



In the Matter of:

JANATHAN HARTE,

ARB CASE NO. 2017-0002

COMPLAINANT,

ALJ CASE NO. 2015-NTS-00002

v.

DATE: September 6, 2019

METROPOLITAN TRANSPORTATION
AUTHORITY/NEW YORK AUTHORITY
and MARK RUGGIERO

RESPONDENTS.

Appearances:

For the Complainant:

Charles C. Goetsch, Esq.; *Charles Goetsch Law Offices LLC*; New Haven, Connecticut

For the Respondent:

James J. Gallagher, Esq. and Robert K. Drinan, Esq.; *Metropolitan Transportation Authority Legal Department*; Brooklyn, New York

For the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae:

Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Megan E. Guenther, Esq.; and John M. D'Elia, Esq.; *United States Department of Labor*; Washington, District of Columbia

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges*.

ERRATA

On August 20, 2019, the Administrative Review Board issued a Final Decision and Order (D. & O.) affirming the ALJ's decision below. In the caption of our decision, the Board inadvertently misidentified counsel for the parties. Accordingly, we hereby reissue the Final Decision and Order to correct the identification of counsel who made appearances before the Board in this matter. In all other respects, the D. & O. remains unchanged.

FINAL DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the National Transit Systems Security Act (NTSSA), 6 U.S.C.A. § 1142, and its implementing regulations, 29 C.F.R. Part 1982 (2014). Janathan Harte filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, New York City Transit Authority (NYCTA), discriminated against him for complaining about unsafe workplace practices in violation of NTSSA. The Regional Administrator determined that the complaint was timely, that the parties are subject to the Act, and that Harte had engaged in protected activity. NYCTA objected and requested a hearing with the Office of Administrative Law Judges. After an evidentiary hearing, an Administrative Law Judge (ALJ) entered a Decision and Order (D. & O.) concluding that the Respondents had violated the whistleblower protection provisions of the NTSSA and awarded compensatory damages. NYCTA petitions for review, challenging the ALJ's findings. Complainant has filed a response brief and the Department of Labor's (DOL) Solicitor of Labor has filed an amicus brief on behalf of the Assistant Secretary for the Occupational Safety and Health Administration in support of the ALJ's decision. For the following reasons, we affirm.

BACKGROUND

Harte was employed by NYCTA, a public transportation agency subject to the NTSSA. Specifically, Harte worked in the Linden Shop, which fabricated track panels and other track related items in the shop and organized fleet operations which involved trucks that distribute material for track jobs. Harte filed a complaint in June, 2012, with the New York State Department of Labor's Public

Employee Safety and health (PESH) agency regarding various workplace safety hazards at the Linden Shop. As a result of the complaint, on August 9, 2012, two PESH inspectors, Lam and Rivera, visited the shop to conduct a health and safety inspection. Harte was present for part of the investigation, and Respondent's representative Ruggiero and union officials were also present. Approximately five hours into the investigation, Harte, Ruggiero and the inspectors stopped at a device called a drill press. There was a discussion regarding the operability and safety of the drill press between Harte, Ruggiero and Lam regarding the lack of a cover guard. Harte disputed Ruggiero's claim that the drill press was not operable and demonstrated this statement by turning on the press. Ruggiero reacted angrily threatening to withdraw Harte's overtime and changing Harte to a less favorable job in the shop. In addition, the supervisors blamed Harte for negative changes in the work-place before his coworkers. Harte filed a retaliation complaint with PESH, which referred the claim to OSHA on September 27, 2012.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB) the authority to issue final agency decisions in review or on appeal of matters arising under the NTSAA and its implementing regulations at 29 C.F.R. Part 1982.¹ The ARB will affirm the ALJ's factual findings if supported by substantial evidence, but reviews conclusions of law de novo.²

DISCUSSION

The NTSSA provides that a public transportation agency shall not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining, an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been

¹ Secretary's Order No. 01-2019, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 84 Fed. Reg. 13072 (April 3, 2019); 29 C.F.R. §1982.110(a)(2012).

² 29 C.F.R. § 1982.110(b); *Blackie v. Smith Transp., Inc.*, ARB No. 11-054, ALJ No. 2009-STA-043, slip op. at 7 (ARB Nov. 29, 2012).

done or about to be done, to provide information or assist in an investigation regarding any conduct that the employee reasonably believes constitutes a violation of a public transportation safety or security law, rule, or regulation.³ In her D. & O., the ALJ initially rejected NYCTA's contention that the scope of protected activity is limited to matters affecting the public. Specifically, she found that Congress did not evidence an intention to exclude employee-only safety hazards from the broad umbrella of safety threats under the NTSSA, as well as its sister act the Federal Rail Safety Act (FRSA), 49 U.S.C.A. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53. The ALJ also found that Harte established that Respondent violated the whistleblower protection provisions of the Act, and that Respondent did not offer any evidence that it would have taken the same adverse actions in the absence of the protected activity. Consequently, the ALJ awarded compensatory damages in the amount of \$1656, but denied damages for emotional distress and punitive damages.

On appeal, Respondent challenges the ALJ's conclusion that the employee protection provision of the NTSSA are applicable to employee's complaints of workplace safety concerns. Hart and the SOL urge the ARB to affirm the ALJ's decision that the protected activity in this case is covered under the NTSSA. We note that the plain language of the NTSSA protects an employee who reports safety and security concerns and is not limited to actions involving public safety or threats of terrorism. Congress has other employer protection statutes that limit the application of whistleblower protections to the specific public concerns giving rise to a specific parent Act.⁴ But in this case, the NTSSA was modeled after the FRSA and shares its implementing regulations. The provisions relating to the FRSA have been interpreted to protect whistleblowers who complain about workplace safety, as have those relating to the NTSSA.⁵ As there is no express limiting language under

³ 6 U.S.C. §1142 (2007); 29 C.F.R. § 1982.102.

⁴ See Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C.A. § 5851; Surface Transportation Assistance Act, 49 U.S.C. § 31105 (2007), as implemented at 29 C.F.R. Part 1978 (2018); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 20109(d)(2)(A) (2014).

⁵ See *Riley v. Dakota, Minnesota & Eastern Railroad*, ARB Nos. 16-010, 16-052, ALJ No. 2014-FRS-044 (ARB July 6, 2018); *Mercier v. Union Pacific Railroad Co.*, ARB No. 13-048, ALJ No. 2008-FRS-004 (ARB Aug. 26, 2015); *Graves v. MV Transportation, Inc.*, ARB

this Act, and safety is referred to a number of times without reference or limitation to public security or terrorism, we reject Respondent's contention that the NTSSA does not apply to protect safety concerns that do not reach to the general public.

On appeal, NYCTA also contends that the ALJ erred in awarding compensatory damages where the only wages lost were covered by paid time off. NTSSA provides that workers who experience retaliation for engaging in protected whistleblower activities are "entitled to all relief necessary to make the employee whole." 6 U.S.C. § 1142(d)(1). Such relief includes compensation for lost vacation days as they represent terms, conditions, and privileges of employment.⁶ Accordingly, we affirm the ALJ's conclusion that Harte is entitled to compensation in the amount of \$1656, representing six days of wages at \$276 per day.

With his response brief, Harte's counsel filed a petition for fees with exhibits requesting \$11,298 in attorney's fees for litigation before the Board.⁷ NYCTA has not objected to the amount of this request, but we have examined the petition and find the attorney's fee request to be inadequately documented and excessive. Specifically, we note that counsel avers that he spent over 12 hours drafting and editing a brief on issues that were extensively briefed, argued, and litigated below, and were the subject of extensive discussion by the ALJ in well-reasoned decision. We are unpersuaded by counsel's assertions concerning the novelty of this area of practice, and note that the ALJ cited relevant caselaw extending back to 2008. Without adequate and persuasive explanation as to the necessity for such extensive effort, we cannot approve the requested amount, as it is, under the circumstance of this appeal, unreasonable and unsupported. Accordingly, we will reduce the amount billable for effort on the appellate brief in this matter by six hours. We will therefore grant Harte's request in part and order NYCTA to pay attorney's fees in the amount of **\$7,698.00** for services provided by Harte's counsel before the Board.

No. 14-045, ALJ No. 2013-NTS-002 (ARB July 23, 2015); *Winters v. San Francisco Bay Area Rapid Transit District*, ARB No. 12-091, ALJ No. 2010-NTS-001 (ARB Aug. 27, 2013).

⁶ *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 98-ERA-19 (ARB Nov. 13, 2002).

⁷ Specifically, the fee petition requests 18.83 hours of legal services at the hourly rate of \$600.

CONCLUSION

The ALJ did not err by concluding that the NTSSA provides employees protection against retaliation for raising concerns relating to workplace safety, as well as public safety, and that Complainant is entitled to compensatory damages for lost vacation days. The findings of fact and conclusions of law by the ALJ below are **AFFIRMED** and the Complaint is **GRANTED**. In addition, we **GRANT IN PART** Complainant's petition for attorney's fees for work performed before the Board in successfully defending the appeal, as modified above.

SO ORDERED.