



In the Matter of:

LUIS PATINO,

ARB CASE NO. 06-125

COMPLAINANT,

ALJ CASE NO. 2005-AIR-023

v.

DATE: July 7, 2008

BIRKEN MANUFACTURING COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Lynn M. Mahoney, Esq., Law Offices of Leon M. Rosenblatt, West Hartford, Connecticut

For the Respondent:

Robert L. Hirtle, Esq., Rogin, Nassau, Caplan, Lassman & Hirtle, Hartford, Connecticut

DECISION AND ORDER OF REMAND

Luis Patino alleges that the Birken Manufacturing Company fired him in violation of the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121(a) (West 2006 Supp.). After a hearing, a United States Department of Labor Administrative Law Judge (ALJ) concluded that Birken had not violated AIR 21 and dismissed Patino's complaint. Because the ALJ committed legal error, we vacate and remand for further proceedings.

BACKGROUND

The ALJ provided detailed summaries of the hearing testimony of the two witnesses at the hearing. R. D. & O. at 2-11.¹ In view of our remand, we summarize the facts solely for background purposes.

Patino began working for Birken in June 1977, machining parts for airplanes. TR at 30-33. In working on a specific part, Patino would follow instructions, blueprints, and sketches that came with the part. TR at 37-40. Once Patino finished his operation on the part, he would sign or stamp his identification number on the paperwork. TR at 45-47. Patino explained that if an engine part was out of compliance with the documentation, he would inform the foreman who would consult with the engineering department. TR at 36, 41. In line with Birken's policy, Patino would fill out a Non-Conforming Material Report, delineating the problem and eventual resolution. TR at 43, 148.

In the spring of 1998, Birken's president, the father of the present president, Gary Greenberg, met with all employees following an audit by the Federal Aviation Administration (FAA). TR at 47-48. He informed them that the paperwork concerning some parts was found to be irregular and that everyone needed "to go by the book." Following this meeting, Patino started keeping notes on parts he found to be non-conforming, after he told his supervisor about his concern. TR at 48-50; CX 1. He kept the notes "to make myself sure of what I did on that particular part if I was asked by somebody in the shop and if inspection or somebody is to ask [sic] what happened with this part so I could explain because the memory you [sic] just cannot do that." TR130. Patino testified that he always followed his supervisors' orders concerning these defective parts, even if he did not believe the problem had been resolved properly. TR at 126.

On April 2, 1999, Patino informed Greenberg by letter that the main housing of a 43-part lot, with some internal components sealed inside, did not comply with the customer specifications and had not gone through final inspection. Patino added: "Some violation of FAA rules here? These violations are numerous now and have been in the past in Birken" CX 3. Subsequently, in May 2000, January 2001, November 2002, May 2003, and January 2004, Patino reported similar incidents to Birken supervisors and managers. TR at 77-86.

¹ The following abbreviations shall be used: Recommended Decision and Order, R. D. & O; Complainant's Exhibit, CX; Respondent's Exhibit, RX; Hearing Transcript, TR.

On April 28, 2004, Patino wrote to the FAA and requested a meeting. TR at 103-04. His letter stated that he had a list of non-conforming operations and concluded that “some help from the outside” was needed to straighten things out “before” something regrettable happened due to “some slack work” at Birken. CX 6. At a May 4, 2004 meeting with two FAA inspectors, Patino brought the 68 pages of notes he had kept over the past six years and told the inspectors about the incidents of non-conforming and possibly defective parts he had machined. TR at 105-06. The FAA investigated Patino’s safety concerns, but informed him in a letter dated June 5, 2005, that it had found no “violation of an order, regulation, or standard relating to air carrier safety.” RX 1.

In August 2004, Pratt & Whitney, Birken’s main customer, conducted an annual audit of the company, during which Patino turned over to a Pratt & Whitney auditor some of his notes about the allegedly defective parts on which he had worked. TR at 107-11. The auditor told Birken management that the audit had revealed “claims of defective parts leaving the facility.” TR at 196. Subsequently, Greenberg met with Patino, who admitted that he had spoken with the auditor. TR at 112.

Greenberg testified that Birken investigated the parts mentioned in Patino’s notes and found that all the items alleged to be defective or non-conforming were approved later in the quality control process. TR at 198-99. Greenberg stated that after reviewing the remainder of Patino’s notes, the things Patino “thought were wrong weren’t.” TR at 201. Greenberg added that the shut-down caused by the FAA investigation lasted about four weeks and cost Birken between \$300,000.00 and \$400,000.00. TR at 198, 224.

In a September 24, 2004 letter to Patino, Greenberg expressed concern that Patino had not informed him about parts being processed incorrectly. CX 7. Greenberg added that by presenting his concerns to Pratt & Whitney, Patino “caused significant harm to Birken and its employees, all of which was totally unnecessary.” Greenberg stated that Birken was “forced to shut down shipments for several days, work overtime to re-inspect parts, and miss several critical deliveries” to customers.

On November 8, 2004, Patino was working on a castings job, but informed the foreman that no inspection had been done and no serial numbers assigned. TR at 118-19. Later that day, Greenberg met with Patino and fired him because of the “substantial damage” he had caused the company in terms of reputation, loss of business, and the costs of auditing his “unfounded claims.” TR at 117; CX 8.

The termination letter informed Patino that his conduct during the past six years had been detrimental to the company and “potentially could have put the flying public . . . in jeopardy.” The letter added that, since “defective or substandard aircraft parts can obviously create serious safety hazards,” Patino’s failure to communicate his concerns timely was “incomprehensible and totally inexcusable.” The letter concluded:

Your reckless charges of wrongdoing by Birken demonstrate that you apparently do not have an understanding of the Birken quality procedures and the

scrutiny that each part is put through after it leaves your area. Moreover, while we encourage employees to raise issues of concern relative to their work, your conduct of saving your concerns in a notebook and not advising your supervisors for several years, when flight-critical hardware was involved, cannot be tolerated.

Based upon the above conduct and the substantial damage you have caused this Company in terms of reputation, loss of business, and the costs of auditing your unfounded claims, we feel it is appropriate to terminate our employment relationship.

CX 8.

Greenberg testified that he decided to fire Patino after Pratt & Whitney was satisfied that none of Patino's notes about non-conforming parts over the past six years contained any real defects or problems that "were not explainable" by Birken's quality control department. TR at 223. Greenberg added that if Patino had made a correct statement of improper conduct by his supervisors or managers, "he would not have been let go. He was let go because he kept these documents to himself, and refused to let management know his concerns." *Id.*

Patino filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on February 3, 2005. OSHA found no merit to his complaint. Patino requested a hearing, which was held on November 3-4, 2005. After the hearing, the ALJ dismissed Patino's complaint because he had failed to establish that Birken fired him for reporting allegedly non-conforming airplane parts to his employer, Pratt & Whitney, or the FAA. Patino appealed to the Administrative Review Board (ARB), and both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has jurisdiction to review the ALJ's recommended decision. 49 U.S.C.A. § 42121(b)(3) and 29 C.F.R. § 1979.110. The Secretary has delegated to the Administrative Review Board (ARB) her authority to review cases under, inter alia, AIR 21. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

The ARB reviews the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 1979.110(b). This means that if substantial evidence on the record considered as a whole supports the ALJ's findings of fact, they shall be conclusive. We review conclusions of law de novo. *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4-5 (ARB Dec. 30, 2004).

DISCUSSION

AIR 21's whistleblower provision prohibits air carriers, their contractors and subcontractors from retaliating against employees for raising complaints related to air carrier safety. 49 U.S.C.A. § 42121.² To prevail in an AIR 21 case, a complainant must prove by a preponderance of the evidence that he engaged in activity the statute protects, that the employer knew about such activity, that the employer subjected him to an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C.A. §§ 42121(a), 42121(b)(2)(B)(iii). If the employer has violated AIR 21, the complainant is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. § 42121(b)(2)(B)(iv). *See, e.g., Peck v. Safe Air Int'l, Inc.*, ARB 02-028, ALJ No. 2001-AIR-003, slip op. at 22 (ARB Jan. 30, 2004).

Patino's burden of proof

Initially, the ALJ correctly stated that Patino had the burden of proving that he engaged in protected activity as defined by AIR 21, that his employer was aware of his protected activity, that he suffered an adverse employment action, and that his protected activity was a contributing factor in the adverse action. R. D. & O. at 2, 11.

The ALJ found that Patino's April 28, 2004 letter to the FAA and his May 4, 2004 meeting with the FAA inspectors were protected activities, but determined that Patino presented no evidence that Birken knew of this activity prior to firing him. R. D. & O. at 12. Next, the ALJ found that Patino engaged in protected activity when he delivered his

² AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. The statute prohibits air carriers, contractors, and their subcontractors from discharging or "otherwise discriminat[ing] against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)" engaged in the air carrier safety-related activities the statute covers. 49 U.S.C.A. § 42121(a). Protected activities under AIR 21 include: providing to the employer or (with knowledge of the employer) the Federal Government "information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety . . ." 49 U.S.C.A. § 42121(a)(1). *See also* 29 C.F.R. § 1979.102. While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event. A complainant reasonably must believe in the existence of a violation. *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998); *Peck*, slip op. at 13.

notes concerning allegedly non-conforming parts to Pratt & Whitney and later to Birken and that Birken knew of these activities because Greenberg acknowledged that fact. R. D. & O. at 13.

The ALJ found that the temporal proximity between Patino's protected activity and his termination gave rise to an inference of illegal motivation. R. D. & O. at 14. In addition, she relied on the termination letter itself, which plainly states that Patino was fired because of the "negative consequences" and "substantial damage" Birken experienced as a result of Patino providing his notes about non-conforming parts to Pratt & Whitney. R. D. & O. at 15. The ALJ concluded:

The timing of the termination coming just a few months after the protected activity, the reasons articulated in the termination letter for the Complainant's dismissal, and [Greenberg's] statement that the Complainant would not have been fired had his complaints been substantiated, are sufficient to establish that the Complainant's protected activity in turning the diary of allegedly defective parts over to Pratt and Whitney played a role in his termination.

Id. Thus, the ALJ determined that Patino met his burden of proving by a preponderance of the evidence that his protected activities were a contributing factor in his firing. Therefore, Birken violated AIR 21's whistleblower protection provision.

The Board agrees with the ALJ that Patino proved by a preponderance of the evidence that he engaged in protected activity and that he suffered an adverse action that was, at least in part, because of his protected activity.

Birken's burden of proof

The ALJ also correctly stated that if a complainant succeeds in proving that his employer has violated AIR 21, the complainant is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action absent the complainant's protected activity. R. D. & O. at 11. The ALJ failed, however, to impose this burden of proof on Birken. Instead, she stated that Birken could rebut Patino's showing that protected activity was a contributing factor in his firing by producing evidence of a legitimate, non-discriminatory reason for the firing. R. D. & O. at 15.

This is error. Mere production of a legitimate, non-discriminatory reason for the adverse action is not sufficient to rebut a showing that Patino's protected activities contributed to his firing. Rather, Birken must demonstrate, *i.e.*, prove, by clear and convincing evidence that it would have fired Patino in the absence of his protected activity. *See Peck*, slip op. at 13 (explaining the "scope of coverage, procedures, and burdens of proof under AIR 21"). Because the ALJ did not analyze the record evidence to determine whether Birken met its burden of proof, we must remand this case. *Clemmons*

v. Ameristar Airways, Inc. ARB Nos. 05-048, -096, ALJ No. 2004-AIR-011, slip op. at 10 (ARB June 29, 2007). *Cf. Bechtel v. Competitive Techs., Inc.*, ARB No. 06-010, ALJ No. 2005-SOX-033, slip op. at 7 (ARB Mar. 26, 2008). On remand, the ALJ must apply this evidentiary standard in determining whether Birken has met its burden of proof.

Arguments on appeal

Birken argues on appeal that the ALJ applied the correct “clear and convincing” standard in finding that Birken did have a legitimate, non-discriminatory reason for firing Patino. Respondent’s Brief at 22-25; R. D. & O. at 16. But this conclusion by the ALJ does not demonstrate under the clear and convincing burden of proof that Birken would have terminated Patino’s employment absent his protected activity. Therefore, we reject this argument.

Patino argues on appeal that had the ALJ applied the correct standard of clear and convincing evidence, Birken could not have met its burden of proof because the ALJ concluded that, “[i]n my view,” it is a close question whether Birken’s reason for firing Patino was “a mere pretext for a discriminatory motive.” R. D. & O. at 17; Complainant’s Brief at 4. That conclusion, Patino contends, shows that the record contains insufficient evidence to meet the clear and convincing standard, and, therefore, Patino should have prevailed. *Id.*

Because the ARB reviews recommended decisions under a substantial evidence standard and does not act as fact-finder, our preferred method is to remand for application of the correct legal standard to the facts as found. *See Clemmons; Bechtel.*

CONCLUSION

The ALJ ruled that Patino established by a preponderance of the evidence that his protected activity was a contributing factor in his firing. Thus, Birken violated AIR 21. Birken can avoid liability only if it can prove by clear and convincing evidence that it would have fired Patino absent his protected activity. Therefore, we **VACATE** the ALJ’s recommended decision and **REMAND** this matter for the ALJ to determine whether Birken has met its burden of proof.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge