



In the Matter of:

GRANT E. TIMMONS,

ARB CASE NO. 14-051

COMPLAINANT,

ALJ CASE NO. 2014-STA-009

v.

DATE: September 29, 2014

CRST DEDICATED SERVICES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Grant E. Timmons, *pro se*, Pineville, North Carolina

For the Respondents:

Kevin J. Visser, Esq.; *Simmons Perrine Moyer Bergman PLC*, Cedar Rapids, Iowa

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

FINAL DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 (STAA or the Act), as amended, 42 U.S.C.A. § 31105 (Thomson Reuters 2013), and its implementing regulations, 29 C.F.R. Part 1978 (2013). Grant E. Timmons, a truck driver, filed a complaint with the Occupation Safety and Health Administration (OSHA) on August 8, 2013, alleging that CRST Dedicated Services Inc. (CRST or Company) blacklisted him in violation of the STAA. OSHA dismissed the complaint. On April 14, 2014, after a hearing, an Administrative Law Judge (ALJ) entered a Recommended Decision and Order (D. & O.) determining that the company's actions violated the STAA, and ordered relief. CRST petitions the Administrative Review Board (ARB) for review. We affirm.

BACKGROUND

A. Facts

CRST is a commercial motor carrier engaged in transporting products over the nation's highways. Timmons worked as a truck driver for CRST until his employment ended pursuant to a notice of personnel action processed on July 6, 2012. D. & O. at 2. Timmons subsequently filed a whistleblower complaint under the STAA on August 8, 2012, alleging that CRST had terminated his employment for making complaints about job safety violations. Timmons and CRST settled this complaint pursuant to an agreement signed in March 2013. Respondent's Exhibit (RX) A. The settlement agreement contains a "Non-Disparagement" clause that states:

[t]he parties agree that they will not at any time, directly or indirectly, either orally, in writing, or through any other medium, disparage, defame, impugn, or otherwise attempt to damage or assail the reputation, integrity, or professionalism of Employee [Timmons]. Employer agrees that it will not provide any derogatory information regarding Employee's employment with Employer for his Drive-A-Check ("DAC") report and/or will amend the information provided to remove any derogatory references.

The agreement also contains a clause which states that "Employee [Timmons] is not entitled to reemployment or reinstatement." *Id.*

Timmons later applied for a truck driver position with Howell's Motor Freight (Howell's). D. & O. at 3; Hearing Transcript (HT) at 18. Howell's reviewed an employment verification report regarding Timmons's prior employment with CRST from TenStreet, a third-party verification provider. D. & O. at 2, 3; HT at 20, 59. The employment verification report contained information CRST's computer system automatically generated to TenStreet stating that CRST had terminated Timmons's employment because he did not meet company standards and was not eligible for rehire. Complainant's Exhibit (CX) 1; D. & O. at 4; HT at 87. Timmons testified that a Howell's representative told him he would have been hired but for his reference indicating he had been terminated from CRST. D. & O. at 3; HT at 22-23.

B. ALJ Recommended Decision and Order

The ALJ determined that Timmons engaged in protected activity, and that he suffered an adverse action when CRST failed to give Timmons a positive reference when he was seeking employment with Howell's. D. & O. at 9-10. The ALJ observed that "blacklisting may serve as the adverse action in a STAA claim." *Id.* at 9 (case citations omitted). The ALJ found that the "content of the employment reference" that CRST officials provided to Howell's about Timmons was "plainly disparaging and is of the quality that would prevent a reasonable employer from extending an offer of employment." *Id.* at 10. The ALJ further determined that the protected

activity contributed to the adverse action Timmons suffered. *Id.* The ALJ found that CRST staff engaged in an “active desire to disseminate damaging information about Complainant.” *Id.* at 11. The ALJ determined that CRST failed to show a “legitimate, nondiscriminatory reason for including damaging information on Complainant’s employment verification report.” *Id.*

The ALJ awarded Timmons \$17,000 in compensatory damages, and ordered that CRST purge Timmons’s employment file of any reference to his protected activity and discharge, and amend his employment records “to show Complainant has a satisfactory work and safety record as related to the subject of his complaint.” *Id.* at 13.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions under the STAA, and implementing regulations. Secretary’s Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. Part 1978. The ARB reviews the ALJ’s factual findings to determine whether they are supported by substantial evidence, 29 C.F.R. § 1978.110(b), and 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). The ALJ’s evidentiary rulings are reviewed for abuse of discretion. *Butler v. Anadarko Petroleum Corp.*, ARB No. 12-041, ALJ No. 2009-SOX-001, slip op. at 2 (ARB June 15, 2012).

DISCUSSION

A. *Statutory framework and burden of proof*

The STAA states 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). The STAA protects an employee who makes a complaint “related to a violation of a commercial motor vehicle safety or security regulation, standard, or order.” *Id.* To prove a 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. *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). 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. *Id.* at 5-6 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv)).

The STAA regulations 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), and the Board has recognized that blacklisting may be the adverse action in a STAA complaint. *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 11-021, ALJ Nos. 2008-

STA-020, -021; slip op. at 6 (ARB June 28, 2012). 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)). “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.

B. ALJ’s liability determination is supported by substantial evidence

The ALJ determined that Timmons engaged in protected activity, and that the adverse action that he suffered, blacklisting, was due to his protected acts. On review of the record, we hold that the ALJ’s liability determination is fully supported by substantial evidence. *See* D. & O. at 3-11.

CRST argues (Brief at 8) that Timmons failed to show that the information provided in the employment verification form prevented him from finding employment. This argument lacks merit. The Secretary explained in *Earwood v. Dart Container Corp.*:

The fact that Complainant would not have lost an employment opportunity due to [Respondent’s] improper statement should not shield [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 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). *See Beatty*, ARB No. 11-021, slip op. at 6-7. The negative information CRST provided on the employment verification report, indicating that Timmons had been terminated and failed to meet company standards, “[was] disseminated and [is] on [its] face damaging information that would affirmatively prevent and arguably did prevent [Timmons] from finding employment.” *Id.* at 7. Thus, the ALJ’s determination that the negative information constituted blacklisting is supported by substantial evidence.

CRST further argues (Brief at 10) that the ALJ erred because the unfavorable reference generated on Timmons was unintentional, and caused by a computer system CRST uses for employment verifications. There was no error. The ALJ found evidence establishing that : 1) Timmons’s former dispatcher provided the disparaging reference found in Timmons’s employment record (HT at 33, 100-101); 2) that after Timmons notified a CRST employee of the “Non-Disparagement” clause in his settlement agreement, she initially removed the negative reference from his employment record, but then her CRST supervisor, CRST Director of Human Resources Angie Stastny, required her to put the negative reference back; and 3) that CRST later changed its policy of including termination information in employment verification reports

because of the mistake with Timmons (HT at 64, 67, 79). The ALJ concluded that this evidence reflected the Company's desire to disseminate disparaging information about Timmons; indeed, the ALJ found it "highly unusual" that CRST did "not have a mechanism" to "flag" and remove the negative information from Timmons's employment record after signing the settlement agreement. D. & O. at 11. Moreover, the ALJ did not find Stastny's testimony that she had been unaware that termination information was included in employment verification reports credible, as she required Timmons's negative information to be added back to Timmons's record, only to change CRST's policy twenty days later. *Id.*

Based on this evidence, the ALJ found "by a preponderance of the evidence" that CRST blacklisted Timmons in retaliation for his prior STAA complaint. *Id.* The ALJ determined that CRST "failed to rebut" the proof of a violation, as no CRST witness adequately explained "why the negative information was provided" to TenStreet or why Stastny insisted that the negative information remain in Timmons's report. *Id.*

Finally, although the ALJ erred in analyzing this case under the analytical framework of case authority derived from Title VII of the Civil Rights Act of 1964,¹ the application of Title VII principles was harmless and does not obviate the ALJ's liability determination under STAA. *See, e.g., Blackie v. Pierce Transp.*, ARB No. 13-065, ALJ No. 2011-STA-055, slip op. at 8-11 (ARB June 16, 2014). The Title VII analytical framework ceased applying to STAA with the 2007 STAA amendments that dramatically altered the burden of proof framework applicable to STAA whistleblower cases. In making the causation determination, the ALJ relied upon case law adopting the Title VII burden shifting paradigm, as first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973). But as the Board pointed out in *Salata v. City Concrete*,² the 2007 STAA amendments replaced the *McDonnell Douglas* Title VII burden of proof standards and burden-shifting analytical framework in STAA cases by incorporating the legal burdens of proof and framework imposed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21),³ which provides whistleblower protection for employees in the aviation industry. The 2007 amendments revised paragraph (b)(1) of 49 U.S.C.A. § 31105 to expressly provide that STAA whistleblower complaints are governed by the legal burdens of proof set forth in AIR 21 at 49 U.S.C.A. § 42121(b).

The AIR 21 burden of proof framework is much more protective of complainant-employees and much easier for a complainant to satisfy than the *McDonnell Douglas* standard. *See, e.g., Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3d Cir. 2013).

¹ 42 U.S.C.A. § 2000e *et seq.* (Thomson Reuters 2012). The ALJ specifically cited to *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-508 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *Clean Harbors Envtl. Serv., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Moon v. Transp. Drivers*, 836 F.2d 226, 229 (6th Cir. 1987); *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987); *Poll v. R. J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 1996-STA-035, slip op. at 5 (ARB June 28, 2002). D. & O. at 9, 11.

² ARB No. 08-101, ALJ No. 2008-STA-012 (ARB Sept. 15, 2011).

³ Pub. L. No. 106-181, 114 Stat. 61 (Apr. 5, 2000).

For instance, the AIR 21 complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action. *See, e.g., Araujo*, 708 F.3d at 158; *Marano v. Dept. of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993); *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 10 (ARB June 29, 2006). If the complainant proves that his or her protected activity was a contributing factor in the unfavorable personnel action, the burden shifts to the respondent, in order to avoid liability for damages, to prove “by clear and convincing evidence” that it would have taken the same adverse action in any event. *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). This is a high burden of proof that we examined recently in detail. *Speegle v. Stone & Webster Constr. Co.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 10-12 (ARB Apr. 25, 2014). To meet the burden, the employer must show that ‘the truth of its factual contentions is highly probable.’” *Araujo*, 708 F.3d at 159 (citations omitted). “In addition to the high burden of proof, the express language of the statute requires that the ‘clear and convincing’ evidence prove what the employer ‘would have done’ not simply what it ‘could have’ done.” *Speegle*, ARB No. 13-074, slip op. at 11.

The ALJ determined that Timmons demonstrated by a preponderance of the evidence that CRST blacklisted him in retaliation for his prior STAA complaint. This determination is fully supported by substantial evidence in the record. Under the AIR 21 framework, after the complainant has demonstrated that protected activity was a contributing factor in his adverse action, the burden of proof switches to the employer to show by clear and convincing evidence that it would have acted adversely in the absence of the protected activity. Because the employer’s “clear and convincing” burden of proof standard required under the STAA is a higher burden of proof than the corresponding Title VII standard, the ALJ’s failure to explicitly apply the correct standard is harmless since the ALJ found the employer unable to meet even the lower Title VII standard. *See Blackie*, ARB No. 13-065, slip op. at 8-11.

C. The ALJ’s compensatory damage award is supported by substantial evidence

Under the STAA, a successful complainant is entitled to “compensatory damages, including back pay.”⁴ The ALJ found that Timmons credibly testified that Howell’s was seriously considering him for employment prior to receiving Timmons’s negative job reference on his employment verification form on August 1, 2013, and that a Howell’s recruiter told him that he would have been paid \$1,000.00 per week.⁵ In addition, the ALJ found that Timmons testified that he was unable to find new employment after leaving CRST until November 27, 2013, when he began his current job.⁶ Based on Timmons’s testimony, which the ALJ found credible, the ALJ awarded lost wages in the amount of \$1,000.00 per week for 17 weeks. D. & O. at 12.

⁴ 49 U.S.C.A. § 31105 (b)(3)(A)(iii); 29 C.F.R. § 1978.109(d)(1).

⁵ D. & O. at 3, 5, 12; CX 1; HT at 22-23, 63.

⁶ D. & O. at 4, 12; HT at 42.

CRST argues (Brief at 12) that the ALJ erred in awarding lost wages because evidence supporting payment of the award is based on hearsay. Specifically, CRST states that the award amount is based on Timmons's hearsay testimony as to the amount that Howell's would have paid him had he gotten the job. *See* HT at 23.

Administrative hearings in STAA cases are conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings. *See* 29 C.F.R. § 1978.106(a) (citing 29 C.F.R. Part 18).⁷ Under these rules, hearsay statements are inadmissible unless they are defined as non-hearsay or fall within an exception to the hearsay rule. 29 C.F.R. § 18.802. The ALJ found the testimony of Timmons, who was *pro se*, credible, and indeed CRST introduced no evidence as to lost wages that contravened Timmons's testimony. Moreover, pursuant to 29 C.F.R. § 18.803(a)(24), a statement not covered by any of the exceptions to the hearsay rule "but having equivalent circumstantial guarantees of trustworthiness to the aforementioned hearsay exceptions," are admissible "if the judge determines that":

- (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Under the circumstances, the ALJ did not abuse discretion in admitting Timmons's testimony as to his lost wages. "[A] certain degree of latitude should be afforded such unrepresented parties," *Butler v. Andarko Petroleum Corp.*, ARB No. 12-041, ALJ No. 2009-SOX-001, slip op. at 3 (ARB June 15, 2012), and here there is nothing in the record that contravenes the ALJ's reliance on Timmons's testimony as to the weekly wage he would have received had Howell's hired him absent CRST's blacklisting of him.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's finding that CRST blacklisted Timmons in violation of the STAA, and we **AFFIRM** the ALJ's order of damages and remedies.

⁷ *See Ass't Sec'y & Mailloux v. R & B Transp., LLC*, ARB No. 07-084, ALJ No. 2006-STA-012, slip op. at 6 (ARB June 16, 2009).

As the prevailing party, Timmons is entitled to costs incurred for litigation before the ARB. Timmons shall have thirty (30) days from receipt of this Final Decision and Order in which to file a fully supported statement of costs with the ARB, with simultaneous service on opposing counsel. Thereafter, CRST shall have thirty (30) days from its receipt of the costs statement to file a response.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge