U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

KEICHIE CAMPBELL,

COMPLAINANT,

v.

NATIONAL RAILROAD PASSENGER CORP. (AMTRAK),

RESPONDENT.

ARB CASE NO. 2020-0056

ALJ CASE NO. 2018-FRS-00129

DATE: September 21, 2021

Appearances:

For the Complainant:
Keichie Campbell; *pro se*; Byron, California

For the Respondent:
Gina E. Nicotera, Esq. and William G. Ballaine, Esq.; *Landman Corsi Ballaine & Ford P.C.*; New York, New York

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the whistleblower protection provisions of the Federal Railroad Safety Act (FRSA)[1] and Food Safety Modernization Act

[1] 49 U.S.C. § 20109 (2008), as implemented by 29 C.F.R. Part 1982 (2020) and 29 C.F.R. Part 18, Subpart A (2020).

(FSMA).[2] Keichie Campbell (Complainant) filed a timely complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Amtrak (Respondent) violated the FRSA and FSMA by furloughing her after she reported the improper storage of pillows, pillow cases, food, and beverages in Respondent's station base in Raleigh, North Carolina. Complainant requested a formal hearing after OSHA dismissed the complaint. After a hearing, an Administrative Law Judge (ALJ) denied the complaint, finding that Complainant failed to prove by a preponderance of the evidence that her protected activity was a contributing factor in Respondent's decision to furlough Complainant. On appeal, we summarily affirm the ALJ's Decision and Order (D. & O.).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated the authority to the Administrative Review Board (ARB) to review appeals of ALJ's decisions pursuant to the FRSA and FSMA.[3] The ARB will affirm the ALJ's factual findings if supported by substantial evidence, but reviews all conclusions of law de novo.[4]

DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate commerce or its officers or employees from discriminating against an employee because the employee engaged in a protected activity.[5] To prevail on an FRSA retaliation complaint, complainants must prove by preponderance of the evidence that: (1) they engaged in protected activity, (2) their employer took an adverse employment action against them, and (3) the protected activity was a contributing factor in the

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[2] 21 U.S.C. § 399d (2016), as implemented by 29 C.F.R. § 1987.

[3] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[4] *Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 7 (ARB Mar. 11, 2019).

[5] 49 U.S.C. § 20109(b).

unfavorable personnel action.[6]

In this case, the ALJ found that Complainant's protected activity was not a contributing factor in the Respondent's decision to furlough the Complainant. A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[7] Substantial evidence in the record supports the ALJ's finding that although Complainant's complaint was a protected activity, it was not a contributing factor to the adverse action that resulted in the termination of her employment.

The ALJ primarily relied upon Respondent's application of its company-wide directive, which was effective during the relevant time period, and the collective bargaining agreement (CBA) with the Transportation Communication Union (TCU). Respondent's downsizing directive advised its employees that all vacant positions would no longer be automatically kept open. Instead, senior management would review a vacant position to determine whether the position should be abolished due to ongoing downsizing measures. Under the CBA, if an employee does not have a current position, the employee has five days to either bid for a vacant position or "bump" a more junior employee out of their position (for which they qualify). If the affected employee is unable to bump a more junior employee, then the employee will automatically be furloughed.

We will affirm ALJ findings if they are supported by substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[8] The record before us demonstrates that since September 13, 2013, Respondent employed Complainant as a Secretary-1/Crew Base (OBS-Secretary 1) located in Respondent's Raleigh, North Carolina facility. On December

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[6] *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 2014-0047, ALJ No. 2013-FRS-00035, slip op. at 5 (ARB Nov. 24, 2015). The FSMA has the same substantive standards as to adverse action and contributing factor. 21 U.S.C. § 399d; 29 C.F.R. § 1987.109. We affirm the ALJ's findings as to Complainant's FSMA allegations that any FSMA-protected activity was not a contributing factor to her being furloughed.

[7] *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013).

[8] *McCarty v. Union Pacific R.R. Co.*, ARB No. 2018-0016, ALJ No. 2016-FRS-00066, slip op. at 3 (ARB Sept. 23, 2020).

19, 2016, Complainant made a report (i.e., the protected activity at issue) about the improper storage of pillows, pillow cases, food, and beverages via email to Karen Shannon (Silver Star Route Director) and Thomas Kirk (Deputy General Manager for the Southeast Division/Region).

Prior to Complainant's protected activity, Respondent posted a job vacancy on December 7, 2016, for the position of secretary to Mr. Brown, Respondent's District Manager of Stations in Raleigh, N.C. On December 14, 2016, Respondent awarded the position to Complainant, effective on December 19, 2016, and she then left her position as OBS-Secretary 1. After Complainant returned from her previously approved vacation on January 4, 2017, Complainant learned that she was being "bumped" from her positon as Mr. Brown's secretary, effective January 5, 2017, in favor of an employee with more seniority. Complaint wanted to return to her former job position, but under Respondent's downsizing policy directive, vacant positions would no longer be automatically kept open. Mr. Kirk ultimately decided to eliminate Complainant's former OBS-Secretary 1 position.

The ALJ found Mr. Kirk's explanation for abolishing Complainant's prior Secretary I position credible for several reasons: He was credible both in the manner of his live testimony and its substance, and he did not show any animus toward Complainant. Although Mr. Kirk was aware of Complainant's protected activity at the time he decided to abolish her former position, it is uncontested that he also temporarily retained Complainant as Mr. Brown's secretary through January 10, 2017, to allow her time to find a different position within the company. The ALJ similarly found that Mr. Brown was a credible witness. Like Mr. Kirk, it is uncontested that Mr. Brown was also aware of Complainant's protected activity, but went out of his way to keep Complainant employed and also found her a position that she could claim (a secretarial position in Lorton, Virginia). However, Complainant did not bid for the Lorton position, or any another position. Complainant also did not attempt to "bump" a more junior employee before being automatically furloughed under the CBA-mandated date of January 15, 2017.

Substantial evidence supports the ALJ's findings that Respondent's reasons for terminating Complainant's employment were clear and straightforward—based on its application of the previously established company-wide downsizing directive

and the CBA. He also found that there was no indication of pretext. Thus, substantial evidence supports the ALJ's finding that Complainant's report of improper storage was not a contributing factor in her being furloughed. Accordingly, we summarily affirm the ALJ's conclusion.[9]

CONCLUSION

For the reasons stated above, substantial evidence supports the ALJ's factual determination that Complainant's protected activity was not a contributing factor in Respondent's decision to terminate Complainant's employment. Therefore, we **AFFIRM** the ALJ's conclusion that Respondent did not violate the FRSA and FSMA, and the complaint in this matter is **DENIED**.

SO ORDERED.

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[9] "Campbell's decision not to claim the Lorton position or another position on or before January 10, 2017, when her retention in the secretary position for Brown expired, was the reason she was furloughed. I find that Campbell's protected activity played no role in Amtrak's adverse action against Campbell." D. & O. at 19.