U.S. Department of Labor

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

In the Matter of:

STEVEN ONYSKO,

COMPLAINANT,

v.

STATE OF UTAH, DEPARTMENT OF ENVIRONMENTAL QUALITY,

RESPONDENT.

ARB CASE NO. 2019-0042

ALJ CASE NOS. 2017-SDW-00002
2018-SDW-00003

DATE: February 4, 2021

Appearances:

For the Complainant:
Richard R. Renner, Esq.; *Kalijarvi, Chuzi, Newman & Fitch, P.C.*; Washington, District of Columbia

For the Respondent:
Sean D. Reyes, Esq.; *Utah Attorney General*; Alain C. Balmanno, Esq. and Stephen W. Geary, Esq.; *Assistants Utah Attorney General*; Salt Lake City, Utah

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

ORDER DENYING RECONSIDERATION

PER CURIAM. This case arises under the employee protection provision of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300(j)-9(i) (1994), and its implementing regulations, 29 C.F.R. Part 24 (2020). Complainant Steven Onysko filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that his employer, the State of Utah's Department of Environmental Quality, retaliated against him in violation of the SDWA. OSHA

investigated and dismissed the complaint on April 21, 2017. Complainant objected and requested a hearing with the Office of Administrative Law Judges.

On February 20, 2019, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) Granting Summary Decision because the undisputed facts showed that there was no genuine issue of material fact and that the complaint should be dismissed. We affirmed and adopted and attached the ALJ's order.

On December 30, 2020, Complainant filed a petition (Petition) seeking reconsideration of our decision. The Administrative Review Board (ARB or Board) may reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued. We will reconsider our decisions under limited circumstances, which include: (i) material differences in fact or law from those presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, or (iv) failure to consider material facts presented to the court before its decision.[1]

Complainant asserts that we should reconsider our decision for several reasons, including that the Board's Decision and Order: (1) erred in stating that the ALJ did not "strike" Complainant's Declaration, (2) erred in stating that Complainant submitted "nothing more than general allegations and nonspecific denials," (3) used the wrong standard for a hostile work environment claim, and (4) failed to address all of the material issues. These arguments were addressed by the Board in our Decision and Order[2] and do not fall within any of the four limited circumstances under which we will reconsider our decisions. Indeed, the Board fully considered and specifically addressed Complainant's first two arguments about Complainant's Declaration and his submission on summary decision generally.

As for the hostile work environment claim, we considered each of the eighty seven allegations of adverse action which include acts by several non-Respondent persons including Complainant.[3] Onysko argues in his Motion for Reconsideration

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[1] *Wolslagel v. City of Kingman, Ariz.*, ARB No. 2011-0079, ALJ No. 2009-SDW-00007, slip op. at 1 (ARB June 24, 2013) (Order Denying Motion for Reconsideration) (citation omitted).

[2] *Onysko v. State of Utah, Dep't of Environ. Quality*, ARB No. 2019-0042, ALJ Nos. 2017-SDW-00002, 2018-SDW-00003 (ARB Dec. 16, 2020).

[3] The eighty seven enumerated incidents include, among others, Respondent accusing Complainant of not being cooperative, Respondent officers calling others, non-Respondent persons emailing others or talking to others, Respondent officer drafting a warning letter about Complainant that was never sent to Complainant, supervisors accusing Complainant of various things, Respondent ordering Complainant to attend a meeting, Respondent not allowing Complainant to speak for it at a meeting, someone calling Complainant a

that the Board used the wrong standard for hostile work environment, citing *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). However, *Burlington Northern* makes clear that "a hostile work environment claim requir[es] a showing of severe or pervasive conduct." *Id.* at 743. It is that severe or pervasive conduct that is wholly lacking in Onysko's submissions. Putting eighty seven incidents together in a list does not create a hostile work environment claim out of disconnected acts by various persons, including Complainant. Considering these eighty seven allegations as a whole, there is simply no cognizable hostile work environment as a matter of law.

Finally, the Board considered all of the material issues and reviewed all of Complainant's citations in his brief to his and Respondent's submissions to the ALJ. While we did not address each argument in turn, we determined they missed the mark.[4] None of them affect the underlying conclusion that Onysko failed to set forth a genuine issue of material fact about whether Respondent would have taken every adverse action it took against Onysko absent any of his protected activities.

Accordingly, we **DENY** Onysko's Petition for Reconsideration. Onysko may appeal the Board's Decision and Order pursuant to 29 C.F.R. § 24.112(a).

SO ORDERED.

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troublemaker, being accused of poor customer service, persons accusing Complainant of harassing coworkers and engaging in unprofessional conduct, having grievances denied at various stages, and having complaints and counter complaints filed against him because of his behavior.

[4] One such argument was that the Board overlooked per se violations of the statute. Complainant's Motion for Reconsideration at 6 (citing Complainant's Initial Brief at 11-12). We reviewed the evidence at each of Complainant's citations to the alleged "per se violations" and could find no per se violations. Like with Complainant's hostile work environment assertion, characterization of the evidence in a certain way in a brief such that it is a mischaracterization does not support Complainant's appeal and does not merit reconsideration.