U.S. Department of Labor

Administrative Review Board
200 Constitution Ave., N.W.
Washington, DC 20210

In the Matter of:

JEFFREY BONDURANT **ARB CASE NO. 14-049**

COMPLAINANT, **ALJ CASE NO. 2013-AIR-007**

v. **DATE: February 29, 2016**

SOUTHWEST AIRLINES, INCORPORATED,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Jane S. Leger, Esq.; *Provost & Umphrey Law Firm, L.L.P.*; Beaumont, Texas

For the Respondent:
Cathy L. Altman, Esq.; *Carrington, Coleman, Sloman & Blumenthal, L.L.P.;* Dallas, Texas and Douglas W. Hall, Esq.; *Ford & Harrison, LLP*; Washington, District of Columbia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge;* E. Cooper Brown, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

Complainant Jeffrey Bondurant filed a complaint under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century[1] with the Department of Labor's Occupational Safety and Health Administration (OSHA). In the complaint he alleged that Respondent Southwest Airlines (Southwest) terminated his employment in response to complaints he made regarding violations of regulations and standards of the Federal Aviation Administration (FAA). A Department of Labor Administrative Law Judge (ALJ) determined that Bondurant failed to establish that he had engaged in protected activity under the Act, and thus granted Respondent's motion for summary decision. Bondurant petitions for review, challenging the ALJ's dismissal of the claim. Because we conclude that there exists a genuine issue of material fact precluding summary decision, the Board vacates the ALJ's Decision and Order on Respondent's Motion for Summary Decision (D. & O.) and remands the case for further proceedings.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to decide this matter to the Administrative Review Board.[2] The ARB reviews de novo an ALJ's grant of a motion for summary decision. The Board is guided in its consideration by 29 C.F.R. § 18.72 (2015), governing an ALJ's grant of summary decision. Pursuant to 29 C.F.R. § 18.72, the moving party is entitled to summary decision if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."

BACKGROUND

These background facts are taken from the ALJ's D. & O. and from Complainant's Opposition to Respondent's Motion for Summary Decision. We view the facts in the light most favorable to Bondurant, the party responding to a motion for summary decision. Southwest employed Bondurant for 23 years; the last six as a Cargo Customer Service Manager. The ALJ discussed the facts surrounding three instances during Bondurant's tenure when it was alleged that the airline transported hazardous material. The first incident occurred in August 2010 when a cylinder containing pressurized flammable gas was inadvertently and incorrectly accepted and transported from LAX. The second incident involved the shipment of human urine that was

[1] 49 U.S.C.A. § 42121 (Thomson/West 2007)(AIR 21). AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2015).

[2] Secretary's Order 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1979.110.

improperly packaged and consequently leaked.[3] Lastly, in February 2012, lithium batteries were improperly labeled and should not have been accepted or transported. When Bondurant found the batteries after they had arrived in his cargo area, he reported the incident to management.

Meanwhile, Bondurant was issued a disciplinary letter for behavior at a company/customer golf outing in 2010. After the same outing the following year, Bondurant was given a "Last Chance Agreement" (LCA) due to his behavior, and Bondurant agreed to seek alcohol counseling.[4] Complainant's Opposition to Respondent's Motion for Summary Decision at 6. In late February or early March 2012, Elden Allen began an investigation into Bondurant's work habits. Following the investigation, Southwest terminated Bondurant's employment for violating his LCA.

DISCUSSION

To prevail on his whistleblower complaint Bondurant must prove by a preponderance of the evidence that (1) he engaged in activity protected by AIR 21, (2) that an unfavorable personnel action was taken against him, and (3) that the protected activity was a contributing factor in the unfavorable personnel action taken against him.[5] The ALJ concluded that Bondurant did not engage in protected activity. Specifically, he found that Bondurant may have had a reasonable concern that Respondent was failing to comply with a requirement to report shipping incidents. However, he must have communicated that concern and there is nothing in the record to permit that finding as he did not raise concerns about reporting until he was being discharged.

Under AIR 21,[6] a complainant engaged in protected activity when he or she:

> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard

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[3] Bondurant conceded that he may have confused two different instances of boxes leaking urine in February 2012 and December 2011. There is no evidence that he reported such an incident in February 2012 and the December 2011 incident was reported internally by employees at his direction, but then was reported to the FAA by Southwest.

[4] Bondurant did not file any claim challenging the issuance of a previous warning or Last Chance Agreement issued in 2010 and 2011 respectively.

[5] 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

[6] 49 U.S.C.A. § 42121(a).

> of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
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> (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding 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 or any other law of the United States;
>
> (3) testified or is about to testify in such a proceeding; or
>
> (4) assisted or participated or is about to assist or participate in such a proceeding.

As the ALJ correctly found, an employee engages in protected activity any time he provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee's belief of a violation is subjectively and objectively reasonable.[7]

The ALJ reviewed Bondurant's allegations that he raised concerns regarding management's failures to report to the FAA that it had transported air cargo that did not comply with federal safety standards on three occasions. He found that in the first incident relating to the transport of a gas cylinder in August 2011, Bondurant reported the event to management, but was told that no report was made to the FAA. The ALJ found that Bondurant proceeded no further and did not express concern that management did not report the incident to the FAA. The ALJ also found there is no record that Bondurant reported a problem with a shipment of human urine improperly packaged and leaking in February 2012.[8] Lastly, the ALJ discussed the third incident, which occurred on February 22, 2012, relating to an unsafe box of lithium batteries that was discovered and reported to management. The ALJ acknowledged that management failed to report it to the FAA, but found that Bondurant did not know whether it was ever reported, and thus did not complain that it had not been.

We hold that the ALJ unduly limited his consideration of protected activity to whether Bondurant communicated to Respondent his reasonable belief that Respondent was failing to

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[7] 49 U.S.C.A. § 42121(a)(1).

[8] As noted previously, at Bondurant's direction, subordinates internally reported an earlier incident of leaking urine, and management subsequently reported this incident to the FAA. Bondurant testified that he may have mixed the two events up. There is no evidence that Bondurant made a complaint about a failure to submit a report to the FAA in either incident.

report a FAA violation. The ALJ stated: "However, it is not enough that a complainant honestly and reasonably believed there was or would be a violation. He must also have communicated that concern and the essence of Respondent's Motion is that there is nothing in the record to allow a finding of fact to decide that he did so." This was error for two reasons. First, we have repeatedly held that a complainant need not actually *convey* reasonable belief to his or her employer'; "[t]he reasonable belief standard requires an examination of the reasonableness of a complainant's beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities."[9] Second, Bondurant presented evidence that on February 22, 2012, he reported to upper management that Respondent had transported lithium batteries in an unsafe manner. This is sufficient to raise a genuine issue of material fact with respect to protected activity. Protection under the statute may be afforded to reports of information relating to air carrier safety—a complainant need not also report the air carrier's failure to report such information to the FAA. In the complaint dated May 14, 2012, Bondurant stated that he feared "that public safety will be endangered if Southwest Airlines continues to ignore its safety obligations imposed by the FAA as this hazardous cargo is at times improperly packaged and is being transported on passenger aircraft." Complaint May 18, 2012. In addition, in his opposition to summary decision, Bondurant raises the temporal proximity between his termination and reporting the shipment of the lithium batteries. *See* Complainant's Opposition at 16. Thus, it appears that Bondurant's actions of reporting the transportation of dangerous cargo may also be considered protected activity.

Moreover, Bondurant also alleged that he raised the failure to report the hazardous cargo incidents to the FAA at his performance meeting on March 29, 2012, which is unequivocally before the decision to terminate was made in April. The ALJ did not address this contention in his decision. Because on summary decision all facts and inferences are to be viewed in a light most favorable to the non-moving party (*i.e.,* Bondurant), the ALJ should have assessed the motion as if Bondurant's allegations and evidence were presumed to be true.[10] Because there is a genuine issue regarding whether Bondurant raised concerns prior to the termination of his employment regarding management's failure to properly report the transportation of hazardous cargo as the FAA requires, and actions raised that may be characterized as protected activity, summary decision is not appropriate and the case will be remanded for an evidentiary hearing.

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[9] *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39, -42; slip op. at 15 (ARB May 25, 2011)(citation omitted).

[10] It appears from the pleadings before the ALJ that Respondent alleges this issue was raised at the termination meeting on April 18. These competing recollections were raised in declarations submitted in support of the parties' positions before the ALJ.

CONCLUSION

Because there are genuine issues in dispute regarding material facts, summary decision is not appropriate. In remanding the case for hearing, we emphasize that we have reached no conclusion regarding the merits of Bondurant's complaint. We **VACATE** the Decision and Order on Respondent's Motion for Summary Decision and **REMAND** the case to the ALJ for further proceedings in accordance with this decision.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge