



Issue Date: 12 December 2016

OALJ Case No.: 2016-SPA-00003
OSHA Case No.: 6-0150-16-057

In the Matter of:

JASON B. MEEKS,
Complainant,

v.

GENESIS MARINE, LLC,
Respondent.

ORDER GRANTING RESPONDENT’S MOTION TO DISMISS

This matter purports to arise under the Seaman’s Protection Act (“SPA”), 46 U.S.C. § 2114, as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281, (“SPA”), and the regulations promulgated thereunder at 29 C.F.R. Part 1986, which are employee protective provisions.

1. **Background**

Complainant filed a complaint with the Secretary of Labor on April 25, 2016 (“C1”), and a supplemental complaint that appears to have been submitted the same day (“C2”), alleging that Respondent terminated his employment after he engaged in protected activity under the SPA. In a decision dated August 30, 2016, the Regional Administrator for the Occupational Safety and Health Administration (“OSHA”), Region VI, dismissed the complaint finding that Complainant had not engaged in protected activity under the SPA. In a letter dated September 16, 2016, Complainant requested a formal hearing before the Office of Administrative Law Judges (“OALJ”). On November 30, 2016, I issued a Notice of Docketing and Prehearing Order setting this case for hearing in or near Nashville, Tennessee, on April 11, 2017.

2. **The Complaint**

The complaint is a typed, 14-page (including signature page), single-spaced document. According to the complaint, Complainant is about 39 years of age and worked for Respondent from February 2013 until he was terminated on March 26, 2016. (C1 at 1). Complainant alleged that during the summer of 2015, while he was assigned to the crew of the Renee Davison, other crew members used drugs and alcohol while they were on duty. He and two other crew members did not participate in this behavior. Complainant said they did not report the illicit activity

because the Captain of the vessel and the Port Captain were both involved in the illicit activity and they feared they would lose their jobs unless they kept quiet. (C1 at 2).

Rumors of the illicit activity spread among crew members of other vessels, and in January 2016 Respondent detailed investigators to conduct an internal investigation. Complainant and the two crew members that had not participated in the illicit activity told the investigators what they had observed aboard the Renee Davison during the summer of 2015. Some of the crew members alleged to have been involved in using drugs and drinking alcohol quit during the investigation or were reassigned to work on other vessels. On January 27, 2016, Complainant and the two other crew members who had not used drugs or consumed alcohol were placed on probationary status for 90 days for failing to report the illicit activity they had observed in the summer of 2015. Complainant was transferred off the Renee Davison the same day. (C1 at 2-3).

On March 26, 2016, Complainant began work performing duties as a tankerman level 2 (he had been a tankerman level 3 before, which paid more) on marine vessel barge no. 5042. He later left the barge and boarded the Bryan Lee Teste, which went up river to pick up two barges. (C1 at 6). Respondent terminated Complainant's employment that afternoon for leaving marine vessel barge no. 5042 without a licensed tankerman aboard. (C1 at 7, 11).

Complainant submitted a completed Notice of Whistleblower Complaint (OSHA form 8-60.1) along with a narrative complaint. In item 21 (page 7 of the form), it asked "what are the actions or events that you are reporting to OSHA?" The handwritten response was "Threat to fire Jason Meeks if he didn't agree to a 90 day probation period." Item 22 asked "when did the employer takes these actions against you?" The handwritten response was "last action took Saturday March 26 2016." The form was signed by Complaint and his attorney.¹

3. Supplemental Complaint

The supplemental complaint is a typed, 9-page (including certificate of service), single-spaced document with 20 pages of attachments. The supplemental complaint alleges that Respondent set Complainant up for termination by placing him on probation for 90 days in retaliation for the statement Complainant made to Respondent's investigators concerning illicit drug and alcohol activity aboard the Renee Davison. As an example of allegations in the supplemental complaint:

At the outset, this non-partisan investigative team devolved into an opaque partisan investigative team with the mindset to cover up GM's [Respondent's] maritime infractions and criminal behavior. This opaque partisan team was sent to investigate the criminal conduct that was alleged to have occurred on the Renee Davison with an agenda to practice "CYA" for GM [Respondent], conceal and camouflage all wrongdoings of the guilty but to find a way to punish the innocent. This is GM's [Respondent's] MO penchant to keep the Serfs at bay. Why was no action taken against the guilty? Captain Mike Johnson's initial observations of the physical condition of the Renee Davison **evidences** the horrendous condition

¹ Thomas R. Meeks is Complainant's father and his attorney.

of the Renee Davison. That vessel did not get into such a deplorable state with the dark force doing their duty. (Look at the history the dark force has compiled on the Callie Ethridge since the dark force was assigned to that vessel).²

(C2 at 4, para. 44) (emphasis in original).

One of the attachments Complainant submitted along with his supplemental report is an unsigned letter from Complainant's attorney to an attorney for Respondent that was sent to her by email on April 22, 2016. It is typed, seven-pages in length, and single-spaced. More than five pages of the document is a continuous block of text. In the final paragraph that extends from the middle of page six to the signature block in the upper half of page seven, counsel states that if Respondent did not come to a settlement with Complainant he would "be forced to become a whistleblower." He proposed that Respondent fly him and Complainant to Houston, Texas, by Monday, April 25, 2016, to sign documents so Complainant would "not be forced to solicit OSHA and the Coast Guard's – more particularly OSHA – assistance in regaining his employment and being reasonably compensated for his mistreatment."

4. Documents Filed with the Office of Administrative Law Judges

On September 29, 2016, Respondent submitted a Motion to Dismiss contending that Complainant failed to state a claim upon which relief can be granted. Specifically, Respondent asserts that Complainant failed to allege that he engaged in any activity that is protected under the SPA.

Complainant filed a Response to Respondent's Motion to Dismiss dated October 5, 2016. The response states in part:

1. The Complainant was a victim of retaliatory discharge on the 26th day of March, 2016, based upon the Respondents illegal bullying in violation of President Obama's Executive Order outlawing bullying in regard to Federal employees, the respondents vindictive retaliatory discharge against the complainant because of complainant's statement of the illegal drug activity that the respondents knew or either should have known that was being carried on by the crew of the Renee Davison during the summer of 2015, and before, and the fact that Hunter Garrett refused to take a drug test when asked by the Respondents during their alleged internal investigation of drug activity.

Complainant attached a copy of the handwritten statement he submitted to the Coast Guard on the U.S. Coast Guard Witness/Investigator Statement Form he was provided. The form is signed and dated April 25, 2016, the same date as the complaint he filed with OSHA. It indicates that a copy of the OSHA complaint was attached to the form. The one page handwritten statement alleges that Respondent breached contracts by loading or unloading the contracting party's product using vessels, barges and docks of the contracting party's competitors, and that Respondent mistreated employees by threatening to discharge them.

² The "dark force" refers to a former Captain and two crew members on the Renee Davison. (C2 at 4, para. 43)

Complainant submitted an affidavit dated October 6, 2016. In it, he alleges that Respondent discharged him on March 26, 2016. Complainant goes on to say, in part:

2. Within the first ten days in April 2016, I called the Coast Guard located in New Orleans, LA. I erroneously failed to memorialize the date, the telephone number and the identity of the person who answered the telephone at the Coast Guard. I advised the spokesperson about the illegal conduct of the defendants as outlined in my pleadings. The spokesperson's voice sounded like a lady. The spokesperson stated they have a "written form" that the Coast Guard utilizes in fielding complaints made by seamen. The spokesperson stated that the Coast Guard would send me a statement form.

Complainant submitted a second affidavit dated October 12, 2016. In it, Complainant notes that he submitted the prior affidavit showing he contacted the Coast Guard "within the first thirty days of my cause of action (March 26, 2016)." He said his father received a telephone call from Coast Guard Lieutenant Megan Clifford on October 11, 2016, informing him that the Coast Guard determined Complainant did not have a cause of action.

Respondent submitted a Reply to Complainant's Response dated October 18, 2016. Respondent argues that Complainant's Response shows that he does not have a cause of action because he alleges he contacted the Coast Guard after he had already been discharged from his employment with Respondent, which does not constitute protected activity under the SPA.

On November 28, 2016, counsel for the Complainant submitted a letter inquiring about the status of Respondent's motion. In the letter, counsel states that "respondents continue to advocate that [Complainant] failed to contact the Coast Guard **within thirty days of his wrongful discharge.**" (emphasis in original). Counsel argues that Complainant filed in a timely manner because he contacted the Coast Guard "within thirty days of [Complainant's] retaliatory discharge, March 24, 2016."

5. Seaman's Protection Act

The SPA prohibits Seamen from being unlawfully retaliated against for engaging in conduct deemed protected activity. Specifically, §2114(a) provides, in part:

A person may not discharge or in any manner discriminate against a seaman because .. the seaman in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred.

46 U.S.C. § 2114(a) (emphasis added).

One of the primary goals of the SPA is to facilitate the Coast Guard's enforcement of maritime safety laws and regulations. *Gaffney v. Riverboat Services of Indiana*, 451 F.3d 424, 444 (7th Cir. 2006), *cert. denied* 549 U.S. 1111 (2007). "The statute accomplishes this goal by guaranteeing that, when seamen provide information of dangerous situations to the Coast Guard, they

will be free from the ‘debilitating threat of employment reprisals’” *Id.*, quoting *Passaic Valley Sewerage Commissioners v. U.S. Dept. of Labor*, 992 F.2d 474, 478 (3d Cir. 1993), cert. denied 510 U.S. 964 (1993).

In determining whether Respondent violated Complainant’s rights under the SPA, I am required to follow the procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”). Title 29, Part 1986, of the Code of Federal Regulations provides that the “SPA incorporates the procedures, requirements, and rights described in the whistleblower provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. §31105.” 29 C.F.R. § 1986.100(a). Section 31105 of the STAA in turn states that “[a]ll complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b)” of AIR21. 49 U.S.C. § 31105(b); 49 U.S.C. § 42121(b).

There is a two-pronged burden-shifting framework applicable to a whistleblower case that incorporates the legal standards set forth in AIR21. 42 U.S.C § 42121(b); *Bechtel v. Admin. Review Bd.*, *U.S. Dept. of Labor*, 710 F.3d 443, 447 (2d Cir. 2013); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Allen v. Admin. Review Bd.*, *U.S. Dept. of Labor*, 514 F.3d 468, 475-76 (5th Cir. 2008); *Harp v. Charter Communications, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 5 (ARB May 31, 2013). The complainant has the initial burden of satisfying prong one of the two-part test. *See* 42 U.S.C § 42121(b); *Bechtel*, 710 F.3d at 447; *Araujo*, 708 F.3d at 157; *Allen*, 514 F.3d at 475-76; *Harp*, 558 F.3d at 723; *Hutton*, ARB No. 11-091, slip op. at 5. In doing so, a complainant must demonstrate the following four elements by a preponderance of the evidence: (1) He engaged in protected activity; (2) Respondent knew he engaged in protected activity; (3) He suffered an adverse action; and (4) His protected activity was a contributing factor in Respondent’s adverse action against him. *See* 42 U.S.C § 42121(b); *Bechtel*, 710 F.3d at 447; *Araujo*, 708 F.3d at 157; *Allen*, 514 F.3d at 475-76; *Harp*, 558 F.3d at 723; *Hutton*, ARB No. 11-091, slip op. at 5. If the complainant makes out a prima facie case by satisfying all four elements under the first prong of AIR21’s analytical framework, the burden then shifts to respondent to show by clear and convincing evidence that it would have taken the same adverse action against the complainant notwithstanding his protected activity. *See Araujo*, 708 F.3d at 157; *Cain v. BNSF Railway Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 3 (ARB Sep. 18, 2014).

The SPA affords seamen extensive protection against retaliation for reporting or threatening to report safety concerns to the Coast Guard or other federal regulatory agencies. *See* 46 U.S.C. § 2114(a). Consistent with other Federal whistleblower statutes, the SPA’s provisions defining protected activity should be interpreted broadly. *See, e.g., Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 20-21 (1st Cir. 1998) (construing STAA anti-retaliation provisions broadly to facilitate policy goals of ensuring corporate compliance with safety regulations through accountability); *Passaic Valley Sewerage Commissioners*, 992 F.2d at 478 (discussing “broad remedial purpose” of the Clean Water Act in expansively interpreting its whistleblower provisions); *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) (“[I]t is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws”).

The SPA is a shield, not a sword. Submitting a complaint to the Coast Guard or another other federal agency after having suffered an adverse action is not protected activity under the SPA. *Robinson v. Alter Barge Line, Inc.*, 513 F.3d 668, 671 (7th Cir. 2008) (“The defendant could not have fired him because he was about to report the use of illegal drugs to the Coast Guard if it didn’t know

he had any intention of doing so.”). The burden of persuasion is on the complainant to establish that the person who made the adverse employment decision had knowledge of the protected activity. *See Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). In order for a complaint to be protected it must be specific in relation to a given practice, condition, directive or event. *Id.*

6. Standards Governing a Motion to Dismiss

Neither the SPA, AIR21 nor the Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges contain specific provisions on motions to dismiss for failure to state a claim upon which relief can be granted. In the absence of specific provisions, Federal Rule of Civil Procedure 12(b)(6) applies.³ To survive a 12(b)(6) motion, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2006). While factual allegations in a complaint must be accepted as true, the same does not apply to legal conclusions. *Iqbal*, 556 U.S. at 678-79.

The Administrative Review Board has said that to survive a motion to dismiss in an administrative proceeding before OALJ, a complaint must contain: (1) Some facts about the protected activity alleging that they relate to the laws and regulations of a statute within the Department of Labor’s jurisdiction; (2) Some facts about the adverse action; (3) An assertion of causation, and (4) A description of the relief sought. *Johnson v. The Wellpoint Companies, Inc.*, ARB Case No. 11-305, ALJ Case No. 2010-SOX-038, slip op. at 6 (ARB Feb. 25, 2013), citing *Evans v. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 6 (ARB July 31, 2012). Simply alleging that a complainant engaged in protected activity is not enough to survive a motion to dismiss. The complaint must set forth specific facts indicating that the activity alleged could qualify for protection under the SPA. *Evans*, ARB No. 08-059, slip op. at 9; *Lewandowski v. Viacom, Inc.*, ARB Case No. 08-026, ALJ Case No. 2007-SOX-088 slip op. at 10 (ARB Oct. 30, 2009) (entire claim fails when complainant did not proffer evidence that she engaged in protected activity, an essential element of her whistleblower retaliation case).

7. Discussion

Considering all the factual allegations in the light most favorable to the Complainant and drawing all reasonable inferences in the Complainant’s favor, I find that the complaint fails to state a claim upon which relief can be granted under the SPA. The SPA prohibits a seaman from being discharged because he “reported or is about to report to the Coast Guard or other appropriate Federal agency or department” what the seaman believes is a violation of a maritime safety law or regulation. 26 U.S.C. § 2114(a)(1)(A) (emphasis added). I have read and considered every document Complainant submitted and there is not a single averment or reasonable inference that Complainant reported or was about to report a violation of a maritime safety law or regulation to the Coast Guard or other Federal agency or department before Respondent terminated his employment. To the contrary, the record establishes that Complainant’s decision to submit reports to the Coast Guard and OSHA was a result of his termination, not the cause of his termination.

³ 29 C.F.R. § 18.10(a) provides that the Federal Rules of Civil Procedure shall apply in situations not covered by applicable rules, statutes, regulations, or executive orders.

Complainant and his counsel seem to be under the mistaken impression that filing a complaint within 30 days of termination is the key to invoking the protection of the SPA. The time requirement is actually 180 days from the date of the alleged violation. *See* 49 U.S.C. § 31105(b)(1), made applicable to SPA by 46 U.S.C. § 2114(b). The deadline for filing a complaint, however, does not negate the requirement that the complaint state a violation covered by the SPA, which requires an allegation that the employer took an adverse action in retaliation for the complainant either filing a complaint with the Coast Guard or other appropriate federal agency regarding a safety violation or because the complainant was about to file such a complaint. There is no allegation raised in this case that the Complainant reported an alleged safety violation to the Coast Guard or other appropriate agency prior to his termination or that he was about to file such a report when he was terminated. Complainant's claim that he filed a report within 30 days of his termination on March 24, 2016 may be critical in perfecting a cause of action under some other federal or state law, but it does not create a cause of action under the terms of the SPA.

Again, accepting every allegation raised by Complainant and his counsel as true and drawing all reasonable inferences in his favor, there are no allegations set forth that implicate the protections set out in the SPA. Since post-termination reports to the Coast Guard and OSHA fall outside the protection of the SPA, which cabins the Department of Labor's jurisdiction, OALJ has no authority to grant relief in this matter. Therefore, Respondent's Motion to Dismiss is **GRANTED**.⁴

ORDER

1. Respondent's Motion to Dismiss for failure to state a claim upon which relief can be granted dated September 29, 2016, is **GRANTED**.
2. The hearing scheduled for April 11, 2017, is **CANCELED**.
3. As Complainant has not alleged that he engaged in any activity protected under the terms of the SPA and has not raised any other issue that is within the jurisdiction of the OALJ, this matter is **DISMISSED**.

SO ORDERED.

MORRIS D. DAVIS
Administrative Law Judge

⁴ Granting Respondent's Motion to Dismiss neither confirms nor refutes the facts alleged and it is not an indication of the propriety or impropriety of the actions taken by any party. Granting the motion simply reflects that the matters the Complainant alleged do not fall within the protection of the SPA and the jurisdictional limits of OALJ.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within 14 days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1986.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1986.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1986.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed 30 double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points

and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1986.109(e) and 1986.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within 30 days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1986.110(b).