U.S. Department of Labor

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

In the Matter of:

THOMAS E. CLEMMONS,	**ARB CASE NO. 08-067**
COMPLAINANT,	**ALJ CASE NO. 2004-AIR-011**
v.	**DATE: April 27, 2012**

AMERISTAR AIRWAYS, INC.,

and

AMERISTAR JET CHARTER, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Steven K. Hoffman, Esq., and Emilie S. Kraft, Esq., *James & Hoffman, P.C.*, Washington, District of Columbia

For the Respondent:
Chris E. Howe, Esq., *Kelly, Hart & Hallman, LLP,* Fort Worth, Texas

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Luis A. Corchado, *Administrative Appeals Judge*

ORDER OF REMAND

Thomas E. Clemmons alleged that Ameristar Airways, Inc. and Ameristar Jet Charter, Inc. violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act)[1] when Ameristar terminated his employment after he complained about air safety issues. Following a hearing, a United States Department of Labor (DOL) Administrative Law Judge (ALJ) concluded that Ameristar violated AIR 21.[2] Ameristar appealed to the Administrative Review Board (ARB). The ARB vacated the ALJ's recommended decision because of legal errors and remanded the case for further consideration.[3]

On remand, the ALJ addressed each of the four legal errors that the ARB had identified and again concluded that Ameristar had violated AIR 21.[4] Ameristar appealed to the ARB, which affirmed his decision on the merits and his remedies, including a back pay award of $37,995.09 plus interest.[5] Ameristar then appealed to the United States Court of Appeals for the Fifth Circuit. The court affirmed the ARB's decision on the merits and its award of back pay, but remanded the case for the ALJ to determine the proper amount of the award.[6]

The court instructed the ALJ to address the question of whether the period of the back pay award, which ran from January 20, 2003, the date of Clemmons's discharge, through July 2004, the date of the hearing, should have ended as of March 28, 2003.[7] The court cited *McKennon* for the proposition that "where there is after-acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the

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[1] 49 U.S.C.A. § 42121 (Thomson/West 2007). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2009).

[2] *Clemmons v. Ameristar Airways, Inc,* ALJ No. 2004-AIR-011 (ALJ Jan. 14, 2005).

[3] *Clemmons v. Ameristar Airways, Inc.* ARB Nos. 05-048, -096; ALJ No. 2004-AIR-011 (ARB June 29, 2007).

[4] *Clemmons v. Ameristar Airways, Inc,* ALJ No. 2004-AIR-011 (ALJ Feb. 20, 2008).

[5] *Clemmons v. Ameristar Airways, Inc.,* ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB May 26, 2010).

[6] *Ameristar Airways v. A.R.B.*, 650 F.3d 562, 570 (5th Cir. 2011).

[7] The ALJ initially erred in awarding back pay only until the date of the hearing because back pay generally runs from the date of the unlawful discharge to the date the employer makes a bona fide offer of reinstatement. However, Clemmons did not want reinstatement and did not argue the amount of the award on appeal. The ARB affirmed the final award of $37,995.09 plus interest as uncontested. *Clemmons*, ARB No. 08-067, slip op. at 14.

employer known about it," back pay should be limited to the period "from the date of the unlawful discharge to the date the new information was discovered."[8]

In this case, Clemmons sent an admittedly insubordinate and offensive e-mail dated January 13, 2003, to other Ameristar pilots prior to his discharge,[9] but the ALJ found, and the record supports, that his managers, Frazier and Wachendorfer, did not see the e-mail until March 28, 2003, two months after they fired him. In his initial decision, the ALJ noted Frazer's testimony that he saw a copy of the e-mail prior to firing Clemmons, but found that Frazer and Wachendorfer were not credible witnesses.[10] On remand, the ALJ again rejected Ameristar's contentions that the January 13, 2003 e-mail was grounds for firing Clemmons because he found that both managers were "were unaware of this e-mail until March 28, 2003."[11] The ARB affirmed the ALJ's finding as supported by substantial evidence.[12] Because Clemmons's managers did not know of the January 13, 2003 e-mail until March 28, 2003, the e-mail is after-acquired evidence as defined in *McKennon*.[13]

The court acknowledged that the ALJ considered the issue of the after-acquired evidence's impact on his back-pay award, but held that the ALJ failed to address the proper question.[14] To determine whether the after-acquired e-mail evidence would have led to Clemmons's discharge on legitimate grounds, thereby ending the back pay period

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8 *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995); *Ameristar*, 650 F.3d at 570.

9 At the hearing, Clemmons admitted that this e-mail was "vulgar, rude, and improper for a manager to do." He added that he was "at the end of his rope" because of all the problems with maintenance, duty times, the call sign, and the pilots' schedule, but that he did not think of the consequences when he sent the e-mail. Hearing transcript at 512-15, 657-59.

10 (ALJ Jan. 14, 2005) at 56, 68-69.

11 (ALJ Feb. 20, 2008) at 17-21, 23, 25, 50.

12 *Clemmons*, ARB No. 08-067, slip op. at 7-8.

13 *See EEOC v. Dial Corp.*, 469 F.3d 735 (8th Cir. 2006); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545 (10th Cir. 1999); *Webb v. District of Columbia*, 146 F.3d 964 (D.C. Cir. 1998); *Wallace v. Dunn Const. Co., Inc.*, 62 F.3d 374 (11th Cir. 1995).

14 The ALJ focused on language in *McKennon* that courts take into consideration "extraordinary equitable circumstances" affecting "the legitimate interests of either party" in determining whether or not the after-acquired evidence warranted termination of the back pay award as of the date the new information was discovered. (ALJ Feb. 20, 2008) at 7, citing *McKennon*, 513 U.S. at 362. Finding that the disparate treatment to which Clemmons was subjected provoked him into sending the e-mail, the ALJ concluded that "extraordinary equitable circumstances" warranted continuation of Clemmons's back pay award beyond March 28. Ameristar raised this issue on appeal, but the ARB failed to address it.

on March 28, 2003, the proper question is whether the evidence "was of such severity that [Clemmons] would have been terminated on those grounds alone."[15] This, the court noted, is a question of fact in this case. Thus, the court remanded the case for the ALJ to make the necessary factual determination.

At the outset, we must determine whether the Supreme Court's decision in *McKennon* applies to actions brought pursuant to the whistleblower provisions of AIR 21. The Supreme Court noted in *McKennon* that the Age Discrimination in Employment Act of 1967,[16] Title VII of the Civil Rights Act of 1964,[17] and the Equal Pay Act of 1963[18] all are "part of a wider statutory scheme to protect employees in the workplace nationwide." All three statutes share "a common purpose: 'the elimination of discrimination in the work place.'" Additionally, the Court noted that the ADEA and Title VII share common substantive features, and the ADEA and the Equal Pay Act share common remedial provisions.[19]

Similarly, the purpose of AIR 21 is to eliminate employer discrimination and retaliation against employees who report violations of air safety regulations. And AIR 21 provides similar remedies – reinstatement, back and front pay, and abatement. Based upon the similarities between AIR 21 and the other employee protection statutes, we will apply the holding of *McKennon* to claims brought under AIR 21.[20]

However, a question remains as to the proper burden of proof on this issue for after-acquired evidence, whether it is "preponderance of the evidence" or "clear and convincing." In other words, must Ameristar prove by a preponderance of the evidence or clear and convincing evidence that it would have fired Clemmons on this alleged misconduct alone? In enacting AIR 21, Congress clearly imposed a heavy burden on an

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[15] 650 F.3d at 570.

[16] 29 U.S.C.A. § 626(a)(1)(Thompson/Westlaw 2011).

[17] 42 U.S.C.A. § 2000e et seq. (West 2003).

[18] 29 U.S.C.A. § 206(d) (West 1998).

[19] 513 U.S. at 357, quoting *Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 756 (1979); *see also Miranda v. B & B Cash Grocery Store, Inc.,* 975 F.2d 1518, 1527 (11th Cir.1992) ("Title VII and the Equal Pay Act exist side by side in an effort to rid the workforce of gender-based discrimination.").

[20] *See O'Driscoll v. Hercules Inc.,* 52 F.3d 294 (10th Cir.1995) (remanding ADEA, Title VII, and Fair Labor Standards Act claims to district court for reconsideration in light of *McKennon*); *Wehr v. Ryan's Family Steak Houses, Inc.,* 49 F.3d 1150, 1153 (6th Cir.1995) ("While *McKennon* involved an ADEA claim, we are persuaded by its language that it applies equally to a Title VII claim."); *Manard v. Fort Howard Corp.,* 47 F.3d 1067, 1067 (10th Cir.1995)(applying *McKennon,* without discussion, to a Title VII case).

employer in the liability phase of a mixed motive case by requiring the employer to prove by clear and convincing evidence that it would have discharged the employee in the absence of the protected activity.[21] It seems strange that the burden of proof would change in this case where the after-acquired evidence involved an incident occurring before the termination but merely discovered afterwards; that would result in a windfall to the employer solely because it learned of such information later. The parties have not briefed this issue and it seems proper to allow the parties to brief this issue before the ALJ and allow the ALJ to consider the proper standard.

Accordingly, we **REMAND** this case to the ALJ for further consideration. On remand, the ALJ must determine whether the January 13, 2003 e-mail memo that Clemmons sent to Ameristar's pilots was of such severity that Ameristar would have fired him on those grounds alone. In other words, was Clemmons's transmittal of the e-mail misconduct "so grave that immediate discharge would have followed its disclosure in any event?"[22] In making this determination, the ALJ should consider any "extraordinary equitable circumstances" affecting "the legitimate interests of either party."[23] If the ALJ concludes that Ameristar would have fired Clemmons upon learning of the e-mail's contents, the ALJ shall recalculate Clemmons's back pay for the period January 20 until March 28, 2003.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

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[21] *Riess v. Nucor Corp.-Vulcraft-Texas, Inc*. ARB No. 08-137, ALJ No. 2008-STA-011, slip op. at 4 (ARB Nov. 30, 2010).

[22] *Wallace*, 62 F.3d at 379-80, citing *McKennon*, 513 U.S. at 356.

[23] *Id*. at 380, citing *McKennon*, 513 U.S. at 362.