



In the Matter of:

TODD D. HOFFMAN,
COMPLAINANT,

v.

NOCO ENERGY CORP.,
RESPONDENT.

ARB CASE NOS. 15-070
16-009

ALJ CASE NO. 2014-STA-055

DATE: June 30, 2017

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Mark R. Walling, Esq.; Williamsville, New York

For the Respondent:

**Thomas A. DeSimon, Esq.; Gregory M. Dickinson, Esq.; Harris Beach PLLC,
Pittsford, New York**

Before: E. Cooper Brown, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Leonard J. Howie, *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 or the Act), as amended, 49 U.S.C.A. § 31105 (Thomson Reuters 2016), and its implementing regulations, 29 C.F.R. Part 1978 (2016). A Department of Labor Administrative Law Judge (ALJ) concluded that Respondent NOCO Energy Corporation (NOCO) retaliated against Complainant Todd D. Hoffman in violation of the STAA employee protection provisions; awarded Hoffman damages, including back pay; and ordered that NOCO reinstate Hoffman to employment. Before the Administrative Review Board

(ARB or Board) in ARB Case No. 15-070, is Respondent's appeal of the ALJ's Decision and Order Granting Relief and the ALJ's Reinstatement Order, both issued June 22, 2015. Before the Board in ARB Case No. 16-009 is NOCO's appeal from the ALJ's Order Awarding Attorney's Fees, issued October 23, 2015. For the following reasons, the Board remands ARB Case No. 15-070 to the ALJ for further consideration consistent with this Decision and Order of Remand and dismisses, without prejudice, ARB Case No. 16-009.

BACKGROUND SUMMARY

The issues giving rise to Hoffman's complaint arose on January 10, 2013. On that date, Hoffman, who NOCO had employed as a propane delivery driver since 2003, ended his regular shift at 4:30 p.m. Consistent with company policy, he was scheduled to be the "on call" driver that evening should a company emergency arise requiring a driver, before resumption of work the next day. Following the end of his regular shift on January 10th, NOCO's Propane Operations Assistant notified Hoffman that Respondent needed him to deliver fuel to a NOCO customer.

Hoffman initially refused the "on call" assignment. The Operations Assistant referred the matter to NOCO's Operations Manager, who in turn called Hoffman. As the presiding ALJ in this case found, during the three or four phone conversations that followed, Hoffman expressed concerns that NOCO's on-call policy resulted in violations of applicable hours of service regulations, concerns about which he and other NOCO employees had previously complained and about which the Operations Manager was aware. There is conflicting testimony about what else was discussed during the phone calls,¹ but at the conclusion of those calls, either that same day or the next, Hoffman's employment with NOCO terminated.²

Hoffmann filed his STAA complaint with the Occupational Safety and Health Commission (OSHA) on July 2, 2013, alleging that NOCO discharged him because he raised complaints about NOCO's hours of service policy and practice. Following its investigation, OSHA issued a determination letter dismissing Hoffman's complaint; Hoffman requested a hearing before an ALJ.

Following a hearing, on June 22, 2015, the ALJ issued a Decision and Order (D. & O.) in Hoffman's favor. The ALJ concluded that Hoffman's complaints that NOCO had committed hours of service violations constituted STAA-protected activity. Without making a finding of fact as to whether or not NOCO terminated his employment, the ALJ concluded that Hoffman's

¹ Of especial import to the Board's review of the ALJ's decision, and the basis for the Board's remand (see discussion *infra*), is the unresolved factual question of whether, as a result of the phone conversations, NOCO terminated Hoffman's employment or whether he voluntarily quit.

² By letter dated February 1, 2013, NOCO informed Hoffman that his employment with the company ended on January 11, 2013.

protected activity contributed to the termination.³ The ALJ further held that NOCO failed to show, by clear and convincing evidence, that it would have discharged Hoffman in the absence of his protected activity. Accordingly, the ALJ awarded Hoffman damages, including back pay, and ordered NOCO to reinstate his employment. Subsequently, in an Order issued October 23, 2015, the ALJ awarded Hoffman his attorney's fees and costs. NOCO timely appealed both ALJ decisions to the ARB (Case Nos. 15-070 and 16-009).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to issue final agency decisions on the Secretary's behalf in STAA cases.⁴ Upon appeal of a Department of Labor Administrative Law Judge's decision, the ARB reviews questions of law de novo, but is bound by the ALJ's factual determinations if they are supported by substantial evidence of record.⁵

DISCUSSION

I. ARB CASE NO. 15-070

The STAA provides that “[a] person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because” the employee has engaged in certain protected activities.⁶ STAA complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).⁷ To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action.⁸ Once the

³ The ALJ did not find that NOCO discharged Hoffman. Instead, the ALJ held that Hoffman suffered an adverse employment action, within the meaning of STAA, “because whether or not NOCO ‘terminated’ him, his employment ended.” D. & O., slip op. at 18.

⁴ 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); 29 C.F.R. § 1978.110(a).

⁵ 29 C.F.R. § 1978.110(b); *Lachica v. Trans-Bridge Lines*, ARB No. 10-088, ALJ No. 2010-STA-027, slip op. at 2, n.3 (ARB Feb. 1, 2012) (citation omitted).

⁶ 49 U.S.C.A. § 31105(a)(1).

⁷ *Id.* § 31105(b)(1); *see* 49 U.S.C.A. § 42121 (Thomson Reuters 2016).

⁸ 49 U.S.C.A. § 42121(b)(2)(B)(iii).

complainant has established that the protected activity was a contributing factor in the employer's decision to take adverse action, the employer may nevertheless avoid liability by proving, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the protected activity.⁹

Concerning the issue of whether Hoffman engaged in STAA-protected activity, the substantial evidence of record fully supports the ALJ's finding that Hoffman raised hours of service safety concerns with NOCO, both prior to January 10, 2013 (along with other NOCO employees) and on January 10th during his phone conversation with NOCO's Operations Manager. Furthermore, 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,"¹⁰ including complaints charging violation of U.S. Department of Transportation hours of service regulations.¹¹ The ALJ's determination that Hoffman engaged in STAA-protected activity is thus supported by substantial evidence of record and in accordance with applicable law, and accordingly, is affirmed.

The next question is whether the ALJ correctly held that Hoffman was subjected to adverse employment action. The ALJ held that Hoffman suffered adverse employment action simply because "his employment ended," regardless of "whether or not NOCO 'terminated' him."¹² This holding is erroneous as a matter of law. The STAA whistleblower provision prohibits an employer from taking retaliatory adverse employment action *against* an employee. Thus, the question to be resolved is whether NOCO took an adverse employment action against Hoffman; not whether Hoffman experienced an adverse employment action irrespective of any action NOCO took. An employee who resigns from employment without coercion has not been subjected to an adverse employment action within the meaning of STAA's whistleblower provision.

Because the ALJ made no finding of fact as to whether the termination of Hoffman's employment was voluntary or the result of an action NOCO took, the Board's review of this case cannot proceed. The Board is limited in its jurisdiction regarding factual matters to a determination of whether an ALJ's factual findings are supported by substantial evidence of record. The Board cannot itself make findings of fact. Absent the necessary and relevant finding of fact by the ALJ as to whether NOCO is responsible for the termination of Hoffman's employment, the Board is unable to complete its review of the ALJ's Decision and Order.

⁹ *Id.* § 42121(b)(2)(B)(iv).

¹⁰ 49 U.S.C.A. § 31105(a)(1)(A)(i).

¹¹ *See* 49 C.F.R. § 395.3; *Mailloux v. R & B Transp.*, ARB No. 07-084, ALJ No. 2006-STA-012 (ARB June 26, 2009).

¹² D. & O. at 18.

Consequently, the Board remands this case to the ALJ to make the factual determination of whether NOCO is responsible for Hoffman's employment termination.¹³

Should the ALJ, upon remand, find that NOCO terminated Hoffman's employment, the next question of course will be whether Hoffman's protected activity was a contributing factor in his discharge. In making that determination, the ALJ is referred to the Board's most recent decision on the subject of "contributing factor" causation in *Palmer v. Canadian Nat'l R.R./Illinois Central R.R. Co.*, ARB No. 16-035, ARB No. 2014-FRS-154 (ARB Jan. 4, 2017).

If the ALJ finds that Hoffman's protected activity contributed to NOCO's decision to terminate his employment, the ALJ's attention is directed to the ARB's recent decisions addressing the rigorous "clear and convincing" evidentiary burden of proof that an employer must meet to avoid liability.¹⁴

II. ARB CASE NO. 16-009

ARB Case No. 16-009 involves Respondent's appeal of the ALJ's October 23, 2015 Order Awarding Attorney's Fees. Under 49 U.S.C.A. § 31105(a)(3)(B), an award of costs, including attorney's fees, may be assessed against the respondent when the complainant prevails on his or her STAA whistleblower complaint. Given the Board's determination and order in ARB Case No. 15-070, vacating in part the ALJ's decision on the merits and remanding the case to the ALJ for further consideration, the ALJ's October 23, 2015 Order Awarding Attorney's Fees is rendered null and void. NOCO's appeal of the ALJ's award of attorney fees is thus effectively rendered moot, and accordingly is dismissed. Because the ALJ will have to issue a new attorney's fee award should Hoffman prevail on the merits upon remand, dismissal of ARB Case No. 16-009 is without prejudice to NOCO's right to challenge, through subsequent appeal any award of attorney's fees that the ALJ makes upon remand, should NOCO conclude that an appeal of such an award is warranted.

¹³ In making this factual determination, the ALJ should be mindful of the ARB's decisions in which an employer's interpretation of an employee's ambiguous action as a voluntary resignation, without having first sought clarification from the employee, has been held to constitute the employer's discharge of the employee, and therefore an adverse employment action. *See Klosterman v. E.J. Davies*, ARB No. 08-035, ALJ No. 2007-STA-019 (ARB Sept. 30, 2010) (*citing Minne v. Star Air, Inc.*, ALJ No. 2004-STA-026 (ARB Oct. 31, 2007)); *see also Hood v. R&M Pro Transp., LLC*, ARB No. 15-010, ALJ No. 2012-STA-036, slip op. at 5 (ARB Dec. 4, 2015) (rejecting Respondents' argument that they took no adverse action when they fired an employee who, upon being asked to perform an allegedly prohibited task, replied that he was not going to do it, that he was "done," and would clean out his truck).

¹⁴ *See Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006 (ARB Apr. 25, 2014); *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009 (ARB Sept. 30, 2015).

CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order Granting Relief, issued June 22, 2015, is **AFFIRMED IN PART AND VACATED IN PART**. The ALJ's determination that Hoffman engaged in STAA-protected activity is **AFFIRMED**; in all other respects and as to all other rulings the ALJ's Decision and Order of June 22, 2015 is **VACATED**. The ALJ's Reinstatement Order of June 22, 2015 is similarly **VACATED**. ARB Case No. 15-070 is accordingly **REMANDED** to the ALJ for further consideration consistent with this Decision and Order of Remand. ARB Case No. 16-009 is **DISMISSED WITHOUT PREJUDICE**.

SO ORDERED.

E. COOPER BROWN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge