U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

FREDERICK B. WRIGHT,	**ARB CASE NO. 2019-0011**
COMPLAINANT,	**ALJ CASE NO. 2015-SDW-00001**
v.	**DATE: May 22, 2019**
RAILROAD COMMISSION OF TEXAS,	
RESPONDENT.	

Appearances:

For the Complainant:

Frederick B. Wright; *pro se*; Houston, Texas

For the Respondent:

Michael J. DePonte, Esq., and Julie C. Tower, Esq.; *Jackson Lewis, P.C.*; Austin, Texas

Before: William T. Barto, *Chief Administrative Appeals Judge*, James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

PER CURIAM. The Complainant, Frederick Wright, filed a retaliation complaint under the employee protection provisions of the Safe Drinking Water Act (SDWA), the Federal Water Pollution Control Act (FWPCA), and their

implementing regulations.[1] He alleged that the Railroad Commission of Texas, his employer and the Respondent, violated the SDWA and FWPCA whistleblower protection provisions when it retaliated and discriminated against him because he raised concerns about requiring oil and gas operators to comply with rules regulating drilling wells to protect sources of underground drinking water.

Following a hearing, a Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Wright's complaint because he found that Wright did not meet his burden of showing that any protected activity motivated the termination of his employment. After Complainant appealed the ALJ's decision to the Administrative Review Board (ARB or Board), the Board vacated the ALJ's conclusion that Complainant had not engaged in protected activity and remanded for further consideration for the ALJ to assess whether Complainant had a reasonable belief that he was furthering the purpose of the Acts when he engaged in activities he alleges were protected.[2]

On remand, the ALJ reconsidered whether Complainant engaged in protected activity and found that "Complainant did not have a reasonable belief that he was raising environmental or public health and safety concerns governed by or in furtherance of either SDWA or FWPCA" when he engaged in his alleged protected activities. Decision and Order on Remand (D. & O.) at 26-27.[3] Further, the ALJ

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[1] 42 U.S.C. § 300j-9(i) (1994); 33 U.S.C. § 1367 (1972); 29 C.F.R. Part 24 (2018).

[2] *Wright v. R.R. Comm'n of Tex.*, ARB No. 16-068, ALJ No. 2015-SDW-001 (Jan. 12, 2018).

[3] While it is evident that the ALJ undertook the analysis the Board directed on remand, the ALJ did not specifically indicate in his D. & O. on remand whether Complainant lacked a subjective belief that he was raising environmental concerns in his complaints, his complaints were not objectively reasonable, or both. *See Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-006, slip op. at 10 (ARB Jan. 10, 2018) (noting a complainant must demonstrate that s/he had a reasonable belief that the conduct complained of violated the pertinent act or regulations, which requires both a subjective belief and an objective belief); *Tomlinson v. EG&G Defense Materials*, ARB Nos. 11-024, 11-027, ALJ No. 2009-CAA-008, slip op. at 13 (ARB Jan. 31, 2013). And notwithstanding the ALJ's assertion that the Board originally remanded this case for reconsideration under an "expansive definition of protected activity," *see* D. & O. at 3, the Board had merely set forth the definition of protected activity as it exists in law and regulation and directed the ALJ to reconsider that element on remand pursuant to that definition. Nevertheless, in light of our affirmance of the ALJ's finding that Complainant failed to establish causation, any shortcomings in the findings and conclusions made by the ALJ in this regard are harmless.

found that even if Complainant did engage in protected activity, he "failed to establish by a preponderance of the evidence that such activity was a motiving factor in his termination." *Id.* at 27. Finally, the ALJ found that Respondent proved by a preponderance of the evidence that it would have taken the same action against Complainant absent his alleged protected activity. *Id.* We affirm the ALJ's dismissal of Complainant's complaint because substantial evidence supports the ALJ's finding that Complainant failed to prove by a preponderance of the evidence that any protected activity was a motivating factor in Respondent's decision to take adverse action against him.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to review ALJ decisions in cases arising under the SDWA and FWPCA and issue final agency decisions in these matters.[4] The Board will affirm the ALJ's factual findings if supported by substantial evidence.[5] The Board reviews an ALJ's conclusions of law de novo.[6]

DISCUSSION

To prevail on a whistleblower complaint under the Acts, a complainant must establish by a preponderance of the evidence "that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint."[7] If a

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[4] Secretary's Order No. 1-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019).

[5] 29 C.F.R. § 24.110(b). And, as the United States Supreme Court has recently observed, "the threshold for such evidentiary sufficiency is not high," amounting to "more than a mere scintilla," and requiring only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, U.S. , 139 S. Ct. 1148, 1155 (2019).

[6] *Wolslagel v. City of Kingman, Ariz.*, ARB No. 11-079, ALJ No. 2009-SDW-007, slip op. at 2 (ARB Apr. 10, 2013) (citations omitted).

[7] 29 C.F.R. § 24.109(b)(2).

complainant makes this showing, "relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity."[8]

The findings of fact are set forth in the ALJ's D. & O. at pages 4 to 10. The ALJ's further findings and conclusions regarding motivating factor causation are set forth at D. & O. at 23-25.

The ALJ reviewed the evidence of record and noted that Complainant had a documented history of interpersonal conflicts with both staff and operators. D. & O. at 24. Specifically, he found that Complainant had demonstrated an "unwillingness to work with operators . . .", "behavioral problems," "inappropriate conduct," an "inability to work with [a] Respondent employee," "unprofessional conduct," "uncooperative conduct in dealing with operators and colleagues," and that he was "arrogant, insulting, and insolent" in working with other people. *Id.* Similarly, the ALJ found that Respondent fired Complainant because "he refused to follow instructions and created a state of confusion which was indicative of his refusal to work with operators and to make the application process more difficult than necessary." *Id.* at 25. Substantial evidence in the record supports these findings of fact and the ultimate finding as to Respondent's motivation; therefore, we affirm the ALJ's findings.

Wright objects to the ALJ's finding that Complainant was disciplined because he failed to make reasonable efforts "to call" a consultant to inform her about the correct number of centralizers needed for a project, asserting that he was never specifically told to telephone the consultant. We reject this assertion because substantial evidence supports the ALJ's finding that Respondent expected Complainant to let the operator/consultant know in some manner what was needed for approval and Respondent believed that he had failed to do so.[9] Specifically, Charles Teague emailed other members of Respondent's management team that Complainant "placed on the operator the unnecessary task of filling out another

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[8] *Id.*

[9] We note that it is the role of neither the ALJ nor the Board to act as a super-personnel "department that reexamines an entity's business decisions." *Jones v. U.S. Enrichment Corp.*, ARB Nos. 02-093, 03-010, ALJ No. 2001-ERA-021, slip op. at 17 (ARB Apr. 30, 2004) (citations omitted).

form and failed to detail what specific information is needed for approval." RX 25 at 1. Respondent expected Complainant to let the operator know what was required by sending either a fax or email, making a call, etc., in some manner so that she could get approval for her project.[10]

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's finding that Complainant failed to prove that protected activity caused or was a motivating factor in the adverse action alleged in the complaint, an essential element of his case. Therefore, this complaint is **DENIED**.

SO ORDERED.

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[10] Complainant also asserts the ALJ erred in rejecting certain exhibits Complainant proffered and in admitting certain others that Respondent proffered. In regard to the various exhibits at issue, we reject Complainant's allegations of error and conclude that the ALJ did not abuse his discretion with respect to any of his evidentiary determinations. *See Wright*, ARB No. 16-068, slip op. at 10 n.49 (stating that an "ALJ's evidentiary rulings are reviewed under an abuse of discretion standard") (citing *Shactman v. Helicopters, Inc.*, ARB No. 11-049, ALJ No. 2010-AIR-004, slip op. at 3 (ARB Jan. 25, 2013)).