



In the Matter of:

VAN McMULLEN,

ARB CASE NO. 2017-0018

COMPLAINANT,

ALJ CASE NO. 2015-AIR-00027

v.

DATE: March 30, 2020

FIGEAC AERO NORTH AMERICA,

RESPONDENT.

Appearances:

For the Complainant:

Sean M. McGivern, Esq. and Donald N. Peterson, Esq.; *Graybill & Hazlewood, LLC*; Wichita, Kansas

For the Respondent:

Diane H. Sorensen, Esq. and Ryan M. Peck, Esq.; *Morris, Laing, Evans, Brock & Kennedy, Chtd*; Wichita, Kansas

Before: James A. Haynes, Heather C. Leslie, and James D. McGinley, *Administrative Appeals Judges.*

DECISION AND ORDER

PER CURIAM. The Complainant, Van McMullen, filed a retaliation complaint against Figeac Aero North America (Figeac) under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or Act)¹ with the Department of Labor's Occupational Safety and Health Administration (OSHA). McMullen alleged that his employer violated the Act when it terminated his employment in retaliation for reporting safety

¹ 49 U.S.C. § 42121 (2000). AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2019).

violations. OSHA dismissed the complaint because it determined that Figeac met its burden of demonstrating by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. At Complainant's request, the case was referred to the Office of Administrative Law Judges (OALJ). Following a full hearing, the ALJ found that McMullen established by a preponderance of the evidence that his protected activities were contributing factors in the termination of his employment and that the Respondent failed to present clear and convincing evidence that it would have terminated Complainant in the absence of his protected activity. Respondent filed a petition requesting that the Administrative Review Board (ARB or the Board) review the ALJ's order. We granted that petition and now affirm.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or Board) has jurisdiction to review the ALJ's AIR 21 decision pursuant to Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020). The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings as long as they are supported by substantial evidence. 29 C.F.R. §1979.110(b); *Yates v. Superior Air Charter, LLC, d/b/a Jetsuite Air*, ARB 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 4 (ARB Sept. 26, 2019).

BACKGROUND

Respondent Figeac, a French corporation, acquired an airline component parts plant in Wichita, Kansas, in spring of 2014. McMullen was hired as the general manager of the Wichita plant by the previous owners in March 2014. He entered into an employment contract with Respondent on May 2, 2014, and continued as the general manager. Complainant reported to Jean Claude Maillard, the CEO of Respondent's parent company in France. Hocine Benaoum was vice-president of sales and also reported directly to the CEO. Kim Sawyer is Respondent's Quality Assurance Manager and reported to McMullen. In an email dated June 4, 2014, Sawyer reported that on May 16, 2014, Benaoum asked her if she could change the Quik Tek machining Certificate of Conformance logo to a Figeac-Aero logo. On May 30, 2014, Benaoum asked Sawyer to not mention R&R Aero on the First Article Inspection Report (FAI) if at all possible. Sawyer responded that to change the documents would be falsification and would violate the regulations.

In July 2014, Sawyer noted inconsistencies in FAI documentation on parts with which she and Benaoum had had a confrontation. These parts were shipped

from the Wichita facility without the proper certification to a client in Canada. The team in the Wichita facility attempted to determine pertinent information regarding the parts in order to bring the paperwork into compliance. Via an email dated July 26, McMullen brought Benaoum's actions to the attention of Maillard, specifically referencing FAA and FAI infractions, as well as compliance issues with the AS9100 procedures and warning that failure to follow the process would generate an audit.² The ALJ found that McMullen credibly testified that he had informed Maillard on multiple occasions that Benaoum's requests raised FAA compliance issues. On July 27, Maillard responded with a lengthy email in which he denied that Benaoum asked Sawyer to falsify anything and emphasized that it was McMullen's responsibility to ensure that the company was compliant with the regulations. By email on July 28, McMullen attempted to reiterate and explain his concern with irregularities in the paperwork. McMullen filed a complaint with the FAA on July 30, 2014, and Maillard notified McMullen of his decision to terminate his employment by letter dated July 31, 2014. Complainant was out of work until May 2015, when he began working for Sonaca Montreal.

McMullen filed a complaint under the Act with OSHA on October 13, 2014, which was referred to the ALJ on July 1, 2015. The ALJ held a hearing on April 18 and 19, 2016. He issued a Decision and Order Granting Relief on January 13, 2017, ordering Respondent to pay \$100,000 in back wages plus interest, \$60,000 in severance pay plus interest, \$5,000 in compensatory damages and a reasonable attorney's fee plus costs. Respondent appealed this decision.

DISCUSSION

AIR 21's employee-protection provisions generally prohibit covered employers and individuals from retaliating against employees because they provide information or assist in investigations related to the categories listed in the AIR 21 whistleblower statute. To state a claim under the Act, a complainant must allege that his employer took an unfavorable action against him, and that protected activity by the Complainant was a contributing factor in the adverse action.³

1. Protected Activity

² AS9100 compliance is not a governmental requirement, but it is a standard mandated by private industry and the company would not win certain contracts if the company was not AS9100 qualified. Certified private consultants, not the FAA, performed by the audit referenced by Complainant on direct examination.

³ See 49 U.S.C. § 42121(a), (b)(2)(B)(iii).

Protected activity under AIR 21 has two elements: (1) the information that the complainant provides must involve a purported violation of a regulation, order, or standard of the FAA or federal law relating to air carrier safety, though the complainant need not prove an actual violation; and (2) the complainant's belief that a violation occurred must be subjectively held and objectively reasonable.⁴ "The information provided to the employer or federal government must be specific in relation to a given practice, condition, directive, or event that affects aircraft safety." *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-013, slip op. at 5 (ARB June 30, 2010).

The ALJ found that McMullen engaged in protected activity when he informed Maillard that Benaoum threatened Sawyer because she refused to falsify FAI documentation in violation of FAA regulation 14 C.F.R. §21.2(a) by emails dated July 26 and 28, 2014,⁵ and when he filed a complaint with the FAA on July 30, 2014. With regard to the first protected activity, the evidence shows that McMullen notified Maillard of possible violations of federal aviation regulations and

⁴ The employee protection provisions of AIR 21 state the following:

(a) Discrimination against airline employees.--No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a).

⁵ At one point, the ALJ discusses an email of July 25 as evidence of protected activity. We note that the email written by McMullen on July 25 was received by Maillard on July 26. For consistency, we will refer to this transmission as the July 26 email.

while McMullen did not cite to a specific violation, that is not necessary.⁶ The ALJ found that McMullen's concerns were well-based and reasonable. D. & O. at 56.

In addition, the ALJ found that Sawyer discovered that Respondent had used a French unapproved supplier for a part that had been shipped to a customer under the Wichita facility's certification, and expressed her concern in an email. Sawyer raised issues with another part at a staff meeting on July 24, 2014. Sawyer continued to have concerns about the lack of proper documentation into July 29, 2014. Without the proper paperwork this part was not approved for installation on certificated aircraft. As he had objectively and subjectively reasonable concerns about omission of information in the FAI's, McMullen informed Maillard by email dated July 28, 2014, that omitting information on the FAI could be considered fraud and a violation of FAA regulations. JX 18. We affirm the ALJ's finding that this communication qualifies as protected activity. Moreover, information only has to be related to any violation or alleged violation and Complainant need not have waited for an FAA violation to occur in order to report the omission and have whistleblower protection.

Furthermore, contrary to Respondent's contentions on appeal, the Board's holdings in *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-013 (ARB June 30, 2010), and *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-008 (ARB July 2, 2009), do not require a different outcome under the facts of this case. In *Hindsman*, the Board held that the complainant could not have had a reasonable belief that flying with the portable oxygen concentrator on board violated air safety regulations once she had confirmed that the item was permitted by the FAA. These facts are not analogous to those in this case as McMullen was reporting potential violations, which the ALJ found were objectively reasonable. In addition, in *Malmanger*, the Board affirmed an administrative law judge's finding that the complainant did not have a reasonable belief that the company violated an order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety. At the time he reported his concerns to management, the complainant knew the problems had been resolved and the ALJ found that his complaints were insincere and made to forestall what he believed would be an adverse performance evaluation. In this case, the ALJ found that McMullen's concerns were sincere and not made to "cloak himself" with whistleblower protection. Moreover, the concerns had not been resolved by the time the Complainant reported his concerns to Maillard. Thus, we affirm the ALJ's

⁶ Section 14 C.F.R. §3.5(c)(2) provides that "no person may make, or cause to be made, through the omission of material information...that a...part...is acceptable for installation on a type-certificated product in any record if that representation is likely to mislead a consumer acting reasonably under the circumstances."

finding that McMullen engaged in protected activity on July 26 and 28, as well as when he filed the report to the FAA on July 30, 2014 as they are supported by substantial evidence.

2. Contributing Factor

To prevail, a complainant must demonstrate “that [the protected activity] was a contributing factor in the unfavorable personnel action” 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). “A contributing factor is ‘any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.’” *Coates v. Grand Trunk W. R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 3 (ARB July 17, 2015). The complainant must then prove by a preponderance of the evidence that protected activity played some role and was a proximate cause in the adverse personnel action. *Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 877 (7th Cir. 2016) (distinguishing between causation and proximate causation).

Discussing the role the protected activity played in Maillard’s decision to terminate McMullen, the ALJ noted that temporal proximity may support a finding of retaliation, but that it is not necessarily dispositive. In reviewing the evidence, the ALJ found that Maillard had knowledge of McMullen’s concerns based on the July 26 and 28 emails, and also found that Maillard specifically referenced McMullen’s reports about Benaoum’s interference in the Witchita operation in his termination letter.⁷ Importantly, the termination letter fails to mention performance issues, but does identify McMullen’s allegations against Benaoum, the steps McMullen took to avoid FAA violations, and McMullen’s decision to seek legal advice. While the ALJ found it significant that the adverse action occurred within five days of the July 26 email and within three days of the July 28 email, the ALJ’s conclusion on contribution was also based on the email chain between McMullen and the deciding official, Maillard. Moreover, the ALJ’s decision was also based on the credited testimony of record, and his attendant finding that the Respondent did not prove that there were legitimate reasons for terminating McMullen’s employment. On this question, we conclude that the ALJ’s finding of temporal proximity between McMullen’s emails about potential, or actual FAA violations, and his discharge, is supported by substantial additional evidence surrounding his termination. Further, the evidence of record also supports the ALJ’s finding that the

⁷ The ALJ does not specifically address the FAA filing, but we find no evidence that Maillard or any other members of French management knew the complaint had been filed by the date of termination, July 31. The ALJ found that the July 26 and 28 emails separately and together contributed to McMullen’s discharge.

protected activity was a contributing factor in the adverse employment action.⁸ We therefore affirm.

3. Affirmative Defense

If the complainant proves that the respondent violated AIR 21, the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected acts. *See* 49 U.S.C.A. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1979.109(a); *White v. Action Expediting*, ARB No. 13-015, ALJ No. 2011-STA-011, slip op. at 6 (ARB June 6, 2014). The ALJ found that Respondent presented four reasons that it would have terminated McMullen’s employment even absent protected activity: performance problems; disclosure of confidential information; seeking legal advice without authorization; and making a false claim against Benaoum to cloak himself with whistleblower protection. The ALJ rejected these contentions, finding that Respondent failed to establish the affirmative defense by clear and convincing evidence.⁹

Specifically, the ALJ credited McMullen’s testimony regarding his performance with the company (including meeting performance goals and issues regarding his attendance) and found that Maillard submitted no corroborating evidence to support his testimony regarding concerns with Complainant’s performance. The ALJ noted that Respondent did not provide evidence that substantiated or corroborated Maillard’s testimony that McMullen’s performance was poor and that he did not work very hard. Rather, he concluded that without

⁸ The Board recently issued *Acosta v. Union Pacific Railroad Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082 (ARB Jan. 22, 2020). In *Acosta*, the Board held that the ALJ erred in concluding that an “inference” of contribution can be established with temporal proximity alone. We stated that “[t]he mere circumstance that protected activity precedes an adverse personnel action is not proof of a causal connection between the two.” *Acosta*, slip op. at 8 (citations omitted). The facts in *Acosta* are dissimilar to the case at hand because in *Acosta*, the nature of complainant’s job involved almost daily protected activity, and there were intervening events between the protected activity and the adverse action. Importantly, the Board did clarify that “temporal proximity may be supported by other forms of circumstantial evidence establishing the evidentiary link between the protected act and the adverse action.” *Id.* Such is the case before us, where, the ALJ credited Complainant’s testimony, which is supported by the evidence of record, the emails between Complainant and Maillard, and did not exclusively rely on temporal proximity.

⁹ On appeal, Respondent does not raise allegations regarding the disclosure of confidential information or seeking legal advice without authorization, and focuses on performance problems with McMullen and Maillard’s belief that McMullen made false claims against Benaoum.

direct evidence, McMullen's testimony was entitled to greater weight. Respondent's contentions on appeal are directed at the ALJ's weighing of the evidence and do not raise reversible error. Thus, we affirm the ALJ's finding that Respondent failed to establish by clear and convincing evidence that it would have terminated Complainant in the absence of protected activity.

4. Remedies

The regulations provide that if the ALJ concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation including compensation, terms, conditions, and privileges of that employment, and compensatory damages. 29 C.F.R. §1979.109(b). Respondent only appeals the ALJ's award of severance pay pursuant to the parties' employment agreement.¹⁰

The ALJ reviewed the employment contract signed by the parties on May 2, 2014. He noted that the contract provided that if the Respondent desired to terminate the agreement without Complainant's consent he was to receive a six month severance package. J. Ex. 3. This clause does not include any conditions or restrictions, and is contracted to be paid following termination after due notice. Although no notice was provided before McMullen was discharged, the ALJ found, and we affirm, that McMullen was discharged in violation of the employee protection provisions under the Act. We also hold that a severance provision such as this was a negotiated term, condition and privilege of employment, and thus should be fulfilled.¹¹

Contrary to Respondent's contention, the cases cited on appeal do not require a different outcome because the complainants in those cases were reinstated to

¹⁰ Contrary to Respondent's contention on appeal, McMullen did request this remedy in the complaint to OSHA. See J. Ex. 1

¹¹ See generally *In re Pub. Ledger*, 161 F.2d 762 (3d Cir. 1947) (holding that severance provisions were a part of compensation agreed on and were reasonable as protection to workmen against having his needed income stopped without notice); *Triad Data Servs., Inc. v. Jackson*, 153 Cal. App. 3d Supp. 1, 10, 200 Cal. Rptr. 418, 423 (App. Dep't Super Ct. 1984) (holding that vacation pay and severance pay constitute wages as term "wages" should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as part of his compensation).

their former positions and thus not entitled to severance benefits.¹² Rather, the Board has held that an employee is entitled to both back pay and previously contracted severance pay to which he would be entitled in the event of discharge without cause when reinstatement was not appropriate. *See Loftus v. Horizon Lines, Inc.*, ARB No. 16-082, ALJ No. 2014-SPA-004 (ARB May 24, 2018). Therefore, we affirm the ALJ's award of severance pay pursuant to the employment agreement, as well as the back pay to which McMullen is entitled, as both are necessary to restore Complainant to the position he was in before he was discharged in violation of the employee protection provisions of AIR 21.

CONCLUSION

The ALJ properly found that Complainant established that he engaged in protected activities and that these activities, separately and together, were contributing factors in his termination from employment. Moreover, the ALJ properly awarded remedies which included back wages of \$100,000 plus interest and \$60,000 in severance pay plus interest, as well as compensatory damages and reasonable attorney's fees, expenses and costs. Accordingly, the ALJ's decision is **AFFIRMED**.

McMullen's attorney has 30 days in which to submit a petition for attorney's fees and other litigation expenses for work done before the ARB. He is to serve any such petition on Figeac, which will have 30 days in which to file objections to the petition.

SO ORDERED.

¹² *See Jones v. EG&G Def. Materials, Inc.*, ARB No. 97-129, ALJ No. 95-CAA-3 (ARB Sept. 29, 1998), *Creekmore v. ABB Power, Sys. Energy Servs., Inc.*, Case No. 93-ERA-24 (Dep. Sec. Dec. and Rem. Ord., Feb. 14, 1996), *McCuiston v. Tennessee Valley Authority*, 89-ERA-6 (Sec'y Nov. 13, 1991).