



In the Matter of:

JAMES SEEHUSEN,

ARB CASE NO. 12-047

COMPLAINANT,

ALJ CASE NO. 2011-STA-018

v.

DATE: September 11, 2013

MAYO CLINIC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

For the Complainant:

Paul O. Taylor, Esq.; *Truckers Justice Center*; Burnsville, Minnesota

For the Respondent:

Karen G. Schanfield, Esq.; and Lori-Ann Jones, Esq.; *Fredrikson & Byron, PA*; Minneapolis, Minnesota

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

The Complainant, James Seehusen, filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that the Respondent, Mayo Clinic, violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) and its implementing regulations,¹ when it suspended him from his job, removed him from his job as a mail truck driver and prohibited him

¹ 49 U.S.C.A. § 31105 (Thomson/West 2011); 29 C.F.R. Part 1978 (2012).

from applying for a truck driver position.² Seehusen alleged that Mayo took these adverse actions in retaliation for his complaints about a broken windshield on a sprinter van, the requirement to perform pre-trip inspections, and Mayo's failure to require shuttle bus operators to have Department of Transportation (DOT) medical cards.³

On February 8, 2012, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order in which he found that Seehausen proved by a preponderance of the evidence that Mayo violated the STAA's whistleblower provisions and that it failed to prove by clear and convincing evidence that it would have taken the same adverse actions against Seehusen had he not engaged in protected activity. The ALJ awarded Seehusen remedies including reimbursement for lost wages; interest on his back pay award; and reinstatement "with the same seniority, status, and benefits he would have had but for Respondent's unlawful discrimination."⁴

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under STAA.⁵ The ARB "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."⁶ We are bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole.⁷ The ARB reviews the ALJ's conclusions of law de novo.⁸

The STAA prohibits an employer from discharging or discriminating against an employee because the employee has engaged in certain protected activity.⁹ To prove a

² *Seehusen v. Mayo Clinic*, ALJ No. 2011-STA-018, slip op. at 10 (Feb. 8, 2012) (D. & O.).

³ *Id.* at 9.

⁴ *Id.* at 17.

⁵ Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

⁶ *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted).

⁷ 29 C.F.R. § 1978.110(b). Substantial evidence is that which is "more than a mere scintilla" and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

⁸ *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip. op. at 2 (ARB Nov.28, 2012).

⁹ 49 U.S.C.A. § 31105(a)(1).

STAA violation, the complainant must show by a preponderance of evidence that his safety complaints to his employer were protected activity, that the company took an adverse employment action against him, and that his protected activity was a contributing factor in the adverse action.¹⁰ If the complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the adverse personnel action, his employer can avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event.¹¹

We find the ALJ's D. & O. to be most detailed, thorough, and replete with numerous supportive citations to the hearing transcript and exhibits and to applicable legal precedent. Having reviewed the evidentiary record, and upon consideration of the parties' briefs on appeal, we find the ALJ's findings of fact to be supported by substantial evidence of record. We also find the ALJ's legal conclusions to be in accordance with applicable law. Accordingly, for the reasons stated by the ALJ, we conclude that Seehusen established by the preponderance of the evidence that Mayo unlawfully retaliated against him under the STAA's whistleblower protection provisions.

Regarding the ALJ's damages award, Mayo raises one issue that the ALJ did not address, i.e., whether it was incumbent upon Mayo to return Seehusen to a truck driver position. Mayo argues that it is not proper to do so because the relevant regulation provides for "reinstatement of the complainant to his or her former position, together with the compensation, terms, conditions, and privileges of the complainant's employment" ¹² In support of this argument, Mayo avers that the truck driver position was a different position, and the "[r]egulations only permit reinstatement of an employee to his *former* position – not promotion to a position he never held."¹³

Seehusen replies that Mayo's argument is disingenuous because he drove a truck for Mayo for eight years.¹⁴ He points out that even where a job no longer exists, the

¹⁰ *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

¹¹ *Id.* at 5-6 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv)).

¹² 29 C.F.R. § 1978.109(d)(1).

¹³ Respondent Mayo Clinic's Legal Brief or Points and Authorities in Support of its Petition for Review at 25-28.

¹⁴ Complainant's Reply Brief at 26.

Secretary has ordered employers to reinstate employees to other jobs¹⁵ and that Mayo has other truck driving positions in other Departments.¹⁶

It appears that the ALJ did not address Mayo's argument because Mayo did not raise it before the ALJ. Generally, the Board will not consider an argument that a party raises for the first time on appeal.¹⁷ Thus, the ALJ's reinstatement order stands. Nevertheless, even if we were inclined to address this argument, we would affirm the ALJ's order of reinstatement.

The ALJ found, "The job duties for the position were the same duties previously performed by Complainant and required the employee to operate a commercial mail truck. Tr. at 6, 37, 71-72, 147-148; JX 22; JX 27." Further, Mark Draper, Seehusen's supervisor since 2005, testified as follows:

MR. TAYLOR: . . . When Mr. Seehusen applied for the truck driving job on March 19, 2010, he was asking to be restored to the same job he had done for eight years, correct?

[MR. DRAPER]: Correct.

MR. TAYLOR: You call that a promotion, correct?

[MR. DRAPER]: No.^[18]

Consequently, Mayo has conceded that the mail truck driving position was neither "different," nor a "promotion." To permit an employer to refuse to reinstate a complainant against whom it has retaliated in violation of the STAA whistleblower protections, under the facts of this case, would be an unconscionable exultation of form over substance – a result the law does not permit.

Accordingly, finding no reason to depart from the ALJ's comprehensive and well-reasoned opinion, we **AFFIRM** it. As the prevailing party, Seehusen is also entitled to costs, including reasonable attorney's fees, for legal services performed before the

¹⁵ *Id.* at 26-27 (citing *DeFord v. TVA*, No. 1981-ERA-001 (Sec'y Aug. 16, 1984); *Creekmore v. ABB Power Sys. Energy*, ARB No. 88-038, ALJ No. 1993-ERA-024 (Dep. Sec. Apr. 10, 1996)).

¹⁶ Complainant's Reply Brief at 27.

¹⁷ *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-023, slip op. at 7 & cases cited at n.45 (ARB Sept. 29, 2006).

¹⁸ Hearing Transcript at 78.

ARB.¹⁹ Seehusen's attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney's fee petition with the ARB, with simultaneous service on opposing counsel. Thereafter, Mayo shall have 30 days from its receipt of the fee petition to file a response.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

¹⁹ 29 C.F.R. § 1978.110(d).