



In the Matter of:

LINDELL BEATTY,

ARB CASE NO. 11-021

and

**ALJ CASE NOS. 2008-STA-020
2008-STA-021**

APRIL BEATTY,

DATE: June 28, 2012

COMPLAINANTS,

v.

INMAN TRUCKING MANAGEMENT, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**E. Holt Moore, III, Esq., *The Law Office of E. Holt Moore, III*, Wilmington,
North Carolina**

For the Respondent:

**Andrew J. Hanley, Esq., *Crossley, McIntosh, Collier, Hanley & Edes, PLLC*,
Wilmington, North Carolina**

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

DECISION AND ORDER OF REMAND

This case arises under the whistleblower protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2009), and its implementing regulations, 29 C.F.R. Part 1978 (2011). At issue is whether, after terminating their employment, Respondent Inman Trucking Management, Inc., blacklisted Complainants Lindell and April Beatty because they engaged in STAA whistleblower protected activities. A Department of Labor Administrative Law Judge (ALJ) rejected the Beattys' blacklisting claim and dismissed their complaint in a Decision and Order on Remand (D. & O. on Rem.) issued December 2, 2010, and the Beattys filed this appeal. For the following reasons, we reverse the ALJ's Decision and Order on Remand and remand for further proceedings.

FACTUAL BACKGROUND¹

The Beattys worked for Inman Trucking from August 2004 to December 2005. D. & O. on Rem. at 1. On October 29, 2005, the Beattys complained about an exhaust leak. *Id.* at 1. No repairs were necessary. *Id.* at 7-8.

On December 2005, the Beattys made a second exhaust leak complaint; the leak was repaired in Albuquerque, New Mexico on December 6, 2005. *Id.* at 8-9. Inman Trucking paid for the Beattys to stay in a hotel, paid for their meals, and paid them for the layover. *Id.* at 5.

On December 13 or 14, 2005, the Beattys came into Inman Trucking's offices either at the end of a trip or the beginning of another one. *Id.* at 3-4, 5. Lindell exchanged words with Al Grover, , the safety director for Inman Trucking, and at one point, Lindell told Grover that he was taping their conversation. *Id.* at 5. Grover testified that Inman Trucking was going to fire them if they refused to take a trip for any reason (other than a safety reason). D. & O. on Rem. at 6; Hearing Transcript (Tr.) at 47, 62-63, 67-70, and 138. Inman Trucking terminated the Beattys' employment on or about December 13 or 14, 2005. *Id.* at 5.

Lindell testified that on December 14, 2005, he did not feel like his complaints had any part in his termination. D. & O. on Rem. at 4; Tr. at 94. He thought he was fired because he had the tape recorder. D. & O. on Rem. at 4. He wanted to tape a conversation in which his supervisors berated him for raising safety complaints, such as there being a "phantom muffler," which is apparently what Grover called the Beattys' muffler or exhaust complaint that Grover did not believe had any basis in fact. Tr. at 95, 159. Lindell testified that if he had not had the tape recorder that day, he would not have been fired. Tr. at 95.

¹ The background information comes from the ALJ's summary of the evidence and from the record as it does not appear that the ALJ made any findings of fact.

On or the day after the termination date, Grover filled out a DAC report on the Beattys. D. & O. on Rem. at 5.² It listed “excessive complaints, company policy violation, personal contact requested and other” as the reasons that Inman terminated the Beattys’ employment. *Id.* at 6.

In August 2007, the Beattys applied to US Express but were abruptly pulled out of orientation and not hired. *Id.* at 2. April Beatty testified that after US Express rejected them, they sought employment with Cargill Meats, but that they were told that they would not be hired due to their DAC report. *Id.* at 3.

On August 9, 2007, the Beattys filed a complaint with the Occupational Safety and Health Administration (OSHA). OSHA Findings at 1. OSHA offered to settle the case with Grover if he changed the DAC report. Tr. at 145. On August 24, 2007, Grover revised the DAC report to delete: “personal contact requested.” D. & O. on Rem. at 7.

On August 27, 2007, Grover revised the DAC report to delete: “Eligible for rehire: NO, excessive complaints, and personal contact requested.” *Id.* On that day, he added: “Review required before rehiring.”

On September 13, 2007, Grover sent an e-mail to DB4osha@aol.com stating that he apologized to the Beattys for his obstinacy and stubbornness. CX F. He wrote that he found new information and decided to change the DAC reports for the Beattys but without admitting that the reason for the discharge had anything to do with whistleblowing.

At the hearing before the ALJ, Grover explained that he apologized because during the DAC report negotiations, he had thought that there was only one exhaust leak issue, the “phantom” one, and he discovered information about the actual exhaust leak problem in December and so became less resistant to changing the DAC reports to take out negative information. Tr. at 160. The Beattys wanted all negative information removed but Grover felt that the DAC report should reflect their work history. He did not want to remove the statement that Inman Trucking discharged them for company policy violations because that was one of the biggest reasons they were let go. Grover testified that he discharged the Beattys because he was dissatisfied with their work. Tr. at 163.

On September 13, 2007, Grover revised the DAC report a final time substituting all the text with number codes. D. & O. on Rem. at 7.

² “A DAC report is a consumer report setting forth employment history on truck drivers. It is maintained by HireRight Solutions, Inc. (formerly known as USIS Commercial Services), a consumer reporting agency.” *Canter v. Maverick Transp., LLC*, ARB No. 11-012, ALJ No. 2009-STA-054, slip op. at 2 n.2 (ARB June 27, 2012).

PROCEEDINGS BELOW

The Beattys' OSHA complaint alleged that Inman Trucking terminated their employment and blacklisted them in violation of STAA's whistleblower protection provisions. OSHA investigated and found no STAA violation. The Beattys filed objections to OSHA's determination and requested a hearing before an Administrative Law Judge (ALJ).

The ALJ issued a Recommended Decision and Order (R. D. & O.) on December 9, 2008, dismissing the Beattys' claims of retaliatory termination and blacklisting because he found them to be untimely filed. Following the Beattys' appeal of the ALJ's decision, the ARB affirmed the ALJ's dismissal of the Beattys' retaliatory termination claim as untimely. But the Board reversed the ALJ's finding that the blacklisting complaint was untimely and remanded the case for further proceedings on the blacklisting complaint. *Beatty v. Inman Trucking Mgmt.*, ARB No. 09-032, ALJ No. 2008-STA-020 (June 30, 2010).

Following the ARB remand, the ALJ addressed the merits of the Beattys' blacklisting claim. The ALJ issued a second decision, the Decision & Order on Remand (D. & O. on Rem.) on December 2, 2010, in which he republished his summary of the evidence from his initial R. D. & O. and concluded that the Beattys did not sustain their burden of proof with regard to blacklisting. D. & O. on Rem. at 9. The Beattys appealed.

ISSUES

At issue is whether the Beattys' protected activity contributed to Inman Trucking's alleged adverse action against the Beattys – in other words, whether Inman Trucking violated the STAA employee protections provision, 49 U.S.C.A. § 31105.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978. 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. § 1978.109(a).

In reviewing STAA cases, the ARB is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted). The ARB reviews the ALJ's conclusions of law de novo. *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No.

2002-STA-012, slip op. at 2 (ARB May 28, 2004). To conduct a meaningful review, we need the ALJ's opinion to "include findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact or law presented on the record." 5 U.S.C.A. § 557(c)(West 1996); 29 C.F.R. § 18.57(b)(2011). Providing sufficient findings of fact and analysis also allows the parties to understand the ultimate findings and order. *See, e.g., Guthrie v. Astrue*, 604 F. Supp. 2d 104, 112 (D.D.C. 2009) (under the Social Security Act).

DISCUSSION

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. 49 U.S.C.A. § 31105(a)(1).

To prevail on their STAA claim, the Beattys must prove by a preponderance of the evidence that (1) they engaged in protected activity, (2) Inman Trucking was aware of the protected activity, (3) Inman Trucking took an adverse employment action against them, and (4) the Beattys' protected activity was a contributing factor in the adverse action.³ *See Villa v. D.M. Bowman, Inc.*, ARB No. 08-128, ALJ No. 2008-STA-046, slip op. at 3 (ARB Aug. 31, 2010). If the Beattys do not prove one of these requisite elements, the entire claim fails. *See West v. Kasbar, Inc. /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005). The employer may escape liability only by proving with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 49 U.S.C.A. § 31105(b)(2)(B)(iv).

The Beattys allege that they engaged in protected activity by making safety complaints in October and December 2005, and that they suffered an adverse action because Inman Trucking blacklisted them when it included negative information about them on their DAC report. Following the termination of their employment with Inman

³ 49 U.S.C.A. § 42121(b)(2)(B)(iii). Congress amended the STAA's burden of proof standard, on August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act). The Act amended paragraph (b)(1) of 49 U.S.C.A. § 31105 to state that STAA whistleblower complaints will be governed by the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b)(Thomson/West 2007)(AIR 21), which contains whistleblower protections for employees in the aviation industry. Under the AIR 21 standard, complainants must show by a "preponderance of evidence" that a protected activity was a "contributing factor" to the adverse action described in the complaint. 49 U.S.C.A. § 42121(b)(2)(B)(i); *see also* 75 Fed. Reg. 53545, 53550.

Trucking, the Beattys applied for truck driving jobs with U.S. Express and Cargill Trucking. They claimed that, by creating a negative DAC report entry about them, Inman Trucking blacklisted them and therefore violated the STAA.

The ALJ's analysis appears to relate solely to whether the DAC reports were adverse to the Beattys and whether the DAC reports were entered because of the Beattys' safety complaints.

1. Blacklisting

The Board has recognized that blacklisting may be the adverse action in a STAA claim. *Murphy v. Atlas Motor Coaches, Inc.*, ARB No. 05-055, ALJ No. 2004-STA-036 (ARB July 31, 2006).⁴ Blacklisting is “quintessential discrimination,” that is often “insidious and invidious [and not] easily discerned.” *Pickett v. Tennessee Valley Auth.*, ARB Nos. 02-056, 02-059; ALJ No. 2001-ALJ-018, slip op. at 9 (ARB Nov. 28, 2003) (quoting *Leveille v. New York Air Nat'l Guard*, No. 1994-TSC-003, slip op. at 18 (Sec'y Dec. 11, 1995)). We have said that “blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment.” *Id.* at 5. Therefore, to prevail, the Beattys must prove that Inman Trucking disseminated damaging information about them that would or could prevent them from finding employment.

The ALJ found that the Beattys did not sustain their burden with regard to blacklisting. The ALJ stated that “[t]he Beattys merely speculate that the comments filed by Respondent were the cause of them later not being hired by Cargill and U.S. Express.” D. & O. on Rem. at 9. The ALJ additionally stated that the Beattys' witness, Anthony Hall, “could not state for certain that the Respondent's DAC report was the cause for them not being hired.” *Id.*

We hold that the ALJ did not properly apply the test for blacklisting because he required that the Beattys prove that the negative DAC report actually led to negative consequences for them. As the Secretary found in *Earwood v. Dart Container Corp.*:

The fact that Complainant would not have lost an employment opportunity due to [the Respondent's] improper statement should not shield [the Respondent] from liability because its statement “had a tendency to impede and interfere with [Complainant's] employment opportunities.” *Ass't Sec'y v. Freightway Corp.*, slip op. at

⁴ Indeed, since this claim was filed, the STAA regulations were amended to specifically provide a cause of action on behalf of an employee whose former employer blacklists him because he engaged in protected activity. 29 C.F.R. §§ 1978.102(b), (c) (2011).

3. . . . [E]ffective enforcement of the Act requires a prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment opportunities as a result.

No. 1993-STA-016, slip op. at 3 (Sec'y Dec.7, 1994)(footnote omitted).

Inman Trucking put negative information on the DAC report including "excessive complaints, company policy violation, personal contact requested and other" and "Eligible for rehire: No." These statements were disseminated and are on their face damaging information that would affirmatively prevent and arguably did prevent them from finding employment. Whether the negative statements caused any damages to the Beattys is immaterial based on the case law above. Thus, we reverse the ALJ's ruling that Inman Trucking did not blacklist the Beattys because the evidence of record is sufficient to conclude that the content of the DAC report qualifies as blacklisting.

2. Causation

For the Beattys to prevail in their claims, they must show that their protected activity was a contributing factor in the adverse action/blacklisting Inman Trucking took against them. 49 U.S.C.A. § 31105.

The ALJ indicated that he believed Grover's testimony that the DAC report had nothing to do with the Beattys' alleged safety complaints. D. & O. on Rem. at 9. However, because the ALJ found that there was no adverse action, and we have concluded that there was adverse action in the form of blacklisting, we remand to the ALJ to consider whether any of the Beattys' protected activity contributed to the blacklisting. Additionally, we note that in his discussion of the causation issue, the ALJ failed to reconcile some of the conflicting evidence of record and did not make sufficient findings of fact. For example, Grover testified that he planned to terminate the Beattys' employment if they refused a trip "for any reason." This statement would seem to include any safety-related reason even though he obviously denied violating the Act when asked. Additionally, it is not clear from the record or from the summary of evidence or conclusions of law why Grover decided to terminate the Beattys' employment on December 14, 2005. There is no evidence that they refused a trip on December 14, 2005, the reason Grover gave for planning to terminate their employment "long before" that date. Because Grover made the DAC report entry on the day that the Beattys' employment was terminated and because the DAC report contained information on why Grover decided to terminate the Beattys' employment, the reasons behind the terminations and the entry of the DAC report are related. Tr. at 158, 162. Thus, Grover's motivations for both are critical to the analysis on this issue.

Further, it appears that the ALJ required that there be animus for a finding of causation. This was improper. Animus can be evidence of retaliation, but it is not

required to prove retaliation. Causation is established, with or without evidence of retaliatory animus, if the protected activity contributed to the adverse action.

In addition, the ALJ should address the temporal proximity between the Beattys' protected activity in complaining about the exhaust leak on or about December 6, 2005, and termination of their employment and first DAC report entry on December 14, 2005.

CONCLUSION

The ALJ did not make any findings as to whether the Beattys engaged in protected activity and whether any decision-maker had knowledge of any such activity. Further, the ALJ erred in deciding that Inman Trucking did not blacklist the Beattys. Also, the ALJ appears to have improperly required animus for causation and made insufficient findings of fact. Because of the number of factual findings that may be needed, and the possibility that at least some of these would be better made by someone who has had the opportunity to assess the credibility of the witnesses, we conclude that the best course of action is to return this matter to the ALJ for appropriate findings and recommendations.

We therefore **REMAND** the Beattys' complaints for further proceedings consistent with this opinion. On remand, the ALJ shall make factual findings regarding (1) whether the Beattys engaged in protected activity, (2) whether any protected activity was a contributing factor in the blacklisting, and (3) if it was a contributing factor, whether Inman Trucking established by clear and convincing evidence that it would have made the DAC report entries even if the Beattys had not engaged in protected activity.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge