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ARB Upholds $1.1 Million Award to Maritime Whistleblower

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The Department of Labor Administrative Review Board (ARB) recently upheld a $1.1 million award to a ship captain who was forced out of his position after blowing the whistle on safety violations aboard his vessel.

John Loftus brought a complaint against his former employer, Horizon Lines, Inc. (later bought by Matson Alaska, Inc.) for retaliation under the Seaman's Protection Act (SPA), which prohibits retaliation against seamen who report safety violations to the U.S. Coast Guard. His victory at the ARB is a landmark decision for the infrequently-used SPA and is likely the highest damages award by the Department of Labor for a violation of that Act.

The Background

Loftus was a Captain (or Master) aboard the ship *Horizon Trader*. Between 2011 and 2013 he reported various safety and regulatory violations to the Coast Guard, its partner safety inspection organization the American Bureau of Shipping (ABS), and Horizon management. His reports included concerns about power box fires, derelict equipment, and inoperative valves and fuel systems. He made his last report in April 2013, in which he expressed concern about his shore-side superintendent's insistence that he perform mandatory drug testing in the midst of a weather storm so severe that he stayed awake for two days navigating the ship. Loftus questioned how the drug testing should be prioritized in the presence of more urgent safety concerns. The following month, Horizon removed him as Captain and demoted him to the lower-level position of Chief Mate – a more difficult and physically demanding position – and then offered two Relief Chief Mate assignments on different vessels which would have been temporary assignments. Horizon told him that the removal was discipline for poor judgment during an incident in March 2013 when a crew member was injured during a severe weather episode while trying to carry out an order Loftus had given him. Rather than accept the career-ending demotion, Loftus resigned.

Retaliation Complaints Under the Seaman's Protection Act

The SPA protects seamen from discharge or other retaliation because he or she "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…has occurred." 46 U.S.C. § 2114(a). The SPA was enacted in 1984 in response to a Fifth Circuit decision—*Donovan v. Texaco*, 720 F.2d 825 (5th Cir. 1983)—that the whistleblower provision of the Occupational Safety and Health Act does not apply to seamen. Under the SPA as amended by § 611 of the Coast Guard Act of 2010, OSHA has jurisdiction over SPA retaliation complaints. Since that time, OSHA has reported a small but growing number of complaints filed under the statute, with only 64 cases in total between 2011 and 2017 out of the more than 18,000 total complaints filed under 17 OSHA-administered whistleblower statutes during that time period.

Loftus filed a complaint with OSHA against Horizon under the SPA, claiming that Horizon had constructively discharged him in retaliation for his reports about safety violations. A positive finding

on the merits at the OSHA investigation stage is extremely rare. After OSHA dismissed Loftus's complaint, as it has done with about 60% of SPA complaints, Loftus appealed to an Administrative Law Judge (ALJ), who found that Horizon had retaliated against Loftus for his complaints and reports. The ALJ awarded $655,198.90 in back pay (roughly 20 months' salary plus the $100,000 severance pay he would have received in January 2015 if he had not been discharged) with interest, $10,000 in compensatory damages, and $225,000 in punitive damages, and attorneys' fees and costs, which ultimately amounted to over $200,000. Front pay or reinstatement was not available in this case because Horizon had ceased its east coast operations by the time of trial.

ARB Upholds ALJ's Finding

Horizon appealed the decision to the ARB, which upheld the ALJ's decision. According to the Board, the ALJ properly found that Loftus's various communications with the Coast Guard and ABS constituted protected activity about which Horizon knew. Horizon did not argue that Loftus had failed to prove his demotion was caused in part by his protected activity, and thus, Loftus had made out all the elements of his claim of retaliation by a preponderance of the evidence. That showing shifted the burden to Horizon to prove by the higher clear and convincing evidence standard that it would have demoted Loftus in the absence of his protected activity. Horizon argued that the ALJ erred in finding that it failed to meet this burden. The ARB upheld the ALJ's finding, however, which relied on Loftus's expert witnesses – including former captains and Coast Guard inspectors – who gave testimony that ultimately undercut Horizon's claim that Loftus exercised "poor judgment" during the 2013 severe weather incident and that it demoted him because of that.

The ARB rejected Horizon's argument that Loftus was not constructively discharged and thus the back pay award should have been limited to the difference between Loftus's captain salary and the salary of the chief mate position it offered him. The ARB held that Loftus's resignation in the face of the demotion constituted a constructive discharge in that a reasonable person in his position would have felt compelled to resign. The ARB upheld the ALJ's reliance upon a number of factors to support its conclusion. The demotion of a captain to chief mate represented a pay cut and downgrade from permanent to temporary employment, and it was an unprecedented action by Horizon management. The ALJ also considered expert testimony that as a chief mate who had been demoted from captain, Loftus would not have had the respect of his crew or the officers, thus impeding his ability to do his job properly. Notably, the ARB also supported the ALJ's consideration of Horizon management's "pattern of hostility" toward Loftus's protected activity as supportive of a finding that Horizon created intolerable working conditions sufficient to justify a constructive discharge.

Finally, the Board upheld the $10,000 compensatory damages award, noting that the ALJ properly considered evidence of Loftus's emotional harm, specifically his own testimony about the harm he suffered. The Board also upheld the ALJ's determination that punitive damages were warranted and that the award of $225,000 – close to the statutory cap of $250,000 – was appropriate. The ARB noted that punitive damages are warranted where there is "reckless or callous disregard" for the complainant's rights and intentional violations of law. More severe "[e]gregious or reprehensible conduct" is not required, but is evidence of intentional or reckless behavior. The ALJ found Horizon's conduct "reprehensible" and that it showed "persistent indifference" to Loftus's safety concerns, thus supporting a punitive damages award. The ARB further found that the amount was appropriate given the degree of the misconduct, the harm to the complainant, and awards in comparable cases. Thus, the Board upheld the full award of over $890,000, plus interest on back pay and attorney's fees to be supported by petition.

While there have not been many SPA cases, the *Loftus* award suggests that the Department of Labor will take a firm stance on egregious violations of law and retaliation against employees who raise concerns about them in the maritime industry.