U.S. Department of Labor

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

In the Matter of:

HERBERT ROTHSCHILD,

COMPLAINANT,

v.

BNSF RAILWAY COMPANY,

RESPONDENT.

ARB CASE NO. 2019-0022

ALJ CASE NO. 2017-FRS-00003

DATE: November 30, 2020

Appearances:

For the Complainant:
Paula A. Rasmussen, Esq.; *Hildebrand, McLeod & Nelson LLP*; Oakland, California

For the Respondent:
Jacqueline M. Holmes, Esq. and Nikki L. McArthur, Esq.; *Jones Day*; Washington, District of Columbia

BEFORE: James D. McGinley, *Chief Administrative Appeals Judge*, James A. Haynes and Thomas H. Burrell, *Administrative Appeals Judges*

ORDER REVERSING AND REMANDING

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).[1] Herbert Rothschild (Complainant) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that BNSF Railway Company (Respondent) violated the FRSA by disciplining him in retaliation for activity protected by the

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[1] 49 U.S.C. § 20109 (2008), as implemented by federal regulations at 29 C.F.R. Part 1982 (2019) and 29 C.F.R. Part 18, Subpart A (2019).

FRSA. In June of 2015, Respondent issued disciplinary charges against Complainant for failure to contact an appropriate supervisor before seeking medical treatment as a result of a January 2, 2015 injury. OSHA determined that there was reasonable cause to find that Respondent violated the FRSA. Respondent objected to OSHA findings and requested a hearing. An Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) ruling in favor of the Complainant.

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB or Board) to review ALJ decisions in cases arising under the FRSA and to issue agency decisions in these matters.[2]

In this matter, the ALJ found on January 2, 2019, that Complainant proved by a preponderance of the evidence that his protected activity was a contributing factor to the termination. Specifically, the ALJ found that Complainant met his burden of demonstrating contributing factor causation because the adverse action and protected activity in the present matter were "inextricably intertwined" because there was no way to explain Respondent's disciplinary decision without referring to Complainant's injury report.[3]

The ALJ issued her decision before November 25, 2019, when the Board held in *Thorstenson* that ALJs should not apply the "inextricably intertwined" or "chain of events" analysis, noting that the plain language of the statute does not include

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[2] 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); see 29 C.F.R. § 1982.110(a). The Board has chosen this abbreviated form of remand because it serves the important purposes of allowing for a more prompt decision for the parties involved in this claim. We are also mindful that the ALJ can correctly apply the standards set out in *Thorstenson* and the law of the Ninth Circuit.

[3] D. & O. at 34.

the term "inextricably intertwined."[4] The Board rejected these theories of causation because they depart from the FRSA's text regarding contributing factor causation.[5] The Board made clear that applying either or both of the "inextricably intertwined" or "chain of events" theories to create a presumption of causation would be legal error.[6] Accordingly, the ALJ erred as a matter of law in finding that Complainant established that his protected activity was a contributing factor in his discipline. Therefore, the Board remands this case to the Office of Administrative Law Judges for further proceedings consistent with the ARB's decision in *Thorstenson*. We also direct the ALJ and parties to follow the Ninth Circuit's analysis as set forth in *Frost*

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[4] *Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052 (ARB Nov. 25, 2019). *See also Lemon v. Norfolk S. Ry. Co.*, 958 F.3d 417, 420-21 (6th Cir. 2020) (rejecting the chain-of-events theory of causation); *Dakota, Minn. & E. R.R. Corp. v. U.S. Dep't of Labor Admin. Review Bd.*, 948 F.3d 940, 947 (8th Cir. 2020) (rejecting the chain-of-events and inextricably intertwined theories of causation); *Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 878 (7th Cir. 2016) (condemning a causation finding based on the existence of an initiating event alone)

[5] *See also Sanders v. BNSF Ry. Co.*, 2019 WL 5448309, at *11 (D. Minn. Oct. 24, 2019) (noting that the contributing factor standard requires employees to show that their protected activity was a proximate cause to the adverse action); *Jackson v. BNSF Ry. Co.*, 2018 WL 4003377, at 4 (N.D. Ill. Aug. 22, 2018) (finding that "merely showing a causal link between the protected activity and the employer's action does not suffice" for a finding of contributing factor and rejecting a chain-of-events theory of causation); *Wooten v. BNSF Ry. Co.*, 2018 WL 4462506, at *4 (D. Mont. May 29, 2018) (noting that a finding of proximate cause is relevant to show retaliatory intent and to satisfy the contributing factor element); *Gibbs v. Norfolk S. Ry. Co.*, 2018 WL 1542141, at *8 (W.D. Ky. Mar. 29, 2018) (finding that an employee must show that his protected activity was the proximate cause of the adverse employment action if relying on a cat's paw theory of liability).

[6] *See also Colley v. Union Pac. R.R. Co.*, ARB No. 2018-0063, ALJ No. 2017-FRS-00071 (ARB Nov. 6, 2020) (holding that the ALJ erred in finding that protected activity was a contributing factor in the employee's termination based on an "inextricably intertwined" standard of causation); *Perez v. BNSF Ry. Co.*, ARB Nos. 2017-0014, -0040, ALJ No. 2014-FRS-00043 (ARB Sept. 24, 2020) (noting that an ALJ must explain how protected activity is a proximate cause of the adverse action and not merely an initiating event); *Wevers v. Mont. Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062 (ARB June 17, 2019) (affirming the ALJ's finding that the employee's protected activity was the proximate cause of the adverse action).

v. BNSF Ry. Co.[7]

We **REVERSE** and **REMAND** for proceedings consistent with this opinion.

SO ORDERED.

[7] *Frost v. BNSF Ry. Co.*, 914 F.3d, 1189, 1195 (9th Cir. 2019); *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010).