



In the Matter of:

LEAH C. IBALE,

ARB CASE NO. 16-055

COMPLAINANT,

ALJ CASE NO. 2014-NTS-004

v.

DATE: FEB 16 2018

ALASKA MARINE HIGHWAY SYSTEM,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Leah C. Ibale, pro se, Las Vegas, Nevada

For the Respondent:

William E. Milks, Esq.; State of Alaska, Juneau, Alaska

Before: Joanne Royce, Administrative Appeals Judge, Leonard J. Howie III, Administrative Appeals Judge; and Tanya L. Goldman, Administrative Appeals Judge

FINAL DECISION AND ORDER

Leah C. Ibale filed a complaint under the employee whistleblower protection provision of the National Transit Systems Security Act (NTSSA or Act) and its implementing regulations,¹ alleging that her employer, Alaska Marine Highway System (Alaska Marine), violated the Act after she complained to the U.S. Coast Guard and the Department of Labor's Occupational Safety and Health Administration (OSHA) about asbestos exposure on board the M/V *Columbia*. Following a hearing, an administrative law judge (ALJ) dismissed Ibale's complaint. Ibale appealed to the Administrative Review Board (ARB or Board). For the following reasons, the Board affirms the ALJ's dismissal.

¹ 6 U.S.C.A. § 1142 (Thomson/West Supp. 2016); 29 C.F.R. Part 1982 (2017).

BACKGROUND

In 2007 Ibale began work as a cashier and steward for Alaska Marine, which operated passenger ferry ships with ports of call in the Inside Passage of southeastern Alaska. On March 19, 2012, Ibale, a member of B crew, was working on the M/V *Columbia*, which was in the Ketchikan shipyard for overhaul.² On March 27, 2012, Ibale's supervisor, Rex Roldan, ordered her and co-worker Rafael Soto to clean the ship's forward lounge, where workers had been removing asbestos inside the ceiling vents. Ibale saw that a ceiling panel had not been replaced or covered over and informed Roldan. He investigated and later told Soto and Ibale that it was safe to clean the lounge area since the asbestos removal had been completed. Soto and Ibale verified that information with union representative Pete Lapinsky and then vacuumed and dry-mopped the room.³

The next day, Ibale and Soto had to finish cleaning the lounge, and Ibale asked Tatiana Feldman, who was in charge of the cleaning equipment, for a respirator. Feldman could not find one and told Ibale she did not need any protection. Later, Ibale complained to Roldan that she had stinging in her eyes and a runny nose, was sneezing, and having trouble breathing. She filled out an injury report and left work in mid-afternoon. Dr. Jeanne M. Snyder examined Ibale, signed an unfit-for-duty slip from March 29 to April 4, and prescribed antibiotics and nasal spray.⁴

On April 1, 2012, the M/V *Columbia* returned to active service. On April 8, 2012, Ibale attempted to return to duty, believing that she was scheduled on the M/V *Columbia* from April 4 through April 13. Roldan informed her that the M/V *Columbia* had left the shipyard and that A crew was scheduled the first two weeks in April, not B crew. Ibale then went home.⁵

When Ibale returned to work on April 15, 2012, as a member of B Crew, she expected to work as the head waiter because the crew list had assigned her to that position. But a second crew list posted her job as cashier.⁶ Steward Linda Wilson told

² Rule 19.01 of Alaska's collective bargaining agreement (CBA) with the Inland Boatman's Union provides that two complete crews are assigned to each vessel, depending on the crews' mutual agreement. Respondent's exhibit (RX) C at 24.

³ Hearing transcript (TR) at 17-21.

⁴ Complainant's exhibit (CX 3), TR at 22-24. While on sick leave Ibale filed an anonymous complaint with the Anchorage OSHA office on March 30, 2012, alleging exposure to asbestos. TR at 29-30, CX A-1. That office later informed Ibale that it lacked jurisdiction to conduct a safety inspection of the M/V *Columbia* but would investigate her discrimination claim. CX 9.

⁵ TR at 29.

⁶ RX G 3-4.

Ibale that another employee with greater seniority would be head waiter and instructed her to go down to the ship's purser and obtain a work order for the cashier position. The line at the purser's office was long, and rather than waiting, Ibale went back upstairs to see Wilson who was meeting with a new chief steward, Ludy Uddipa. Wilson was checking on seniority status when Ibale told Uddipa that she felt sick and was getting off the ship.⁷

On April 17, 2012, Ibale submitted a notice-of-pay problem asserting that she was entitled to lost wages for April 15 because another employee with less seniority had been assigned as head waiter.⁸ Dispatch supervisor Debbie Porter notified Ibale on April 19 that she was not entitled to the difference because she was assigned to B crew at the time and had never held a head waiter bid even though she had been named cashier/head waiter on one of the April 15 crew lists. Moreover, Porter noted, Ibale reported to her supervisors at 7:45 a.m. on April 15 that she was sick and left the M/V *Columbia* before it sailed.⁹

On April 22, 2012, Ibale filed a complaint with OSHA alleging that Alaska Marine retaliated against her for reporting exposure to asbestos.¹⁰ OSHA denied the complaint on June 3, 2014, and Ibale timely requested a hearing, which was held on June 18, 2015, in San Francisco. After the ALJ dismissed her complaint Ibale appealed to the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board authority to issue final agency decisions under the NTSSA.¹¹ The ARB reviews the ALJ's factual findings for substantial evidence and reviews conclusions of law de novo.¹²

⁷ TR at 33, CX H, RX U and W.

⁸ The CBA provides that an employee denied a higher classification despite having seniority is due the difference between the wages paid and the wages at the higher position. At the time, head waiters were paid \$22.61 an hour, and cashiers were paid \$22.52 an hour. RX C at 21-23.

⁹ CX G.

¹⁰ Ibale also filed an anonymous online complaint with OSHA. CX A-1. On May 8, 2012, she filed a report of potential asbestos exposure with the Coast Guard, which informed her on October 1, 2012, that it had determined that the M/V *Columbia* had no safety hazard from asbestos. CX 10, 12.

¹¹ Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

DISCUSSION

Under the NTSSA, a public transportation agency, or a contractor or subcontractor of the agency, may not retaliate against a public employee “in whole or in part” because of the employee’s cooperation in the investigation of a violation under the NTSSA, or the employee’s report of hazardous safety and security conditions in public transportation.¹³ The prohibition covers discharge, demotion, suspension, reprimand, intimidation, threats, restraints, coercion, blacklisting, or discipline if the report of hazardous safety and security concerns contributed in any way to that action.¹⁴

In his decision, the ALJ correctly noted that there is very little case law from the ARB interpreting the NTSSA. The ALJ added that since the NTSSA protections and the necessary elements to prove retaliation are similar to other federal whistleblower statutes, he would use those statutes and case law for guidance.¹⁵ We do the same in this opinion.

To prove a NTSSA violation, Ibale must show by a preponderance of evidence that her safety complaints were protected activity, that the company took an adverse employment action against her, and that her protected activity was a contributing factor in the adverse action.¹⁶ Failure to establish any one of these elements requires dismissal of the complaint.¹⁷

The ALJ found that Ibale demonstrated that she engaged in protected activity when she reported a potentially hazardous asbestos exposure to OSHA on March 30, 2012. He additionally noted that Alaska Marine did not dispute that Ibale engaged in protected activity by filing safety complaints with OSHA and the Coast Guard.¹⁸ The

¹² 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).

¹³ 6 U.S.C.A. §1142(a), (b).

¹⁴ *Id.*; 29 C.F.R. § 1982.102(a)(1), (2).

¹⁵ D & O at 6. The ALJ cited the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121; Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A; Federal Railroad Safety Act of 1982 (FRSA), 49 U.S.C.A. § 20109; and Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. § 31105.

¹⁶ 29 C.F.R. § 1982.109(a); *see also Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5-6 (ARB Jan. 31, 2011).

¹⁷ *Luckie v. United Parcel Serv. Inc.*, ARB Nos. 05-026, 054, ALJ No. 2003-STA-039, slip op. at 6 (ARB June 29, 2007).

¹⁸ D & O at 7. Alaska Marine did not dispute the ALJ’s conclusion that Ibale established that she engaged in protected activity. We affirm this finding, *Jackson v. Union Pacific RR Co.*, ARB No. 13-042, ALJ No. 2012-FRS-017, slip op. at 5 (ARB Mar. 20, 2015).

ALJ concluded, however, that Ibale had failed to demonstrate that Alaska Marine engaged in any adverse action against her; alternatively, even if there had been an adverse action, Ibale did not establish that her protected activity in complaining about asbestos exposure had contributed to it.¹⁹

Alaska Marine took no adverse action against Ibale on April 8

On appeal Ibale challenges the ALJ's conclusion that Alaska Marine took no adverse action against her on April 8 and 15, 2012. She argues that an employee who takes sick leave during a crew's two-week assignment must be permitted to return and complete that assignment once found fit for duty; thus, she was supposed to work from April 4, when declared fit for duty, through April 13.²⁰

Substantial evidence supports the ALJ's conclusion that Ibale was not scheduled to work on April 8, 2012. The CBA delineates the scheduling procedures that control which crew is on duty while underway or in dry-dock. The M/V *Columbia* was in dry-dock during the B crew's schedule when Ibale took sick leave. Rule 27 covers employee dispatch, and states that when an employee on the scheduled crew list becomes unfit for duty, he or she is considered unfit for the remainder of that assignment and a replacement takes over.²¹

As a member of B crew, Ibale was scheduled for two weeks from March 19 through April 1 working in the yard. But because she left the M/V *Columbia* as unfit for duty on March 28, another employee replaced her for the rest of her two-week assignment, which ended April 1 when the A crew took over. Ibale and the rest of the B crew were not scheduled again until April 15.²²

At the hearing, Ibale admitted that she had been on the dry-dock schedule until April 1, that another employee had replaced her when she went on leave, that she was not part of A crew, and that B crew was not scheduled to work until April 15.²³ Further, the document Ibale submitted as a timesheet purporting to support her claim that she should have been scheduled on April 8 is a state payroll advice form that does not list schedules or hours worked.²⁴

Finally, substantial evidence supports the ALJ's finding that Deborah Porter, a dispatch supervisor, testified credibly about Alaska Marine's payroll system. She stated

¹⁹ D & O at 10-12.

²⁰ Complainant's Brief (un-numbered). See TR at 34-36, 55-56.

²¹ RX C at 37, TR at 80-82.

²² TR at 79-82, RX C.

²³ TR at 50-56.

²⁴ Compare CX E with RX S at 9.

that while pay periods are generally two weeks long and end on Fridays, two-week crew assignments change on Sundays and Mondays; thus, the end of a pay period does not match the end of an assignment. Porter added that when an employee is on sick leave, only a pay statement is generated, not a timesheet, and that Alaska Marine paid Ibale for all her time off on sick leave.²⁵

Alaska Marine took no adverse action against Ibale on April 15

Ibale argues that her official job assignment on April 15 was head waiter/cashier but Alaska Marine managers replaced her with another employee who had less seniority and additionally, traveling to and from the purser's office to clarify her position exacerbated her breathing condition. She contended that she was neither a no-call nor a no-show and should have received either position.²⁶

Substantial evidence in the record supports the ALJ's factual conclusion that Ibale suffered no adverse employment action on April 15, 2012, because even if she had been placed in the wrong job position, she left the M/V *Columbia* due to feeling "sick and for no other reason."²⁷

On April 15, when Ibale returned to the M/V *Columbia*, as part of the B crew, one position posting listed her as cashier/head waiter; another copy listed her as cashier, with no one assigned as head waiter.²⁸ Second steward Linda Wilson stated in an affidavit that before she boarded the ship her predecessor had informed her that another employee with more seniority than Ibale had been assigned as head waiter, but Wilson thought Ibale had greater seniority. Wilson explained that she talked with another steward and was starting to switch assignments, but the purser informed her that Ibale had left the ship at 7:45 a.m. because she felt sick.²⁹

The ALJ noted that Ibale's testimony at the hearing about why she left the ship was "equivocal."³⁰ Ibale stated that she left because the steward denied her the head waiter assignment, but admitted that Wilson asked her to go down to the purser's office

²⁵ TR at 81-82, 86, 89-92. Ibale also claimed that Roldan erroneously charged her sick leave on her time sheet for March 28, 2012, thus denying her regular pay, even though she had worked that day, but did not list this adverse action in her initial complaint. RX P. The ALJ informed Ibale prior to the hearing that this issue was not properly raised. D & O at 10, n.5.

²⁶ Complainant's Reply Brief at 9.

²⁷ D. & O. at 9.

²⁸ RX G at 3-4, TR at 30-4.

²⁹ RX I, TR at 83-84.

³⁰ D & O at 9.

and get a station bill because of the confusion over assignments and seniority status. Ibale stated that the line at the purser's was long so she went back to the steward's office where Wilson was talking with chief steward Uddipa, and asked about her assignment. When neither steward answered her immediately, Ibale testified that she told Uddipa: "I will get off I was sick the fact truly, for going up and down the stairs that cause exertion of my cough and wheezing for previous week being exposure to dust/asbestos."³¹ We affirm the ALJ's conclusion that Ibale left the M/V *Columbia* on April 15 because she felt sick, and therefore she did not suffer an adverse action.³²

While we affirm the ALJ's dismissal of Ibale's claim based on her failure to establish an essential element of her complaint, we note that the ALJ did not determine whether Ibale engaged in protected activity when she complained to steward Roldan about potential asbestos exposure on March 27 and 28. Ordinarily, such an omission might require remand, particularly in view of the fact that the ARB liberally construes pro se complaints and pleadings such as Ibale's.³³ Here, however, even if there was additional protected activity, it did not result in any adverse action.³⁴

³¹ RX W at 3, CX H; TR at 30-34. Ibale also admitted that she applied for state workers' compensation, claiming that her work injuries prevented her from working from March 29 to May 13, 2012, among other dates. RX Q at 2, TR at 63-67.

³² Because Ibale failed to establish any adverse action, we need not consider the ALJ's alternative analysis of the contributing factor element. We note that the ALJ cited *Powers v. Union Pac. R.R.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015). Subsequently, the ARB revisited the issues in *Powers*, see *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, Order Vacating the ARB's Decision and Order of Remand and Returning the Case to the ARB for Decision (May 23, 2016), and overturned *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014). See *Palmer v. Canadian Nat'l RR*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 15 (ARB Sept. 30, 2016) (re-issued with full dissent, Jan. 4, 2017).

³³ *Menefee v. Tandem Transp. Co.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 7 (ARB Apr. 30, 2010).

³⁴ Additionally, the ARB must be able to discern cogent arguments in any appellate brief, even one from a *pro se* litigant. *Hasan v. Sargent & Lundy*, ARB No. 05-0998, ALJ No. 2002-ERA-032, slip op. at 8-9 (ARB Aug. 7, 2007). Here, Ibale disagrees with the ALJ's reasonable analysis but "merely draws and relies upon bare conclusions" in her briefs; therefore, any argument regarding protected activity or contributing factor is deemed waived. See *Dev. Res., Inc.*, ARB No. 02-046, slip op. at 4 (ARB Apr. 11, 2002) citing *Tolbert v. Queens Coll.*, 242 F.3d 58, 75-76 (2d Cir. 2001) (noting that it is a "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived").

CONCLUSION

While appreciating that Ibale appealed this matter pro se, we find that she failed to identify sufficiently how the ALJ committed reversible error. Accordingly, the ARB **AFFIRMS** the ALJ's dismissal of Ibale's whistleblower complaint.³⁵

SO ORDERED.


JOANNE ROYCE

Administrative Appeals Judge


TANYA L. GOLDMAN

Administrative Appeals Judge


LEONARD J. HOWIE III

Administrative Appeals Judge

³⁵ *Graves v. MV Transp., Inc.*, ARB No. 14-045, ALJ No. 2013-NTS-002, slip op. at 3 (ARB July 23, 2015).