UNITED STATES DEPARTMENT OF LABOR • OFFICE OF ADMINISTRATIVE LAW JUDGES

Whistleblower Newsletter

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AIR21 CASES

PROTECTED ACTIVITY; THREE ELEMENTS; REGISTERING OF COMPLAINT WITH LOCAL AUTHORITIES FOLLOWING CONSULTATION WITH FEDERAL AUTHORITY

In ***Svendsen v. Air Methods, Inc.***, ARB No. 03-074, 2002-AIR-16 (ARB Aug. 26, 2004), the ARB adopted the ALJ's finding that the Complainant was engaged in protected activity when he reported a dust cloud near the airport at which he was assigned for air ambulance flights. The dust cloud had been produced by a car race organized by a local Indian tribe, and the Complainant feared that it reduced visibility, especially for incoming flights. In the ALJ's decision, he found that "a protected activity under AIR 21 has three elements. First, the complaint must either: a) involve a purported violation of an FAA regulation, standard or order relating to air carrier safety, or any other provision of Federal law relating to air carrier safety; or, b) at least "touch on" air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complaint must be made either to the complainant's employer or the Federal Government." *Svendsen v. Air Methods, Inc.*, 2002-AIR-16 (ALJ Mar. 3, 2003), slip op. at 48. The ALJ found that the complaint touched on air carrier safety and represented an objectively reasonable flight safety hazard. *Id.* at 49. The ALJ noted that the Complainant registered his complaint with the local tribe police and government, which were neither the Federal government nor the Complainant's employer. The Complainant had done so, however, after first reporting the visibility issue to a Federal flight

service station, which concluded that it did not have the ability to act on the complaint and directed the Complainant to local authorities.

RETALIATORY INTENT; EVIDENCE ESTABLISHING THAT COMPLAINANT'S MANNER OF RAISING THE COMPLAINT, RATHER THAN THE FACT THAT HE HAD RAISED THE COMPLAINT, CAUSED THE ADVERSE EMPLOYMENT ACTION

In ***Svendsen v. Air Methods, Inc.***, ARB No. 03-074, 2002-AIR-16 (ARB Aug. 26, 2004), the ARB adopted the ALJ's finding that the Complainant's safety concern was protected activity, but that a preponderance of the evidence established that it was the belligerent and unprofessional manner in which the Complainant raised the concern -- and not the report of safety concern itself -- that caused the Complainant's firing. The ARB noted that the issue of retaliatory intent requires careful examination. Although temporal proximity supported the Complainant's case, the Respondent had established a history of complaints about the Complainant's poor interpersonal skills and unprofessional conduct, and established that it was the Complainant's loud and belligerent manner in which he raised the concern rather than the fact that he had raised a safety concern that caused his termination.

TIMELINESS OF APPEAL TO THE ARB; PERIOD FOR APPEAL COMMENCES ON DATE ALJ DECISION IS ISSUED RATHER THAN THE DATE THE DECISION IS SIGNED

In ***Svendsen v. Air Methods, Inc.***, ARB No. 03-074, 2002-AIR-16 (ARB Aug. 26, 2004), the ARB observed that the ALJ had signed his Recommended Decision and Order on February 26, 2003, but that the service sheet indicated that the decision was issued on March 3, 2003. The Board observed that under the regulations in effect at the time, "issuance of the ALJ's decision" triggered the period for appealing the ALJ's decision to the Board.

[*Editor's note*: For both the current regulations and the interim final regulations in effect at the time, it is the preamble in the Federal Register notice, and not the text of 1979.110 itself, that refers to the "issuance" of the ALJ's decision as being the trigger date for the time period for an appeal to the to ARB. *See* 68 Fed. Reg. 14,100 (Mar. 21, 2003) and 67 Fed. Reg. 15453 (Apr. 2, 2002).]

ENVIRONMENTAL CASES

[Nuclear and Environmental Whistleblower Digest VII C 1]
SUMMARY JUDGMENT MOTION; NON-MOVING PARTY MAY NOT RELY MERELY ON CONCLUSORY STATEMENTS

In ***Rockefeller v. U.S. Dept. of Energy, Carlsbad Area Office***, ARB No. 03-048, ALJ No. 2002-CAA-5 (ARB Aug. 31, 2004), the ARB wrote that once a party which has moved for summary decision "has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of act that could affect the outcome of the litigation. The non-moving party may not rest upon mere allegations, speculation, or denials of his pleadings, but must set forth specific facts on each

issue upon which he would bear the ultimate burden of proof." Slip op. at 3-4 (citations omitted). Thus, in ***Rockefeller***, the ARB granted summary judgment against the Complainant's blacklisting claim where his response to the Respondent's summary judgment motion, though verified under oath, contained little more than conclusory statements that the Respondent had blacklisted him.

[Nuclear and Environmental Whistleblower Digest VII C 1]
SUMMARY JUDGMENT; REVERSIBLE ERROR TO RULE ON MOTION PRIOR TO RECEIPT OF RESPONSE BY NON-MOVING PARTY OR EXPIRATION OF 15-DAY RESPONSE PERIOD

In ***Rockefeller v. U.S. Dept. of Energy, Carlsbad Area Office***, ARB No. 03-048, ALJ No. 2002-CAA-5 (ARB Aug. 31, 2004), the Respondent had moved for summary decision. The ALJ granted the motion 10 days after it was filed and before receiving a response from the Complainant. The applicable regulations provide 15 days for a response to a motion. The ARB found that the ALJ's ruling was in error, and that the Complainant did not waive his opportunity to respond because he filed a request for reconsideration in which he specifically objected to the premature ruling where the ALJ denied the request for reconsideration.

[Nuclear and Environmental Whistleblower Digest IX B 1]
CALCULATION OF TIME PERIOD FOR RESPONDING TO A MOTION UNDER OALJ RULES OF PRACTICE AND PROCEDURE

In ***Rockefeller v. U.S. Dept. of Energy, Carlsbad Area Office***, ARB No. 03-048, ALJ No. 2002-CAA-5 (ARB Aug. 31, 2004), the ARB interpreted the combined effect of 29 C.F.R. § 18.6(b) and 29 C.F.R. § 18.4(c)(3) as providing 15 days in which to respond to a motion.

ERA CASES

[Nuclear and Environmental Whistleblower Digest II B 1 b]
AMENDMENT OF THE COMPLAINT BY THE ALJ; PRO SE LITIGANT; GROUNDS AND PROCEDURE ARE AT 29 C.F.R. 18.5(e)

In ***Hooker v. Westinghouse Savannah River, Co.***, ARB No. 03-036, ALJ No. 2001-ERA-16 (ARB Aug. 26, 2004), the Complainant had testified in deposition that the Respondent had refused to rehire him. Although the Complainant had not included this assertion in his ERA discrimination complaint, the ALJ, taking into account the Complainant's *pro se* status, *sua sponte* amended the complaint to include the refusal to rehire allegation. The ARB observed on review that the Respondent did not contest the ALJ's sua sponte amendment, and that it likewise did not contest that action. The ARB, however, also noted that the grounds and procedure for amending whistleblower complaints are found at 29 C.F.R. § 18.5(e), and that the ALJ had not referenced that regulation.

[Nuclear and Environmental Whistleblower Digest VII C 1]
SUMMARY JUDGMENT; REQUIREMENT IN CASES ARISING THE FOURTH CIRCUIT THAT BEFORE SUMMARY JUDGMENT BE ENTERED AGAINST A *PRO SE* LITIGANT, THAT LITIGANT MUST BE ADVISED BY THE COURT OF THE RIGHT TO FILE RESPONSIVE MATERIALS AND THAT THE FAILURE TO DO SO MIGHT RESULT IN SUMMARY JUDGMENT

In ***Hooker v. Westinghouse Savannah River, Co.***, ARB No. 03-036, ALJ No. 2001-ERA-16 (ARB Aug. 26, 2004), the ARB reversed the ALJ based on Fourth Circuit law to the effect that before entering summary judgment against a *pro se* litigant, the district court must advise the litigant "of his right to file counter-affidavits or other responsive material and [alert the litigant] to the fact that his failure to so respond might result in the entry of summary judgment against him." Slip op. at 9, quoting *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975). Notably, the Complainant here did file a response to the motion and asked for additional time to further answer the motion. The ALJ granted the request and subsequently advised the Complainant twice of the need to respond further and twice extended the time for the Complainant to do so. The Complainant did not respond further and the ALJ granted summary judgment because the Complainant "did not produce sufficient evidence that [Respondent] constructively discharged or blacklisted him." Slip op. at 8. The ARB reversed, reasoning that the Complainant "was *pro se* and the ALJ did not notify him pursuant to *Roseboro*."

[Nuclear and Environmental Whistleblower Digest XIII B 6]
CONSTRUCTIVE DISCHARGE; ALLEGEDLY HOSTILE ACTS OCCURRING PRIOR TO COMPLAINANT'S PROTECED ACTIVITY ARE NOT RELEVANT

In ***Hooker v. Westinghouse Savannah River, Co.***, ARB No. 03-036, ALJ No. 2001-ERA-16 (ARB Aug. 26, 2004), the ARB held that the ALJ did not err in finding that allegedly hostile or otherwise adverse acts by the Respondent were not relevant to the Complainant's constructive discharge claim where they all occurred prior the date that the Complainant engaged in protected activity. The Complainant had argued that if the ALJ had considered these prior acts, he could not have granted summary judgment to the Respondent because the Complainant would have shown that intolerable work conditions forced him to resign. The ARB, however, noted that the ERA only prohibited an employer from discriminating against an employee *because* of protected activity.

SOX CASES

CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT WOULD HAVE TAKEN UNFAVORABLE PERSONNEL ACTION IN ABSENCE OF PROTECTED ACTIVITY; LACK OF RELEVANCE OF GENERAL EMPLOYMENT DISCRIMINATION LAW CONCEPTS OF "NONDISCRIMINATORY REASONS" AND "PRETEXT"

In ***Collins v. Beazer Homes USA, Inc.***, __ F.Supp.2d __, 2004 WL 2023716 (N.D.Ga. Sept. 2, 2004), the Defendants had filed a motion for summary judgment. The court found that the Plaintiff's case was sufficient to withstand a summary judgment motion on the issues of protected activity, the Defendant's knowledge of

the protected activity, whether the Plaintiff suffered an unfavorable personnel action and whether the circumstances suggested that the protected activity was a contributing facto to the unfavorable action. Thus, the court observed that the Defendants would only be entitled to summary judgment if they had established by clear and convincing evidence that they would have fired the Plaintiff absent her participation in protected activity under the SOX whistleblower provision. The court noted that the parties had framed their arguments in the language of general employment discrimination law discussing "non-discriminatory reasons" and "pretext." The court, however, emphasized that it would analyze the Defendants' argument under the clear and convincing evidence standard stated in 49 U.S.C. § 42121.

CONTRIBUTING FACTOR; *MARANO v. DEPT. OF JUSTICE* STANDARD

In ***Collins v. Beazer Homes USA, Inc.***, __ F.Supp.2d __, 2004 WL 2023716 (N.D.Ga. Sept. 2, 2004), the court wrote that

> Under the evidentiary framework [of a SOX whistleblower cause of action], Plaintiff must also establish that there are circumstances which suggest that the protected activity was a contributing factor to the unfavorable action. 49 U.S.C. § 42121(b)(2)(B)(iii); *see Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)(stating that under the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), "[t]he words 'a contributing factor' . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision" and noting that "[t]his test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action.").

COVERED EMPLOYEE; WORK OUTSIDE THE U.S.

In ***Carnero v. Boston Scientific Corp.***, No. 04-10031-RWZ (D.Mass. Aug. 27, 2004), the court agreed with OSHA's preliminary determination that the whistleblower provision of the Sarbanes-Oxley Act does not cover employees working outside the U.S. In *Carnero*, the Plaintiff was a foreign national working for the defendant's Argentinean and Brazilian subsidiaries.

COVERED EMPLOYEE; EMPLOYEE OF SUBSIDIARY OF PUBLICLY TRADED PARENT COMPANY

Where the officers of a publicly traded parent company have the authority to affect the employment of employees of a subsidiary, an employee of the subsidiary is a "covered employee" within the meaning of the SOX whistleblower provision. ***Collins v. Beazer Homes USA, Inc.***, __ F.Supp.2d __, 2004 WL 2023716 (N.D.Ga. Sept. 2, 2004).

EVIDENTIARY FRAMEWORK; PLAINTIFF'S BURDEN OF PROOF

In ***Collins v. Beazer Homes USA, Inc.***, __ F.Supp.2d __, 2004 WL 2023716 (N.D.Ga. Sept. 2, 2004), the court summarized a plaintiff's burden in establishing a SOX whistleblower cause of action under 11th Circuit law as follows:

> Under the statutory framework, a plaintiff in federal court must show by a preponderance of the evidence that the plaintiff's protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. 49 U.S.C. § 42121(b)(2)(B)(iii).13 That is, the plaintiff must show by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew of the protected activity; (3) she suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. Proximity in time is sufficient to raise an inference of causation. The defendant employer may avoid liability if it can demonstrate by clear and convincing evidence that it "would have taken the same unfavorable personnel action in the absence of [protected] behavior." 49 U.S.C. § 42121(b)(2)(B)(iv).

Collins, 2004 WL 2023716 * 7 (citations and footnotes omitted).

FEDERAL COURT JURISDICTION; MERE SUGGESTION THAT PLAINTIFF MAY HAVE BEEN UNCOOPERATIVE AND THAT DELAY WAS IN PART DUE TO SETTLEMENT NEGOTIATIONS INSUFFICIENT TO DEFEAT FEDERAL COURT JURISDICTION

The mere fact that the OSHA administrative file suggested that the SOX whistleblower Plaintiff may have not fully cooperated with OSHA investigators and that the delay in issuance of OSHA's final determination was due in some part to settlement negotiations was insufficient to defeat the federal district court of jurisdiction based on bad faith of the Plaintiff, "absent a greater showing." ***Collins v. Beazer Homes USA, Inc.***, __ F.Supp.2d __, 2004 WL 2023716 (N.D.Ga. Sept. 2, 2004). The court noted that a plaintiff's ability to file in federal court is not premised on a showing of good faith, but on a failure to show that the delay in OSHA's final determination was a result of bad faith.

KNOWLEDGE OF PROTECTED ACTIVITY; COURT'S SUSPICION WHERE A "SOLE DECISIONMAKER" IS BROUGHT IN MERELY FOR THE PURPOSE OF FIRING A COMPLAINANT

In ***Collins v. Beazer Homes USA, Inc.***, __ F.Supp.2d __, 2004 WL 2023716 (N.D.Ga. Sept. 2, 2004), the Defendants moved for summary judgment alleging that the person who made the decision to fire the Plaintiff did not know about the Complainant's most recent protected activity. The court denied the motion, finding that the decisionmaker did know about some of the Complainant's complaints. The court stated: "To permit an employer to simply bring in a manager to be the 'sole decisionmaker' for the purpose of terminating a complainant would eviscerate the protection afforded to employees by Sarbanes-Oxley. *Collins*, 2004 WL 2023716 * 9.

PRIVILEGES; STATEMENTS MADE TO DOL IN COURSE OF SOX WHISTLEBLOWER INVESTIGATION

In ***Morlan v. Qwest Dex, Inc.***, __ F. Supp.2d __, 2004 WL 1900368 (D.Or. Aug. 25, 2004), the Plaintiff had brought an action under state law against her employer alleging that company officials had made defamatory statements about her during, *inter alia*, a DOL investigation of a Sarbanes-Oxley whistleblower complaint. Specifically, the employer's attorney had made statements in a letter to DOL as part of a defense against the SOX administrative complaint suggesting that the employer had fired the Plaintiff for "enhancement of data" and "falsification of documents." The court held that these statements were protected by an absolute privilege which applies to statements made to administrative agencies acting in a quasi-judicial capacity.

[Editor's note: ***Morlan*** did not originate in the Department of Labor.]

PROTECTED ACTIVITY; ALLEGATION THAT COMPLAINANT NEVER SPECIFICALLY ALLEGED SECURITIES OR ACCOUNTING FRAUD AND THAT THE COMPLAINTS WERE TOO VAGUE; REASONABLE BELIEF TEST

In ***Collins v. Beazer Homes USA, Inc.***, __ F.Supp.2d __, 2004 WL 2023716 (N.D.Ga. Sept. 2, 2004), the Defendants moved for summary judgment alleging that the Plaintiff did not engage in protected activity within the meaning of the SOX whistleblower provision where the Plaintiff never specifically alleged securities or accounting fraud and where the complaints were allegedly too vague. The Defendants cited in contrast the type of disclosures made by Sherron Watkins regarding Enron's accounting practices. In response, the Plaintiff pointed to four specific disclosures which were allegedly exposed "attempts to circumvent the company's system of internal accounting controls and therefore state a violation of Section 13 of the [Securities] Exchange Act." The allegations were that the Respondent knowingly overpaid invoices to an advertising agency, that the ad agency was being used because of a personal relationship between management and the agency, that sales agents who were friends of the Director of Sales were being overpaid, and that kickbacks were being paid to lumber suppliers.

The court, although acknowledging that it was a close case, found that a genuine issue of material fact existed as to whether the Plaintiff had engaged in protected activity (especially given the lack of caselaw guidance and the broad remedial purpose of the SOX). The mere fact that they did not rise to level of the complaints raised by Ms. Watkins regarding Enron was not determinative. Rather, the test was a "reasonable belief" test. The court rejected the Defendant's assertion that the complaints were too vague to constitute protected activity, noting that the Defendants had taken the allegations seriously and investigated the claims, citing in that respect legislative history to the effect that "any type of corporate or agency action taken based on the information would be strong indicators of a reasonable belief." The court found that since reasonable jurors could find by a preponderance of the evidence that the Plaintiff engaged in protected activity, the Defendants were not entitled to summary judgment as a matter of law.

RELEVANCE OF OTHER FEDERAL CASELAW TO CONSIDERATION OF SOX WHISTLEBLOWER COMPLAINT

In ***Collins v. Beazer Homes USA, Inc.***, __ F.Supp.2d __, 2004 WL 2023716 (N.D.Ga. Sept. 2, 2004), the court was considering the Respondent's motion for summary judgment. The court noted that, given the scarcity of caselaw on the SOX, it was required to look to other federal whistleblower statutes for guidance. The court specifically observed that the SOX regulations were grounded in AIR21, STAA and ERA whistleblower laws, and that the SOX burdens of proof are derived from AIR21. The court acknowledged that USDOL/OALJ decisions may provide guidance, but noted that the ALJ decisions cited by the parties were not in the context of a motion for summary judgment, and that the court was bound to follow the decisions of the 11th Circuit Court of Appeals. *Collins*, 2004 WL 2023716 * 6 and n.10.

The court also observed that the evidentiary framework for a SOX whistleblower case "is an analysis different from the general body of employment discrimination law." *Collins*, 2004 WL 2023716 at n.11. The court cited the analysis in *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997), in which the Court of Appeals had discussed how the ERA analysis was its own "free-standing" framework distinct from the body of general employment discrimination law. *Id*. The district court stated that "while reference to the general body of employment discrimination law may provide guidance in some areas, where the statute provides a specific framework the Court follows the statute." *Id*.

TIME LIMITATION FOR FILING OF COMPLAINT; COMMENCES WHEN EMPLOYEE MADE AWARE OF DECISION TO TERMINATE, EVEN IF POSSIBILITY REMAINS THAT TERMINATION COULD BE AVOIDED

"The statute of limitations begins to run when the employee is made aware of the employer's decision to terminate him or her even when there is a possibility that the termination could be avoided. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988); *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (cited by *Ricks*, 449 U.S. at 261)." ***Lawrence v. AT&T Labs***, 2004-SOX-65 (ALJ Sept. 9, 2004).

TIMELINESS OF COMPLAINT; ALJ DECLINES TO AMEND COMPLAINT TO INCLUDE NEW ALLEGATIONS OF DRASTICALLY DIFFERENT TYPE FROM THAT ALLEGED IN THE ORIGINAL, UNTIMELY FILED, COMPLAINT

In ***Kingoff v. Maxim Group LLC***, 2004-SOX-57 (ALJ July 21, 2004), the ALJ found that the Complainant's constructive discharge complaint was clearly untimely under the SOX whistleblower provision. In an effort to render the action timely, the Complainant made allegations subsequent to his original complaint that the Respondent committed other acts against him that adversely affected his employment (forcing him to execute a promissory note, filing a NASD claim against him for arbitration, sending allegedly threatening or harassing correspondence, and other unspecified acts). The ALJ, however, concluded that the later allegations were of a drastically different type from those contained in the complaint before him, and could not -- consistent with due process -- be considered in the matter before the ALJ, citing *Sasse v. Office of the U.S. Attorney, USDOJ*, ARB No. 02-077, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004). The ALJ, however, forwarded to OSHA copies of the Complainant's letters containing his additional allegations of violations by the

Respondent with a suggestion that OSHA should process those letters as SOX complaints.

STAA CASES

[STAA Whistleblower Digest II P]
SUMMARY JUDGMENT; FAILURE OF RESPONDENT TO RESPOND TO COMPLAINT, DISCOVERY, OR ALJ'S ORDERS; SANCTION OF WAIVER OF RIGHT TO PRESENT EVIDENCE OR ARGUMENT IN RESPONSE TO COMPLAINANT'S CASE

In ***Waechter v. J.W. Roach & Sons Logging and Hauling***, 2004-STA-43 (ALJ Aug. 27, 2004), the Respondents failed to respond to the Complainant's complaint, discovery requests, and the ALJ's orders. Accordingly, the ALJ imposed the sanction of waiver of the right to present evidence or argument in response to the Complainant's case. The ALJ found no disputed issues of fact concerning the Respondent's liability under the STAA and granted summary judgment to the Complainant.

[STAA Whistleblower Digest II U]
CONTINUANCE; ABUSE OF DISCRETION STANDARD; FAILURE OF RESPONDENT TO TIMELY OBTAIN COUNSEL VERSUS REMEDIAL PURPOSES OF THE STAA

In ***Jackson v. Butler & Co.***, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004), the Respondent's newly retained counsel filed a motion for continuance on the eve of the hearing stating as the only reason that he needed more time to prepare. The ALJ, who had issued a notice of the trial date more than a month earlier, denied the request, weighing the Respondent's delay in obtaining counsel against the remedial purposes of the STAA (*e.g.*, expedited hearing and reinstatement). On appeal, the Respondent argued that the ALJ erred in denying the request for a continuance. The ARB reviewed the ALJ's rejection of the motion under an abuse of discretion standard, and found no legal error. On review, the Respondent presented a new reason for needing the continuance -- to secure the testimony of a witness. The ARB, however, observed that the Respondent had not detailed what efforts were made to secure the witness's testimony nor made a proffer that her testimony would have contradicted the Complainant's contentions.

[STAA Whistleblower Digest V A]
REFUSAL TO DRIVE; ANALYSIS UNDER THE "ACTUAL VIOLATION" AND "REASONABLE APPRENSION" PRONGS

The ALJ's Recommended Decision and Order in ***Harris v. C&N Trucking***, 2004-STA-37 (ALJ Sept. 8, 2004), contains an orderly and succinct analysis of a refusal-to-drive based complaint. In ***Harris***, the Complainant expressed concerns about whether the truck was safe to drive because of play in the kingpins. The Respondent (a mechanic who performs repairs on its trucks) checked the truck, found normal wear for the age of truck but no damage or safety issue. The Complainant took the truck to a mechanic when the truck was assigned to him again, confirmed that there was play in the kingpins and at the right spring, and returned the truck and refused

to make the delivery for fear that the wheels would fall off. The Respondent informed the Complainant that it was not possible for the wheels to fall off, and when the Complainant continued to refuse to drive, terminated his employment. Subsequently, the truck logged about 80,000 miles without complaint or incident.

The ALJ first analyzed the facts under the "actual violation" provision at 49 U.S.C. 31105(a)(1)(B)(i), and found that although the Complainant had not specified any specific regulations or laws, his complaint seemed to fall within the parameters of DOT regulations. The Complainant's position was essentially that it is a federal mandate that the driver be satisfied as to the working condition of the truck. Nonetheless, the ALJ noted that courts have stressed that the driver's level of satisfaction is not unfettered, but that a complainant must show by a preponderance of the evidence that an actual violation of the regulation would have occurred. Proof of the driver's subjective good faith opinion is not sufficient; a complainant must prove that his assessment of the condition is correct. The ALJ found that the Complainant's evidence in the instant case did not establish protected activity under the "actual violation" prong.

The ALJ then analyzed the facts under the "reasonable apprehension" provision at 49 U.S.C. 31105(1)(B)(ii). In the instant case there was no dispute that the Complainant refused to drive because of his safety concern, that he made the Respondent aware of the concern and sought to have the condition corrected. Thus, the focus was on whether the Complainant's apprehension of the problem was objectively reasonable. Under the reasonable apprehension prong, the Complainant did not need to establish an actual safety defect, but rather sufficient evidence indicating that his assigned vehicle could reasonably be perceived as unsafe. The ALJ summarized that when examining reasonableness under this prong, "relevant factors include the driver's apprehension about past experience, the vehicle's susceptibility to the defect at issue, whether other drivers have driven under similar circumstances, and the driver's experience." Slip op. at 7 (citations omitted). In the instant case, although the Complainant was an experienced driver, the Respondent was also an experienced mechanic and often repaired his own trucks and there was no evidence to support an assumption that the Complainant was more creditable than the Respondent in regard to the performance or safety of the Respondent's vehicles. The ALJ observed that "[t]he Complainant cannot simply insist upon a standard of care for his vehicles that is stricter than the normal or legal standard." *Id.* (citation omitted). The ALJ also took into account that other subsequent drivers of the same vehicle found no such concerns, and the principle enunciated in *Pensyl v. Catalytic, Inc.*, 1983-ERA-2 (Sec'y Jan. 13, 1984), that an important factor in determining reasonableness is whether the employer has investigated the hazard, determined the vehicle was safe, and informed the employee of that determination. Thus, the ALJ found that the Complainant had failed to demonstrate that a reasonable person, under the circumstances, would conclude that there was a bona fide danger of accident or injury. The Complainant's subjective good faith opinion alone did not demonstrate an objectively reasonable apprehension of serious injury.

[STAA Whistleblower Digest IX B 1]
DAMAGES; RETIREMENT PLAN

In ***Jackson v. Butler & Co.***, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004), the ARB awarded the Complainant the amount he would have

been entitled to in 401(k) plan contributions up to the time he began participating in a similar plan from a subsequent employer.

[STAA Whistleblower Digest IX B 1]
DAMAGES; HEALTH BENEFITS; LOSSES INCURRED AFTER THE ALJ'S DECISION

In ***Jackson v. Butler & Co.***, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004), the ARB awarded the Complainant the amount he had to pay out-of-pocket for a health plan with a subsequent employer and held that this amount would continue to accrue until the Complainant was reinstated.

The ARB also awarded the Complainant uncontested out-of-pocket medical expenses that were covered under the Respondent's policy but not under his current employer's policy. The ARB noted that the ALJ had correctly declined to award estimated future out-of-pocket expenses incurred after issuance of the Recommended Decision and Order. The ARB, however, granted leave to the Complainant to request modification of the ARB's final decision to establish such indirect health care plan losses between the time of the ALJ's recommended decision and the ARB's final decision.

[STAA Whistleblower Digest IX B 3 f]
BACK PAY; LOSS OF SUBSEQUENT JOB AS THE RESULT OF A DISPUTE; NO REDUCTION UNLESS RESPONDENT PROVES THAT THE COMPLAINANT DID NOT EXERCISE REASONABLE DILIGENCE IN RETAINING THE SUBSEQUENT JOB

In ***Jackson v. Butler & Co.***, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004), the ALJ had reduced the back pay award base on his finding that the Complainant lost his job at a subsequent employer as a result of a dispute, and that the Respondent was not an insurer of the Complainant's future employment. The ARB disagreed with the result, finding that the record did not clearly indicate that the Complainant had failed to exercise reasonable diligence to retain his position at the subsequent employer. The ARB observed that uncertainties in determining what the employee would have earned but for the discrimination are resolved against the discriminating employer.

[STAA Whistleblower Digest IX C]
ATTORNEY FEE PETITIONS; LEGAL STANDARDS

In ***Jackson v. Butler & Co.***, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004), the ARB reviewed the legal standards applied to consideration of attorney fee applications:

> In reviewing attorney's fee awards, the ARB follows the fee-shifting precedents of the Supreme Court and other federal courts.
>
> Once it is established that the plaintiff has prevailed, *Hensley v. Eckerhart*, 461 U.S. 424 (1983) provides the framework for deciding the merits of fee

petitions. The *Hensley* Court said, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 433. This lodestar "calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Id.* The district court may reduce the award for inadequately documented hours, or for hours that were not "reasonably expended" due to overstaffing or inexperience. As in private practice, "[h]ours that are not properly billed to one's *client* are not properly billed to one's *adversary* pursuant to statutory authority." 461 U.S. at 434 (emphasis in original).

The petitioner bears the burden of proof that claimed hours of compensation are adequately demonstrated and reasonably expended. Under *DiFilippo v. Morizio*, 759 F.2d 231, 235-36 (2d Cir. 1985), the "reasonableness of the time expended must . . . be judged by standards of the private bar" so that "hours claimed are to be examined in detail with a view to the . . . value of the work product to the client in light of the standards of the private bar." Faced with an unreasonable number of hours, the court can reduce the lodestar fee by a reasonable amount or percentage, without performing an item-by-item accounting.

Courts will permit a partner/associate, or first/second chair staffing, especially at trial. However, they will exclude time that is duplicative, e.g., where two or more attorneys unnecessarily attend hearings and depositions, and perform the same tasks. Also excluded is time attributed to office conferences, supervision and training, and review and revision, since such time is not normally billable to private clients.

The other element of the lodestar calculation (besides time reasonably expended) is the reasonableness of plaintiff's attorney's hourly rates. In *Blum v. Stenson*, 465 U.S. 886 (1984), the Court held that fees under 42 U.S.C.A. § 1988 (West 2003) were to be "calculated according to the prevailing market rates in the relevant community." 465 U.S. at 895. It is the petitioners' burden "to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* at 895 n.11. In deciding the "prevailing market rates in the relevant community," the court may consider, among

> other things, rates plaintiff's attorney charges paying clients, and rates other lawyers in the community charge for similar work.
>
> Finally, the party seeking a fee award must submit evidence documenting the hours worked and the rates claimed. As we have said, "[A] complainant's attorney fee petition must include adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area, as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs." *Gutierrez*, slip op. at 13 (internal quotations and citations omitted).

Slip op. at 10-11 (citations omitted).

In ***Jackson***, the ARB found that declarations from Complainant's lead attorney and two other lawyers stating that the attorney should receive $325 per hour based on his relevant experience fell short of establishing the market rate for comparable work in North Florida. Rather, the ARB, although acknowledging that the attorney's work on the case was excellent and that he was highly experienced, awarded fees at the rate of $300 per hour rate awarded in a recent federal district court decision.

In regard to an Associate attorney's work on the case, the ARB accepted that $175 an hour was a reasonable rate given the aforementioned district court's award and the ALJ's perception that the associate could have handled the matter (albeit the ARB stated that rate was at the high end of the market for an associate with two years of experience). Because it had accepted the senior associate's hourly rate, however, the ARB made downward adjustments, based on review and revision of the associate's work, supervision and training, duplication of effort, and legal research on topics of presumed expertise. Because many of the entries for her work were batched with properly chargeable work, the ARB imposed a 15% downward adjustment rather than just deleting the offending items.

[STAA Whistleblower Digest IX C]
COSTS; OVERHEAD BUILT INTO HOURLY RATE

In-house reproduction, postage and express package costs are generally considered part of attorney overhead and are built into the hour rates. ***Jackson v. Butler & Co.***, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004) (awarding, however, expert witness fess, court reporter fees, and outside copying charges).

[STAA Whistleblower Digest X B 1]
EMOTIONAL DISTRESS; UNREFUTED TESTIMONY

In ***Jackson v. Butler & Co.***, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004), the ARB affirmed the ALJ's award of $4,000 for emotional distress based on the testimony of the Complainant and his wife, even though that

testimony was not supported by evidence of professional counseling or other medical evidence, where the testimony was unrefuted by the Respondent.

MISCELLANEOUS

[Nuclear and Environmental Whistleblower Digest IX M 2]
[STAA Whistleblower Digest II M]
ATTORNEY MISCONDUCT; FIRST AMENDMENT; LIMITATIONS ON IN-COURT SPEECH

In ***Board of Professional Responsibility v. Slavin***, No. M2003-00845-SC-R3-BP (Tenn. Aug. 27, 2004) (unpublished decision available at 2004 WL 1908797), the Tennessee Supreme Court imposed a two-year suspension on an attorney based on, *inter alia*, that attorney's conduct in administrative law judge hearings before the U.S. Department of Labor. One of the contentions made by the attorney on appeal was that he was being sanctioned for First Amendment protected speech. The court rejected this claim, writing:

> In the context of judicial proceedings, an attorney's First Amendment rights are not without limits. Although litigants and lawyers do not check their First Amendment rights at the courthouse door, those rights are often subordinated to other interests inherent in the judicial setting. See Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991); United States Dist. Court v. Sandlin, 12 F.3d 861, 866 (9th Cir. 1993); Koster v. Chase Manhattan Bank, 93 F.R.D. 471, 476 (S.D.N.Y. 1982); State v. Carruthers, 35 S.W.3d 516, 560-61 (Tenn. 2000). Thus, while we find that legitimate criticism of judicial officers is tolerable, "an attorney must follow the Rules of Professional Conduct when so doing." Shortes v. Hill, 860 So. 2d 1, 3 (Fla. Dist. Ct. App. 2003). A lawyer is not free to "seek refuge within his own First Amendment right of free speech to fill a courtroom with a litany of speculative accusations and insults." United States v. Cooper, 872 F.2d 1, 3 (1st Cir. 1989).
>
> The United States Supreme Court stated:
>
> > It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal.
>
> Gentile, 501 U.S. at 1071.

"The First Amendment does not preclude sanctioning a lawyer for intemperate speech during a courtroom proceeding." Jacobson v. Garaas (In re Garaas), 652 N.W.2d 918, 925 (N.D. 2002) (emphasis added). Commenting on Gentile in a disciplinary proceeding, the Supreme Court of Missouri concluded:

> An attorney's free speech rights do not authorize unnecessary resistance to an adverse ruling . . . . Once a judge rules, a zealous advocate complies, then challenges the ruling on appeal; the advocate has no free-speech right to reargue the issue, resist the ruling, or insult the judge.

In re Coe, 903 S.W.2d 916, 917 (Mo. 1995).

In Kentucky Bar Association v. Waller, 929 S.W.2d 181, 183 (Ky. 1996), the Supreme Court of Kentucky observed that the statements need not be false to pursue disciplinary action:

> Respondent appears to believe that truth or some concept akin to truth, such as accuracy or correctness, is a defense to the charge against him. In this respect he has totally missed the point. There can never be a justification for a lawyer to use such scurrilous language with respect to a judge in pleadings or in open court. The reason is not that the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect for the law and for the judicial system. Officers of the court are obligated to uphold the dignity of the Court of Justice and, at a minimum, this requires them to refrain from conduct of the type at issue here.

Thus, an attorney's speech may be sanctioned if it is highly likely to obstruct or prejudice the administration of justice. "These narrow restrictions are justified by the integral role that attorneys play in the judicial system, which requires them to refrain from speech or conduct that may obstruct the fair administration of justice." Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 428-29 (Ohio 2003).

Accordingly, we conclude that Slavin's in-court remarks were not protected by the First Amendment. By this holding we intend to limit an attorney's criticisms of the judicial system and its officers to those criticisms which are consistent in every way with the sweep and

> the spirit of the Rules of Professional Conduct. See Fla. Bar v. Ray, 797 So. 2d 556, 560 (Fla. 2001).

2004 WL 1908797 * 8-9 (footnote omitted).

The Office of Administrative Law Judges has afforded reciprocal effect to the Tennessee Supreme Court's suspension order. ***In the matter of Slavin***, 2004-MIS-5 (ALJ Sept. 28, 2004).

[Nuclear and Environmental Whistleblower Digest XIII A]
[STAA Whistleblower Digest VI A]
ADVERSE EMPLOYMENT ACTION; TANGIBLE JOB DETRIMENT

In ***Hillig v. Rumsfeld***, No. 02-1102 (10th Cir. Aug. 27, 2004), a Title VII case, the 10th Circuit held that any act that causes more than de minimis impact on a plaintiff's future employment opportunities may be actionable as retaliation. The court specifically disagreed with the district court's that an "adverse employment action," under Title VII, may be only those employment actions that result in "tangible harm" to the plaintiff. The court noted that there was split in the circuits on this issue.