Nagle, the ALJ found that Nagle's professed assumption that Unified Turbines had terminated his employment and his decision not to report to work the following Monday were objectively unreasonable. *Id.* at 17. Thus, the ALJ concluded that Nagle voluntarily resigned and was therefore not subject to adverse action. *Id.* To make this determination, the ALJ turned to Vermont law holding that "shaping up or shipping out" does not equal an involuntary or coerced termination. *Id.* However, ARB precedent arising under the Surface Transportation Assistance Act (STAA), not Vermont law, controls a determination of whether there was adverse action in this case. The statutory scheme established by AIR 21 essentially mirrors the protective provisions of the STAA (as well as other whistleblower statutes) and jurisprudence developed under that statute should be applied to this case. *See Sylvester v. Paraxel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, slip op. at 35 (ARB May 25, 2011) (the Board interprets whistleblower statutes in a parallel manner).

Accordingly, we remand for consideration of whether Nagle was discharged under ARB precedent in *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026 (ARB Oct. 31, 2007) and *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-019 (ARB Sept. 30, 2010). In these cases, "discharge" has been interpreted to include the situation where the employment relationship "was ended by one-sided or perhaps mutual assumption by the parties – i.e., by means of behavior from which the parties deduced that the employment relationship was at an end."[4] In the absence of an actual resignation by the employee, "an employer who decides to interpret an employee's actions as a quit or resignation has in fact decided to discharge that employee." *Minne*, ARB No. 05-005, slip op. at 14 (footnotes omitted). The determination on remand may require additional findings of fact as it is unclear from the D. & O. what importance the ALJ gave to the evidence that Nagle called Deavitt to discuss his continued employment, that Deavitt did not call him back, and that, during the OSHA investigation, Deavitt denied that Nagle called him. The ALJ also did not analyze the importance of the evidence that Hubbert told Deavitt that Nagle believed he was fired and that Deavitt took no action when he learned that Nagle believed he was fired. D. & O. at 13.

[4] *Minne,* ARB No. 05-005, slip op. at 13.

CONCLUSION

The ALJ's determination of no adverse action failed to take into consideration relevant ARB case authority. Therefore, we **VACATE** that part of the ALJ's Decision and Order and **REMAND** for further consideration of whether Unified Turbines took adverse action against Nagle and for such further proceedings as may be warranted consistent with this decision.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge