



In the Matter of:

EDWARD MIZUSAWA,
COMPLAINANT,

ARB CASE NO. 11-009

ALJ CASE NO. 2010-AIR-011

v.

DATE: June 15, 2012

UNITED PARCEL SERVICE,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Daniel M. Faber, Esq., Albuquerque, New Mexico

For the Respondent:

David T. Barton, Esq., Rachel L. Robertson, Esq., Quarles & Brady LLP, Phoenix, Arizona

Before: E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Luis A. Corchado, Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals Judge

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ Edward Mizusawa filed a

¹ 49 U.S.C.A. § 42121 (Thomson/West 2011). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2011).

complaint alleging that his former employer, United Parcel Service (UPS), violated AIR 21 by discharging him from employment. After a hearing, a Department of Labor Administrative Law Judge (ALJ) dismissed his complaint. We affirm.

BACKGROUND

UPS employed Edward Mizusawa as Gateway Manager for its air operations in Albuquerque, New Mexico and Tuscon, Arizona. He was responsible for ensuring that those gateways complied with UPS policies and procedures as well as Federal Aviation Administration regulations. His supervisor was John Farley, UPS Hub & Feeder Division Manager. Transcript (Tr.) at 33, 73, 165. During his employment at UPS, Mizusawa expressed concerns that UPS's top deck designees, employees involved in loading aircraft, were committing safety errors. He also complained about weight/balance errors and mistakes made in identifying hazardous materials. *Id.* at 42-54. According to Mizusawa, Farley did not take appropriate steps to address these safety concerns. *Id.* at 42-43.

In October 2008, Zak Abad, one of the employees Mizusawa supervised, asked Mizusawa for permission to record a video at the Albuquerque gateway. Mizusawa gave Abad permission to record the video without consulting any other UPS supervisors or managers. *Id.* at 144. Abad recorded the video on November 22, and 23, 2008. The video shoot involved the use of UPS equipment, including one scene in which an actor was placed into a UPS container and loaded on to a plane, and another scene in which an actor escaped from a plane and ran down a belt loader. *Id.* at 314-15.

UPS conducted an investigation into the making of the Abad video after learning about a different video that had been posted on the internet. UPS Desert Mountain District Security Manager Chuck Martinez discovered that Mizusawa had authorized the Abad video. *Id.* at 312-13, 317. Following the investigation, Craig Wiltz, UPS Desert Mountain District Manager, made the decision to discharge Mizusawa. UPS terminated Mizusawa's employment on February 17, 2009. According to Martinez, he told Mizusawa that UPS discharged him "for violating UPS policies, for granting unauthorized access to a gateway, and the unauthorized use of UPS equipment." *Id.* at 322.

Mizusawa filed a complaint with the Occupational Safety and Health Commission (OSHA) on April 23, 2009. In his complaint he alleged that UPS violated AIR 21 by discharging him in retaliation for reporting air carrier safety violations. OSHA denied Mizusawa's retaliation claim, and Mizusawa requested a hearing before an ALJ.

The ALJ conducted a hearing on April 21-22 2010. On October 21, 2010, he issued a Decision and Order (D. & O.) dismissing Mizusawa's claim. The ALJ held that, although Mizusawa engaged in activities protected by AIR 21 prior to his discharge, those protected activities were not contributing factors in UPS's decision to terminate his employment. Mizusawa appealed the ALJ's ruling to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the ARB.² In AIR 21 cases, the ARB reviews the ALJ's findings of fact under the substantial evidence standard.³ Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁴ Thus, if substantial evidence supports the ALJ's findings of fact, they are conclusive.⁵ The ARB reviews the ALJ's legal conclusions de novo.⁶ The ARB generally defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable."⁷

DISCUSSION

AIR 21 prohibits air carriers, contractors, and their subcontractors from discharging or otherwise discriminating against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee:

provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the

² See Secretary's Order 1-2010, 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1979.110.

³ 29 C.F.R. § 1979.110(b).

⁴ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

⁵ *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005).

⁶ *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

⁷ *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008).

employer or 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 under this subtitle [subtitle VII of title 49 of the United States Code] or any other law of the United States^[8]

To prevail under AIR 21, Mizusawa must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the adverse personnel action.⁹ If Mizusawa proves that his protected activity was a contributing factor in UPS's discharge decision, he is entitled to relief unless UPS demonstrates by clear and convincing evidence that it would have taken the same unfavorable action absent his protected activity.¹⁰

The record indicates that Mizusawa engaged in activities protected by AIR 21 prior to his discharge. But the ALJ concluded that Mizusawa's protected activities were not a contributing factor in his discharge. D. & O. at 18.¹¹ The ALJ indicates that he reached this conclusion "[a]fter taking into consideration UPS's policies, [Mizusawa's] work performance as gateway manager, and the timing of the adverse employment action." *Id.* The record supports the ALJ.

The ALJ found credible the testimony of Martinez and Harvey Hill, a UPS Human Resources Manager, who testified that Mizusawa should have been aware of UPS's video policy. *Id.* at 14. Mizusawa argues that there was no policy in effect during his employment that

⁸ 49 U.S.C.A. § 42121(a). An employer also violates AIR 21 if it intimidates, threatens, restrains, coerces, or blacklists an employee because of protected activity. 29 C.F.R. § 1979.102(b).

⁹ See 49 U.S.C.A. §§ 42121(a), (b)(2)(B)(i); *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 11 (ARB Nov. 30, 2006).

¹⁰ See 49 U.S.C.A. §§ 42121(b)(2)(B)(ii), (3)(B).

¹¹ In identifying the legal issues and citing the legal standard, the ALJ expressly and repeatedly stated that the complainant was required to show only that the protected activity was a "contributing factor" or a "cause" in his termination. See D. & O., at 2, 8, 12, 13, 14, 15, 18. Occasionally, the ALJ also used variations of the term "motive" to refer to the causation element. See, e.g., D. & O. at 1, 8, 12, 16 ("parties disputed what motivated the Respondent," "dual motive," "overall motivation," "discriminatory motive"). Other times the ALJ used the term "because," the exact word used in the statute. In some cases, such terms as "motive" and "motivation" may suggest a reference to a different legal causation standard. Nevertheless, we find that the D. & O., read in its entirety, indicates that the ALJ conducted his analysis in accordance with the correct standard of proof governing AIR 21 claims.

prohibited him from approving the Abad video. Complainant's Petition for Review at 2-3. But there is substantial evidence supporting the ALJ's finding and contradicting Mizusawa's assertion. One UPS policy applicable to Mizusawa states that "[t]he use of all recording devices in any UPS facility for anything other than authorized business purposes is prohibited. Employees may possess cell phones with cameras, or other devices capable of recording pictures, video, or audio, while on UPS facilities provided that the recording capabilities are not used." Complainant's Exhibit (CX) X. Another policy prohibits the use of "company . . . assets for personal benefit." CX Y.

The record supports the ALJ's findings that, in the process of recording the video, Abad violated UPS policies, and Mizusawa was held responsible for those violations. In sum, substantial evidence supports the ALJ's findings of fact, and we agree with the ALJ's conclusion that Mizusawa failed to prove that his protected activity was a contributing factor in UPS's decision to terminate his employment. Accordingly, the ALJ's D. & O. is **AFFIRMED**.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge