



Todd

In the Matter of:

JOHN NAGLE,

ARB CASE NO. 13-010

COMPLAINANT,

ALJ CASE NO. 2009-AIR-024

v.

DATE: AUG - 8 2013

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 Office of John L. Franco, Jr.*; Burlington, Vermont

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

ORDER AWARDING ATTORNEY'S FEES AND COSTS

John Nagle filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that his former employer, Unified Turbines, Inc. (UT), retaliated against him in violation of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century¹ and its implementing regulations.² Following a remand from the Administrative Review Board (ARB),³ on October 25, 2012, the presiding Administrative Law Judge (ALJ)

¹ 49 U.S.C.A. § 42121 (Thomson/West 2007) (AIR 21).

² 29 C.F.R. Part 1979 (2012).

³ *Nagle v. Unified Turbines, Inc.*, ARB No. 11-004, ALJ No. 2009-AIR-024 (ARB Mar. 30, 2012).

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DEPARTMENT OF LABOR
ADMINISTRATIVE JUDGES
WASHINGTON, DC

issued a Decision and Order finding that Nagle proved by a preponderance of the evidence that his protected activity was a contributing factor to the adverse action and that UT failed to demonstrate by clear and convincing evidence that it would have terminated Nagle's employment in the absence of his protected activity.⁴ The ALJ ordered UT to reinstate Nagle and pay him back pay and compensatory damages, and further indicated that upon application, Nagle was entitled to attorney's fees and litigation costs.⁵ On June 12, 2013, the ARB affirmed the ALJ's decision and permitted Nagle's attorney thirty days in which to submit a petition for attorney's fees and other litigation expenses for work done before the ARB.⁶ The ARB allowed U.T. thirty days from its receipt of the fee petition to file a response.

On June 28, 2013, Nagle's attorney submitted to the ARB a Petition for Attorney Fees, Interest and Additional Damages, seeking \$10,260.00 in attorney's fees, \$200.00 in paralegal fees, and \$54.62 in costs for work performed and costs incurred relating to Nagle's appeals before the ARB.⁷ Nagle also requested that interest be awarded to him on the ALJ's award of \$50,000.00 in compensatory damages from the date of the ALJ's order, October 25, 2012, through the date the payment is received. Pet. For Fees at 1. Nagle also submits that UT has failed to make a bona fide offer of reinstatement as ordered by the ALJ; thus Nagle requests damages based on this failure and a hearing on the issue.

UT opposed the petition on several grounds. On review of the parties' pleadings in this case, we grant the petition for attorney's fees and costs in part.

DISCUSSION

Under AIR 21, if the ALJ finds that a person violated the employee whistleblower protection provision, the Secretary of Labor shall assess against that person, at the complainant's request, the costs of bringing the case, including attorney's fees the complainant reasonably

⁴ *Nagle v. Unified Turbines*, ALJ No. 2009-AIR-024, slip op. at 13-15 (Oct. 25, 2012) (D. & O. on Rem.).

⁵ *Id.* at 20.

⁶ *Nagle v. Unified Turbines, Inc.*, ARB No. 13-010, ALJ No. 2009-AIR-024 (ARB June 12, 2013).

⁷ The fee petition Nagle's counsel filed in total sought \$34,925.00 in legal fees and \$3,252.67 in costs for work before both the ARB and the ALJ. Nagle submitted this same petition to the ALJ at the same time he submitted it to the Board. For the following reasons, our ruling is limited to Nagle's request for the award of legal fees and costs for work before the ARB.

incurred.⁸ The regulations governing AIR 21 also provide for an award of attorney's fees incurred by a complainant who prevails in appealing his or her case to the Board.⁹

In calculating attorney's fees, the Board uses the lodestar method, which requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate.¹⁰ The party requesting a fee award must submit "adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area," as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs."¹¹

We have previously adopted the Supreme Court's explanation in *Hensley v. Eckerhart*, defining unreasonably expended hours to include those that are (1) excessive in relationship to the task performed, (2) redundant or duplicative because multiple attorneys performed the same task, or (3) unnecessary or inappropriate because the task is not properly billed to clients.¹² If the documentation of hours is inadequate, the award may be reduced accordingly.¹³

Initially, we note that Nagle's fee petition includes requests for the payment of legal fees for services performed and costs incurred before the ALJ. We decline to address the payment requests for the services and costs incurred in litigation before the ALJ because the ARB does not have jurisdiction to entertain those requests.¹⁴

On appeal, UT does not contest the hourly rates of Nagle's attorneys or paralegals (\$200 and \$50 per hour respectively). We have examined Werner's affidavit concerning the hourly rates for her firm's attorneys and paralegals, and in the jurisdiction where the attorneys practice.

⁸ 49 U.S.C.A. § 42121(b)(3)(B)(iii); *see also* 29 C.F.R. § 1979.109(b).

⁹ 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."). *See generally*, *Jackson v. Butler & Co.*, ARB Nos. 03-116, -144; ALJ No. 2003-STA-026 (ARB Aug. 31, 2004).

¹⁰ *Evans v. Miami Valley Hosp.*, ARB Nos. 08-039, -043; ALJ No. 2006-AIR-022, slip op. at 3 (ARB Aug. 31, 2009).

¹¹ *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 2 (ARB Feb. 6, 2004).

¹² 461 U.S. 424, 433 (1983).

¹³ *Id.*

¹⁴ Pursuant to 29 C.F.R. § 1979.110(d), the ARB is limited in its jurisdiction to the award of attorney's fees and costs to a prevailing complainant for legal services rendered before the ARB on appeal. *See n.9*. Any fees for legal services rendered before the ALJ shall be assessed by the ALJ. 29 C.F.R. § 1979.109(b).

As these rates are uncontested and consistent with practice in the geographical area, we approve the hourly rates upon which Nagle's attorney's fee petition is based.¹⁵

In opposition to Nagle's petition, UT argues that (1) Nagle waived any fee request except that related to the most recent appeal before the Board; (2) the amount of time billed is excessive and should be reduced such that the appropriate fee and costs are \$6,220.00 and \$51.15 respectively; (3) Nagle waived any request for a damages hearing for failure to reinstate; and (4) interest should accrue from the date of the Board's final order. We address these arguments in turn.

Whether Nagle waived fees for matters before the ALJ and ARB

Regarding Nagle's request for the award of legal fees before the ARB, the regulations at 29 C.F.R. § 1979.110(d) state that "[i]f the Board concludes that the party charged has violated the law, the final order shall order the party charged to take appropriate affirmative action. . . ." Additionally, "[a]t the request of the complainant, the Board shall assess against the named person all costs and expenses (including attorneys' and expert witness fees) reasonably incurred." Because our first order of March 30, 2012, simply remanded the matter to the ALJ and was not a final order, our final order of June 12, 2013, was the first opportunity Nagle's counsel had to request fees for any services performed before the Board. Thus, Nagle did not waive any fee request for legal services performed before the Board.

Regarding Nagle's request for legal fees before the ALJ, the regulations at 29 C.F.R. § 1979.109(b) state that "[a]t the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses . . . reasonably incurred." Thus, it is for the ALJ to determine whether to grant Nagle attorney's fees and all issues regarding fees for services rendered before the ALJ, including any issue of waiver.¹⁶

Whether Nagle's counsel billed an excessive amount of time

UT argues that the fees Nagle's attorneys requested are excessive due to the amount of time expended, citing the fact that Nagle's counsel spent more time on the appeal than UT's counsel did. UT asks that the award regarding fees in the second appeal phase be reduced to \$6,220.00.

¹⁵ See *Florek v. Eastern Air Central, Inc.* ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 12 (ARB May 21, 2009).

¹⁶ On July 18, 2013, Nagle filed a Motion to Continue Rebuttal and Partial Rebuttal asking for more time to address UT's arguments regarding fees for legal services performed before the ALJ. On August 2, 2013, Nagle filed a Supplemental Rebuttal to Unified Turbines' Response to his fee petition also regarding fees for legal services performed before the ALJ. We decline to address the arguments contained in these filings because they pertain to matters properly before the ALJ and are for the ALJ to decide.

In *Hensley*, we explained that the degree of a plaintiff's success is "a crucial factor" to be considered in awarding an attorney's fee.¹⁷ In this case, Nagle's attorneys achieved essentially complete relief under AIR 21. Furthermore, we consider the 51.3 hours of time expended by Nagle's attorneys before the ARB in both appeals to be a reasonable amount of time to prepare for the appeals in this matter. Therefore, we reject UT's request.

What are the consequences of UT's failure to reinstate

Nagle requests damages based on UT's failure to offer him reinstatement. UT argues that (1) it appealed the reinstatement order to the Second Circuit and has an opportunity to request a stay,¹⁸ (2) Nagle waived any request for a damages hearing on this issue because he did not raise it before the Board in the appeal, and (3) Nagle's remedy for UT's failure to comply is in the U.S. District Court.

UT is obligated to make a bona fide offer of reinstatement immediately after the ALJ's order.¹⁹ Should UT fail to make a bona fide offer of reinstatement and refuse to comply, with respect to both reinstatement and damages for not having reinstated Nagle immediately following the ALJ's ruling, Nagle's remedy does not lie with the ARB but in district court.²⁰

Whether Nagle shall be awarded interest on the compensatory damages award?

Nagle requests that "[i]n view of the delay caused by Defendant's appeal" interest be awarded to him on the \$50,000.00 compensatory damages award. Pet. for Fees at 1. He requests that the interest accrue from the date of the ALJ's order of October 25, 2012. *Id.* UT argues that since "the amount of damages became known and final only with this board's final order," June 12, 2013, "is the date from which any interest can accrue." UT Br. at 3. While Nagle has requested interest on the ALJ's compensatory damages award, he has not cited any precedent to support his request and we know of none. Nor do we consider such a request responsive to an order permitting a petition for attorney's fees and costs. Moreover, to the extent that this is an issue that Nagle should have raised before the ALJ, we will not consider arguments a party did

¹⁷ *Hensley*, 461 U.S. at 432, 440 n.14; see *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1968) (court approves a fee award seven times the amount of damages awarded). See also *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1221 (3d Cir. 1995).

¹⁸ The regulations at 29 C.F.R. § 1979.109(c) state that "[a]ny administrative law judge's decision requiring reinstatement . . . shall be effective immediately upon receipt of the decision by the named person, and may not be stayed."

¹⁹ *Cole v. R Construction Co., Inc.*, ARB Nos. 12-037, -039; ALJ No. 2011-STA-022, slip op. at 3 (ARB July 31, 2013).

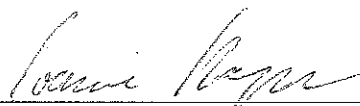
²⁰ "A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order. 49 U.S.C.A. § 42121(b)(6).

not, but could have, presented to the ALJ.²¹ On the other hand, if it was raised but not addressed by the ALJ, Nagle may be warranted in seeking clarification from the ALJ. Alternatively, if Nagle considers that he is entitled to interest on the compensatory damages award as a matter of law, and should the Respondent not pay such interest upon paying the awarded compensatory damages, Nagle would be within his right to seek remedy in a district court of jurisdiction. Therefore, we decline to address Nagle's request for interest on the compensatory damages award.

CONCLUSION

Accordingly, we award attorney's fees for attorney work performed before the ARB in the amount of \$10,260.00, for paralegal work in the amount of \$200.00, and costs in the amount of \$54.62, to Nagle's attorneys for a total of \$10,514.62.

SO ORDERED.



JOANNE ROYCE
 Administrative Appeals Judge



PAUL M. IGASAKI
 Chief Administrative Appeals Judge



E. COOPER BROWN
 Deputy Chief Administrative Appeals Judge

²¹ *Mancinelli v. Eastern Air Ctr.*, ARB No. 06-085, ALJ No. 2006-SOX-008, slip op. at 5 (ARB Feb. 29, 2008).