U.S. Department of Labor

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Issue Date: 22 March 2016

Case No.: 2015-NTS-00002

In the Matter of

JANATHAN HARTE
Complainant

v.

METROPOLITAN TRANSPORTATION AUTHORITY/ NEW YORK CITY TRANSIT AUTHORITY and MARK RUGGIERO
Respondents

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION FOR SUMMARY DECISION

Background and Procedural History

This matter arises out of a complaint filed pursuant to the employee protection provisions of the National Transit Systems Security Act of 2007 (NTSSA or the "Act"), which was enacted on August 3, 2007, as Section 1413 of Public Law 110-053, and is found at 6 U.S.C. § 1142. The "Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges," set forth at 29 C.F.R. Part 18, apply in this proceeding. A hearing in this matter is scheduled to commence on March 29, 2016.

On November 15, 2012, the Complainant filed a complaint, under the NTSSA, with the Occupational Safety and Health Administration (OSHA) against the Respondents, the New York City Transit Authority ("NYCTA" or "New York Transit") and Mark Ruggerio, a supervisor. After an investigation, OSHA made the following findings:

1. The Complainant timely filed his complaint within 180 days of the alleged adverse action;
2. The Complainant filed an additional complaint while the initial OSHA investigation was ongoing and was reasonably related to the initial filing, rendering the additional complaint as an amendment to the initial filing;
3. The Respondent NYCTA is a public transportation agency within the meaning of the NTSSA and Respondent Ruggerio was an employee of NYCTA when the relevant events transpired;
4. The Complainant is an employee within the meaning of the NTSSA;

5. The Complainant engaged in NTSSA protected activity when he accompanied two inspectors on a shop inspection and called to their attention the defective condition of a drill press, at which time Respondent Ruggerio threatened to remove the Complainant from the overtime list;
6. The Complainant again engaged in NTSSA protected activity when he filed a retaliation complaint with OSHA in response to harassment from his boss, who spread accusations that the Complainant reported his co-workers to OSHA for playing cards while on the job.

Secretary's Findings, dated March 19, 2015 ("OSHA Findings").

The OSHA Findings recommended, among other things, that compensatory damages of $2,500 and punitive damages of $50,000 be awarded.

Consequently, on April 6, 2015, the Respondents objected to the OSHA determination and requested a hearing before an administrative law judge (ALJ). The case was forwarded to the Office of Administrative Law Judges (OALJ) and subsequently assigned to me. I issued a notice of hearing on April 28, 2015.

Parties' Submission Regarding Summary Decision

Respondents submitted their Motion for Summary Decision, accompanied by a memorandum of law, and an appendix of exhibits on January 14, 2016. The attached exhibits are as follows:

RX A: [Complainant's] October 29, 2015 Deposition Transcript;
RX B: Marc Ruggerio's November 10, 2015 Deposition Transcript;
RX C: Alexander Umana's November 10, 2015 Deposition Transcript;
RX D: Minutes from a Safety Meeting Held at the Linden Shop on February 1, 2012;
RX E: Kwo Lam's November 10, 2015 Deposition Transcript;
RX F: Iris Rivera's November 10, 2015 Deposition Transcript;
RX G: Sign-In Sheet from the August 9, 2012 PESH Safety Inspection;
RX H: Record of Complainant's Overtime Hours;
RX I: Letter Sent by Complainant to Jack Blazejewicz dated August 9, 2012;
RX J: Letter Sent by Complainant to the New York State Department of Labor dated August 15, 2012;
RX K: New York State Department of Labor Voluntary Discrimination Request signed by Complainant and Kwo Lam dated September 27, 2012;
RX L: Investigation Narrative of the August 9, 2012 Linden Shop Inspection;
RX M: OSHA Secretary's Findings;
RX N: Letter from OSHA to NYCTA regarding Complainant's NTSSA complaint, dated November 15, 2012.

In the Respondents' corresponding memorandum of law, counsel asserts the following arguments:

1. The Complainant cannot establish that he engaged in protected activity under 6 U.S.C. § 1142 of the NTSSA because the PESH Act, a New York state labor law, maintains jurisdiction over any protected activity the Complainant may or may not have engaged in. The Complainant's protected activity does not invoke the NTSSA whistleblower protection;
2. The Complainant did not engage in protected activity under 6 U.S.C. § 1142 when he interacted with the inspectors because the activity did not concern matters of public safety or a hazardous safety or security condition;
3. The Complainant did not engage in protected activity under 6 U.S.C. § 1142 when he complained to OSHA regarding his supervisor's request to change trucks and his report that his co-workers played cards while on the job because this activity did not concern matters of public safety or a hazardous safety or security condition;

The Complainant submitted a Memorandum in Opposition to Respondents' Motion for Summary Decision, accompanied by exhibits, on February 1, 2016. The attached exhibits are as follows:

CX 1: Overview of the New York Public Employees Safety and Health Bureau (PESH) from the U.S. Department of Labor website.

CX 2: Letter sent by the New York State Department of Labor to U.S. Department of Labor, indicating Complainant's preference to file his complaint with the latter agency.

In the Complainant's memorandum of law, counsel asserts the following arguments:

1. PESH's authority to conduct workplace safety instructions does not preclude OSHA's jurisdiction to enforce the federal statutory rights of employees under the NTSSA. The Complainant made a proper election of remedies when he chose to enforce his rights by filing with OSHA.
2. The remedial nature of the NTSSA entitles the statute to broad interpretation such that it protects employees from retaliation for reporting safety hazards that pose a danger to other employees, not just the general public.
3. Respondent Ruggerio's threat to remove the Complainant from the overtime list and Respondent's use of the Complainant's OSHA complaint to turn the Complainant's co-workers against him constituted adverse actions;

On March 8, 2016, the Assistant Secretary of Labor for Occupational Safety and Health filed an Amicus Curiae Brief Opposing Respondents' Motion for Summary Decision.[1] The Assistant Secretary argued that the NTSSA protects complaints related to workplace safety hazards, in addition to complaints regarding public transportation safety and security measures. The Assistant Secretary further contended that the parallel language between the NTSSA and the Federal Railroad Safety Act (FRSA) supports the interpretation that the NTSSA covers workplace safety hazards. Finally, the Assistant Secretary pointed to the NTSSA's election of remedies provision to show that NTSSA protects complaints related to workplace safety.

[1] By order dated February 1, 2016, I authorized an extension of time to allow the Assistant Secretary to file the amicus curiae brief on behalf of the Complaint by March 9, 2016. At the request of the parties, I continued the hearing date to March 29, 2016 so I could consider the brief, pursuant to an order dated February 2, 2016.

In light of the above materials, I find that the record before me is now sufficient to address the Respondents' Motion for Summary Decision.

Applicable Law

In pertinent part, 6 U.S.C. § 1142 provides:

> (a) In general. A public transportation agency, a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against 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 done or about to be done—
>
> (1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to public transportation safety or security, or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—
>
> - **(A)** a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452)[)];
> - **(B)** any Member of Congress, any Committee of Congress, or the Government Accountability Office; or
> - **(C)** a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

6 U.S.C. § 1142(a)(1))

> (3) to file a complaint or directly cause to be brought a proceeding related to the enforcement of this section or to testify in that proceeding;

6 U.S.C. § 1142(a)(3)

> **(b)** Hazardous safety or security conditions.
>
> **(1)** A public transportation agency, or a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for--
>
> - **(A)** reporting a hazardous safety or security condition;

6 U.S.C § 1142(b)(1)(A)

According to the Joint Explanatory Statement of the Congressional Conference Committee, this statute is "modeled on" the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121. H.R. CONF. REP. NO. 110-259, at 340 (2007). Accordingly, the Act has similar standards for establishing what constitutes protected activity, and for what constitutes a defense to a claim. For example, a complainant must establish that the protected activity was a "contributing factor" in the adverse action alleged in the complaint. 6 U.S.C. § 1142(c)(2)(B)(i). In addition, notwithstanding a determination that a complainant has established a prima facie case by making such a showing, the employer prevails if it demonstrates, by "clear and convincing evidence" that it would have taken the same unfavorable personnel action in the absence of the protected activity. 6 U.S.C. § 1413(c)(2)(B)(ii).

Further, the Act provides specific remedies to a complainant who successfully prevails. In addition to reinstatement, back pay (with interest), and compensatory damages, a complainant may be awarded punitive damages up to $250,000. 6 U.S.C. § 1142(d). However, in the event a complaint is determined to have been brought frivolously or in bad faith, the Act permits the employer to be awarded reasonable attorney fees up to $1,000. 6 U.S.C. § 1142(c)(3)(D).

During the pendency of this matter, on November 9, 2015, the Department of Labor issued "Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act." 80 Fed. Reg. 69,115 (Nov. 9, 2015). These provisions, to be codified at 29 C.F.R. Part 1982, mirror the provisions set forth in the Act with regard to the parties' burdens. See, e.g., 80 Fed. Reg. 69,121-69,127 (Nov. 9, 2015), to be codified at 29 C.F.R. §§ 1982.104-109. I find that these regulations govern the procedures to be used in adjudicating this matter.

Standard for Summary Decision

The Department's procedural rules permit a party to move for summary decision. 29 C.F.R. § 18.72(a). An administrative law judge may grant summary decision in favor of a party where no genuine issue of material fact is found to have been raised. Id. The standard for granting summary decision is essentially the same as that set forth in the Federal Rules of Civil Procedure governing summary judgment in the federal courts. Reddy v. Medquist, Inc., ARB No. 04-123 (ARB Sept. 30, 2005); see also Fed. R. Civ. P. 56(c). No genuine issue of material fact is raised when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The moving party bears the initial burden of demonstrating there is no disputed issue of material fact, which may be demonstrated by "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In adjudicating a summary decision motion, I must view all facts and inferences in the light most favorable to the non-moving party. See Celotex Corp., 477 U.S. at 323; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 261 (1986). This consideration includes factual ambiguities and inferences related to

credibility. See Petrosino v. Bell Atl., 385 F.3d 210, 219 (2d Cir. 2004); Inman v. Fannie Mae, ARB No. 08-060, ALJ No. 2007-SOX-00047, slip op. at 8 (ARB June 28, 2011).

A party opposing a summary decision motion may not rest upon the mere allegations or denials of the pleading. "A party asserting that a fact cannot be or is genuinely disputed must support the assertion." 29 C.F.R. § 18.72(c)(1). As the regulation states, an administrative law judge shall grant summary decision if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." 29 C.F.R. § 18.72(a).

The Respondents' Motion for Summary Decision

In its Motion for Summary Decision, the Respondents posit three arguments: (1) that the NTSSA's whistleblower provision does not cover the protected activity alleged by the Complainant; (2) the Complainant did not engage in protected activity under the NTSSA when he interacted with the PESH investigators regarding a drill press during a walkthrough of the Linden Shop; and (3) the Complainant did not engage in protected activity under the NTSSA when he complained to an OSHA investigator about being asked to change trucks by his supervisor and about card playing by employees in the Linden Shop.

Specifically, the Respondents argued that the Complainant's comments to inspectors regarding the working condition of a drill press do not fall under the NTSSA whistleblower provision, which prohibits public transportation agencies from retaliating against an employee because he or she reported a "hazardous safety or security condition" at 6 U.S.C § 1142(b)(1)(A). See Respondents' Motion for Summary Decision at 4. The NTSSA also protects a public transportation employee's "ability to file a complaint or directly cause to be brought a proceeding related to the enforcement of this section or to testify in that proceeding under 6 U.S.C § 1142(a)(3)." Id. The Respondents asserted that under the NTSSA, alleged protected activity must at least "touch on" the subject matter of the related statute and that the primary goal of the NTSSA is to enhance the ability of the nation's transit system to prevent terrorist attacks and to protect American citizens. Id.

Because the Complainant's complaint invoked a workplace safety complaint about the condition of a drill press in the fabrication area of the Linden Shop during a walkthrough inspection on August 9, 2012, and not a hazard to the transit system's security, the Respondents argued, the NTSSA does not have jurisdiction over the Complainant's alleged protected activity. Id. at 5. Instead, the Complainant's complaint would more properly be brought under PESH, a New York state labor statute that prohibits retaliation against employees reporting safety issues in the workplace, the Respondents contended. Id. at 4-5. In sum, the Respondents asserted that the NTSSA solely addresses matters of public safety related to national security and terrorism and the condition of a piece of equipment that does not face the public does not fall under either category. Id. at 6.

Finally, the Respondents argued that the Complainant's July 23, 2013 complaint to an OSHA investigator, reporting his disagreement with his superior's order to change trucks upon discovering a mechanical defect, and co-workers' card playing did not constitute protected activity under the NTSSA because once again the thrust of these complaints do not touch on matters of public safety or terrorism prevention. Id.

The Complainant's Response in Opposition to Respondents' Motion for Summary Decision

In his response, the Complainant argued that he engaged in protected activity under the NTSSA because Congress did not exhibit an intent to limit the scope of the whistleblower provision to the safety of the public. See Complainant's Memorandum in Opposition to Respondents' Motion for Summary Decision at 3. Further, the Complainant asserted that PESH qualifies as a state agency under 6 U.S.C § 1142(a)(1)(A) and does not have independent standards from OSHA, which is charged with enforcing such standards for state and local government employment safety regulations. Id. As such, the Complainant averred that he engaged in NTSSA protected activity under subsections (a)(1)(A) and (b)(1)(A) in the summer of 2012 when he reported a safety hazard to the Linden Shop superintendent and PESH.[2] Id. at 6. Specifically, the Complainant asserted that he engaged in NTSSA protected activity under subsection (a)(1)(A) on August 9, 2012, when he participated in a PESH investigation and called attention to and provided information about the condition of a drill press, which PESH later deemed to be a violation of OSHA. Id. As to the Respondents' argument that the scope of the NTSSA is limited to hazards to the public, the Complainant cited a number of cases in which issues of workplace safety were litigated under the framework of the NTSSA, although none of these cases address the issue directly. Id. at 4. Further, the Complainant cited OSHA's acceptance of the Complainant's complaint as evidence that he made a proper election of remedies available to him under the NTSSA under 6 U.S.C § 1142(e). Id at 5. The Complaint also averred that he engaged in NTSSA protected activity under subsection (a)(3) when he filed NTSSA complaints with OSHA in October 2012 and July 2013 and also on July 23, 2013, when he called OSHA. Id.

The Complainant argued that he suffered an adverse action under the NTSSA based on the Department of Labor's implementing regulations governing NTSSA cases: "A public transportation agency shall not discharge, demote, suspend, reprimand, or in any other way retaliate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee." 29 C.F.R. 1982.102(a)(1). Id. at 7. Based on the regulation, the Complainant asserted that Respondent Ruggerio's threat to the Complainant with the loss of overtime during the PESH inspection constituted adverse action. Id. In addition, the Complainant averred that after he made an OSHA complaint stemming from this protected activity, Respondent used the complaint to turn his co-workers against him by telling his co-workers that Complainant reported them for playing cards while on the job. Id. at 8.

[2] The Complainant also alleged protected activity in the spring of 2012, but this issue is not before me.

Analysis

Protected Activity- The PESH Inspection Incident

I find there are facts sufficient to infer that the Complainant engaged in protected activity under 6 U.S.C. § 1142(b)(1)(A). Protected activity under 6 U.S.C. § 1142(b)(1)(A) involves reporting a hazardous safety or security condition. Here, the Complainant averred that he was retaliated against for reporting the defective condition of a drill press during a PESH investigation. See Complainant's Memorandum in Opposition to Respondents' Motion for Summary Decision at 6. The Respondents, on the other hand, contended that the NTSSA contemplates the reporting of safety or security hazards that touch on the subject matter of the statute, the prevention of terrorist attacks and protection of the public. See Respondent's Motion for Summary Decision at 4.

However, on its face, the statutory language in 6 U.S.C. § 1142(b)(1)(A) does not indicate an intent to exclude workplace hazards from its coverage. On the contrary, 6 U.S.C § 1142(b)(3), which references subsection (b)(1)(A), overtly alludes to the protection of transportation equipment and assets that have no direct effect on the protection of American citizens:

> **(b)** Hazardous safety or security conditions.
>
> > **(1)** A public transportation agency, or a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for--
> >
> > - **(A)** reporting a hazardous safety or security condition;
> >
> > **(3)** In this subsection, only subsection (b)(1)(A) shall apply to security personnel, including transit police, employed or utilized by a public transportation agency to protect riders, *equipment, assets, or facilities*.

(*Emphasis added*)

6 U.S.C § 1142(b)(3)

Although the Complainant is a track worker, and not a member of security personnel or transit police, a close reading of the statutory language does not necessarily limit the employees protected by this provision to security personnel or transit police. Instead, subsection (b)(3) limits security personnel and transit police from invoking other subsections of the statute. Furthermore, I find that subsection (b)(3)'s reference to protection of equipment, assets or facilities of public transportation agencies such as the NYCTA demonstrates that when Congress enacted the NTSSA, it deemed a "hazardous safety or security condition" to extend beyond dangers to public safety to safety hazards facilities that do not necessarily pose a hazard to the general public. This would seem to

include safety hazards akin to the one reported by the Complainant over a drill press without a machine guard in the Linden Shop yard.

In addition, case law suggests that ALJs in the past have treated similar workplace safety concerns as protected activity under the NTSSA. In Serrano v. Metro Transit Auth. and NYCTA, ALJ No. 2008-NTS-00001, slip op. 4, 10-11 (ALJ Oct. 17, 2008), the complainant reported that other workers failed to use the required mats intended to protect them from the electric third rail that powers the subway system. Despite the fact that these safety issues did not concern safety to the public or the prevention of a terrorist attack, the ALJ deemed the complainant's report as protected activity under subsection (b)(1)(A) of the NTSSA. *Id.* at 11. Similarly, in Winters v. S.F. Bay Area Rapid Transit. Dist., ALJ No. 2010-NTS-00001, slip op. 6, 17 (ALJ July 16, 2012), the ALJ determined that the complainant's complaint about the insufficiency of cleaning products and the need for proper protective equipment used to clean vomit from a train car constituted protected activity under the same subsection. Finally, in Graves v. MV Transp., Inc., ALJ No. 2011-NTS-00004, slip op. 7, 14 (ALJ Apr. 18, 2012), the parties stipulated that the complainant's memorandum objecting to the practice of backing his bus between two other buses in the yard without a spotter was protected activity. The protected activity at issue in these cases mirror that of the Complainant because, like the reporting of a defective drill press, they invoked workplace safety concerns and did not pose a danger to the public, yet were deemed protected activity under subsection (b)(1)(A) of the NTSSA.[3]

According to § 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007, the NTSSA whistleblower protections are to be modeled after the protections available to railroad employees under 49 U.S.C. 20109 and aviation employees under 49 U.S.C. 42121. However, the whistleblower protection provision as applied to aviation employees under 49 U.S.C. 42121 does not include a broadly worded analogous provision to NTSSA subsection (b)(1)(A) that protects employees from retaliation for "reporting a hazardous safety or security condition." The Respondents cite Hill v. Champaign-Urbana Mass Transit Dist., ALJ No. 2010-NTS-00004, slip op. at 6-7 (ALJ Oct. 19, 2010), wherein one employee reported concern for his safety over a disagreement with another employee to his superior, for the proposition that such activity does not relate to public or environmental safety and thus does not fall under the NTSSA whistleblower provision. After a hearing, the ALJ denied relief, citing to a case invoking 49 U.S.C. 42121, which has no provision similar to (b)(1)(A).[4] Thus, I find the use of Hill in this case is misguided.

Furthermore, I note, that in coming to his determination in Hill, the ALJ used equivocal language stating, "Under a very broad reading of § 1142(b), the complainant *may* have engaged in protected activity when he made complaints to...management...Precedent from the Administrative Review Board *suggests*, however,

[3] I note that all three of these cases went to a hearing.

[4] In the instant matter, however, the Complainant asserts that his complaint relating to the drill press involved (a)(1)(A), as well as (b)(1)(A).

that a complaint must relate to public transportation safety or security to be protected activity under the NTSSA." (*emphasis added*) Such ambivalent wording can certainly lead one to conclude that the scope of the NTSSA whistleblower provision remains an unsettled question.

Conversely, the FRSA does contain a subsection nearly identical to the NTSSA's (b)(1)(A) whistleblower provision:

> **(b)** Hazardous safety or security conditions.
>
> > **(1)** A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for--
> >
> > > **(A)** reporting, in good faith, a hazardous safety or security condition;

49 U.S.C. 20109(b)(1)(A)

Thus, it may be instructive to look to cases regarding the FRSA whistleblower provision. The U.S. District Court for the District of Maine has treated reports of workplace safety hazards as covered under 49 U.S.C. § 20109(b)(1)(A). In Worcester v. Springfield Terminal Ry. Co., 2014 U.S. Dist. LEXIS 42954 (D. Me. Mar. 31, 2014), a foreman in the terminal's signal department expressed reservations about assigning a subordinate to clean up hydraulic oil, a hazardous material, due to the subordinate's inexperience. In denying the employer's Motion for Summary Judgment, the district court ruled that an employee taking on a task he could not safely complete could constitute a hazardous safety condition under 49 U.S.C. § 20109(b)(1)(A). Id. at 14-15. Much like the operability of a drill press without a safety guard that the Complainant reported, the expression of hesitation to direct a subordinate to clean up hazardous material implicates a matter of workplace safety. Even though the concern expressed by the foreman was limited to workplace safety, and did not extend to a danger to the public, the court found that the FRSA whistleblower provision applied. Id. Similarly, in Kuduk v. BNSF Ry. Co., 980 F. Supp. 2d, 1092, 1099 (D Minn. 2013), aff'd, 768 F.3d 786 (8th Circ. 2014), the court, viewing the facts in the light most favorable to the railroad employee, ruled that the employee's report of a defective derail handle that he reasonably believed posed a risk of injury to employees constituted protected activity under the FRSA whistleblower statute.

Therefore, when viewing the facts and inferences in the light most favorable to the Complainant, as I must when adjudicating the Respondents' Motion for Summary Decision, I conclude that a question of material fact exists as to whether the Complainant engaged in protected activity under 6 U.S.C. § 1142(b)(1)(A). Protected activity under subsection (b)(1)(A) involves reporting of a hazardous safety or security condition. There is no indication that the NTSSA's whistleblower protection was designed only to protect employees reporting a public safety hazard. Thus, I conclude that the Respondents have failed to establish that summary decision is appropriate on this ground.

Moreover, when viewed in the light most favorable to Complainant, Complainant's assertion that the drill press incident invoked subsection (a)(1)(A) is supported by the record. The Respondent's Motion for Summary Decision related only to subsection (b)(1)(A). Therefore, even if Respondent's Motion for Summary Decision as to (b)(1)(A) were granted, the Complainant's assertion as to the applicability of (a)(1)(A) must go forward. Accordingly, summary decision in favor of the Respondent as to this issue is not warranted.

Election of Remedies Provision

The Complainant argued that the NTSSA enables him to make an election of remedies, giving him the choice as to proceed under the NTSSA or PESH whistleblower protection laws, but not both. See Complainant's Memorandum in Opposition to Respondents' Motion for Summary Decision at 5. In support, the Complainant pointed to a letter from the New York State Department of Labor to U.S. Department of Labor, indicating the Complainant's preference to file his complaint with the latter agency under the NTSSA whistleblower provision. See CX 2. The Complainant asserted that the New York State Department of Labor's referral to the U.S. Department of Labor over a workplace safety issue means the NTSSA has jurisdiction over the Complainant's cause of action if the Complainant so chooses.

NTSSA's election of remedies provision states that "an employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the public transportation agency." 6 U.S.C. § 1142(e). Thus far, no court has had occasion to consider the NTSSA election of remedies provision. However, the FRSA provides a nearly identical provision: "An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." See § 20109(f). The Fourth Circuit held, in Lee v. Norfolk S. Ry. Co., 802 F.3d 626, 634 n.6 (4th Circ. 2015), that "Congress intended the Election of Remedies provision to address only the potential overlap between the OSH Act, various state versions of the OSH Act, and the FRSA." As part of his opposition to summary decision, the Complainant attached an overview of New York's PESH including the following: "Federal OSHA also retains the authority to monitor the State Plan under Section 18(f) of the OSH Act." See CX 1. Moreover, "the Enforcement Branch conducts unannounced mandatory inspections which results in a 'Notice of Violation and Order to Comply' for hazards and/or violations of OSHA standards." Id. Based on these provisions, I find that PESH is a state version of the OSH Act as contemplated by Section 20109(f) of the FRSA. Thus, a railroad worker has the option to pursue a remedy under FRSA's whistleblower provision or some other whistleblower protection, but not both.

By extension, because the NTSSA whistleblower provision was modeled after the FRSA whistleblower provision as stated by § 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007, it stands to reason that the Complainant has an identical choice to pursue his whistleblower protection either under PESH, an OSH state equivalent, or the NTSSA whistleblower provision. In support of this argument, the Assistant Secretary pointed to the analogous election of remedies

provision under the FRSA. See Brief of the Assistant Secretary of Labor For Occupational Safety and Health as Amicus Curiae Opposing Respondents' Motion For Summary Decision at 9-10. Based on case law, the Assistant Secretary argued that Congress intended the election of remedies provision to prevent employees from seeking duplicative relief under overlapping whistleblower statutes such as Section 11(c) of the OSH Act, which addresses workplace safety. Id. at 10-11. Because the NTSSA whistleblower provision mirrors that of the FRSA, which seeks to prevent duplicative relief under competing whistleblower statutes, the Complainant has a choice as to seeking relief under the NTSSA or the OSH Act.

Thus, I find that there is no bar to the Complainant reporting his protected activity under the NTSSA instead of the OSH Act. Also, I find that this election of remedies provision supports the conclusion that workplace and employee safety is covered under the NTSSA because it specifically addresses complaints cognizable under the OSH Act, the focus of which is workplace safety. See 29 U.S.C.S. § 651(a).

Protected Activity- Harte's July 23, 2013 Contact with OSHA

On July 21, 2013, the Complainant's supervisor directed the Complainant to change trucks after the truck the Complainant returned with revealed a mechanical failure. In the time that followed this incident and the PESH incident, the Complainant stated he noticed his co-workers' and supervisor's attitudes toward him changing, ostracizing him purportedly for reporting to OSHA. In response, the Complainant reported to an OSHA investigator that his supervisor directed him to change trucks and complained of growing hostility toward him by his co-workers, as evidenced by being assigned work while other employees were playing cards. See EX A at 124-126. The Complainant asserted that his supervisor told his co-workers that the Complainant reported them for playing cards, which further contributed to the Complainant's perceived mistreatment. Id. at 127. The Complainant thus alleges that he engaged in protected activity under 6 U.S.C § 1142(a)(3), which provides:

> (a) In general. A public transportation agency, a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against 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 done or about to be done—
> to provide information, directly cause information to be provided, or otherwise
>
> (3) To file a complaint or directly cause to be brought a proceeding related to the enforcement of this section or to testify in that proceeding;

6 U.S.C § 1142(a)(3)

Unlike the PESH incident, which invoked a workplace safety hazard, a call to OSHA regarding perceived mistreatment does not necessarily fall under the framework

of the NTSSA. The Complaint averred that his July 23, 2013 contact with OSHA constitutes protected activity under subsection (a)(3); however the subsection provides that such protected activity must relate to prior complaints of protected activity. Notably, the Complainant did not indicate that the supervisor's alleged improper activities ("treating him differently") was in retaliation for prior instances of protected activity. See EX A at 100, 103, 122-126.

Likewise, a report that the Complainant's perception of mistreatment by his co-workers cannot constitute NTSSA protected activity because the Complainant did not indicate that the acts were in retaliation for prior protected activity. In Leiva v. Union Pac. R. R. CO., ARB Nos. 14-016, 14-017, 2015 WL 3539576, at *4 (ARB May 29, 2015), the ARB determined that a potentially violent workplace disagreement between an engineer and train conductor constituted protected activity, albeit under subsection (b)(1)(A) of the FRSA, because the employee believed that the dispute posed a hazardous situation. Here, however, the Complainant complained that his supervisor merely treated him differently than other employees. See EX A at 103-105, 126. The Complainant did not link his supervisor's actions to prior complaints of protected activity.[5]

Further, the absence of temporal proximity between the purported protected activity and the alleged retaliatory act tends to establish that there is no link between the two. Nearly a year had elapsed between the PESH incident in August 2012 and the truck incident and subsequent OSHA complaint in July 2013. The Complainant made his October 2012 OSHA complaint ten months before the July 2013 complaint. Because the Complainant did not assert retaliatory animus and could not point to more recent protected conduct, I find the Complainant has not alleged any change in treatment from his supervisor or co-workers that was precipitated by protected activity. Accordingly, I find his complaints do not arise under subsection (a)(3).

Since the Complainant made a complaint to OSHA that did not relate to prior protected activity, I conclude that there is no genuine issue of material fact as to whether his OSHA complaint in July 2013 constituted protected activity under 6 U.S.C § 1142(a)(3). Accordingly, summary decision in favor of the Respondent is appropriate as to this issue.

SUMMARY

As set forth above, drawing all inferences in favor of the Complainant, I find that the evidence of record shows there is a genuine issue of material fact as to whether the Complainant's actions regarding the drill press constituted protected activity under 6 U.S.C § 1142(b)(1)(A). Based on the foregoing, I conclude that summary decision with regard to Section (b)(1)(A) in favor of the Respondents is inappropriate, and I DENY the Respondents' Motion for Summary Decision in that respect.

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[5] While counsel for the Complainant attempted to draw a nexus between the Complainant's prior protected activity and his supervisor's actions, the Complainant did not state, or even imply, that the supervisor's actions were prompted by his prior complaints. See EX A at 110-111.

Further, I GRANT the Respondents' Motion for Summary Decision as it relates to Section (a)(3).

ORDER

Based on the foregoing, it is hereby ORDERED that the Respondents' Motion for Summary Decision be GRANTED in part and DENIED in part.

SO ORDERED.

Digitally signed by Adele Odegard
DN: CN=Adele Odegard, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill New Jersey