



In the Matter of:

GUY COBB,

ARB CASE NO. 16-030

COMPLAINANT,

ALJ CASE NO. 2010-AIR-024

v.

DATE: SEP 29 2017

FEDEX CORPORATE SERVICES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Guy Cobb, pro se; Cordova, Tennessee

For the Respondent:

Carl K. Morrison, Esq.; FedEx Legal Division, Memphis, Tennessee

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Leonard Howie III, Administrative Appeals Judge

FINAL DECISION AND ORDER

This case arises under the employee 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 (Thomson Reuters 2016); 29 C.F.R. Part 1979 (2016). Complainant Guy Cobb filed a complaint alleging that Respondent FedEx Corporate Services, Inc., (FCS), a FedEx Corporate subsidiary, retaliated against him in violation of AIR 21's whistleblower protection provisions for raising air transportation safety concerns. A Department of Labor Administrative Law Judge (ALJ) on January 20, 2012, concluded that FCS was not covered under AIR 21. Cobb appealed to the Administrative Review Board (ARB or Board), which remanded the case to the ALJ, finding that FCS was covered under AIR 21 because of the services it provides to FedEx Express, another FedEx subsidiary. On remand, the ALJ granted FCS's motion for summary

decision, concluding that Cobb had failed to generate a genuine issue of material fact that FCS violated AIR 21. For the following reasons, the Board affirms the ALJ's Decision and Order.

BACKGROUND

Guy Cobb began working for FedEx Corporate Services (FCS) on December 30, 2003. In October 2006, Cobb was a senior analyst in FCS's Business Continuity and Disaster Recovery Department. FCS is a subsidiary of FedEx Corporation, which owns several entities under the FedEx umbrella such as FedEx Express and FedEx Office. FedEx Express owns the well-known cargo planes that transport packages and materials.

FedEx operates a large package-processing facility at Memphis International Airport known as the FedEx SuperHub. The SuperHub is a high-volume facility for packaging, sorting, and routing packages.

To prevent flooding, the airport and FedEx built Hurricane Creek Tunnel in the 1980s to carry floodwaters under the SuperHub and the 9/27 runway, FedEx's main runway. On November 1, 2006, Memphis airport maintenance escorted several employees and Cobb through the Hurricane Creek Tunnel for an inspection. Cobb returned to the tunnel in December 2006 for further review.

Thereafter, Cobb submitted an Enterprise Vulnerability Study (EVS) sometime in December 2006 or January 2007 to Director Rodriguez-Chapman, Cobb's then supervisor, and to Scott Mugno, Managing Director of Safety, Health and Fire Prevention at FedEx Express. The report alerted FedEx management to vulnerabilities in data communication under the SuperHub. The Tunnel was near a fault line and was vulnerable to earthquakes and terrorist attacks. Cobb discussed his report with additional FedEx executives in early 2007. Specifically, Cobb complained that the Hurricane Creek Tunnel would not be able to support the landing of a fully loaded Airbus 380 on runway 9/27. If a disaster were to strike, single points of failure with no redundancy would completely cut off all data communications to and from the FedEx SuperHub. Cobb also submitted his report to the Memphis-Shelby County Airport Authority in late 2006 or early 2007. The airport authority responded to Cobb by providing their engineering reports stating that the runway was structurally able to handle the Airbus 380.

Following his initial presentation in 2006-2007, Cobb complained to several individuals and entities about the vulnerabilities and resubmitted his report. Most of Cobb's complaints occurred in late 2006 and early 2007. On December 1, 2007, Cobb was promoted to the Innovation Department within FCS. Cobb Resp. Mot. Summ. Dec. at 4. Cobb submitted the EVS study to FedEx Express Senior Manager Randy DiGiorlamo on October 31, 2008. Cobb e-mailed DiGiorlamo about reinforcing the tunnel in February 2009. Cobb submitted a FedEx 2020 report in February 2009 that discussed the SuperHub's vulnerability to earthquakes and terrorist events. Cobb e-mailed DiGiorlamo about cameras in the tunnel in March 2009. In late 2008, the Memphis airport authority announced plans for a large reconstruction project of runway 9/27 that was completed on or around November 1, 2009.

FedEx provides shipping discounts to employees and did so when Cobb was hired through his termination. FedEx's Employee Shipping Privilege provided in part:

Employee Discount Shipping and FedEx Office products/services are restricted to the employee's own personal use. Employees are prohibited from sharing their discount privileges with third parties, including family members. However, third parties, shipping ordered items from the employee, may use the employee's discount shipping account number in shipping the items to the employee.

ALJ D. & O. at 4; Mot. Summ. Dec. Ex. K.

The discount shipping policy quoted above became effective after Cobb's hire date. When Cobb began working at FedEx, he was informed by a relative that he could give his shipping employee number to his family to use for the discount, which he did.

When his mother used his privilege at a FedEx location in Lakeland, Florida, the manager reported the incident to a FedEx hotline (alert line) on October 9, 2009. *Id.* at 5. The manager indicated that the relative had used the privilege often. The alert line complaint was transmitted to FedEx security and then to human resources for investigation.

FedEx Services investigated Cobb in mid-October. Stephanie Crockum-King, a human resource advisor, received and investigated Cobb's abuse of the shipping privilege. It is undisputed that Cobb's mother, father, and brother used Cobb's discounted shipping privileges numerous times between September 2007 and Cobb's termination date. ALJ D. & O. at 5; Mot. Summ. Dec. Ex. N. When investigated on October 26, 2009, Cobb stated that he knew that the current shipping privilege policy prohibited relatives from sending packages at a discount to anyone other than the employee. Mot. Summ. Dec. Ex. N. Cobb further asserted that he never gave a family member permission to send discounted packages to third parties and was not aware that family members were sending packages to others.

FedEx characterized Cobb as having engaged in a "significant number" of violations of the policy. Crockum-King reported that 35 of 164 packages, sent using Cobb's discount shipping account number, were in violation of the policy from July 2007-October 2009, which amounted to \$1,823. Mot. Summ. Dec. Ex. O; Cobb Br. at 12. Steve Stewart, Cobb's manager at FCS, consulted with Crockum-King before terminating Cobb's employment on November 13, 2009, for violating FedEx discount shipping privileges.

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Cobb complained to OSHA on November 30, 2009, that Respondent terminated his employment in retaliation for his complaints on the structural integrity of the Hurricane Creek Tunnel. OSHA dismissed the case on June 10, 2010. Although Cobb served FedEx Corporation, OSHA substituted FedEx Corporation Services, Cobb's employer, as the named party. Cobb made several efforts to amend his complaint to include FedEx Corp. and all its

subsidiaries. The ALJ denied Cobb's motions and held that FedEx Express was the entity that was covered under AIR 21. Cobb was an employee of FCS and not of FedEx Express. The ALJ determined that FCS does not own or operate any aircraft and thus is not an air carrier for purposes of AIR 21. The ALJ granted summary decision to FCS. ALJ No. 2010-AIR-024 (Jan. 20, 2012). On December 13, 2013, the ARB remanded the case to the ALJ. The ARB determined that FCS operated as an "air carrier" under the relevant statutory definition. Because FCS was "an entity directly charged with maintaining the security of 'air carriers' and its services [were] integral to Fed Ex's provision of air transportation," the ARB concluded it "indirectly provide[d] air transportation" and was therefore an "air carrier" under AIR 21.¹

The ALJ on remand

The case returned to the ALJ on remand. The ALJ denied a motion for summary decision. The parties continued discovery, but the original ALJ retired and a new ALJ was assigned. FedEx filed a third motion for summary judgment on November 20, 2015. On January 4, 2016, the ALJ concluded that there was no genuine issue of material fact that Cobb's protected activity contributed to FCS's decision to terminate his employment. The ALJ held that Cobb provided no circumstantial evidence of contributing factor causation to avoid summary judgment. D. & O. at 8. The ALJ reasoned that Cobb submitted the study and complaints to non-FCS officials and Cobb failed to make the connection between the recipients and Cobb's FCS supervisors, Stewart and Crockum-King, who had terminated his employment. D. & O. at 7. The ALJ rejected Cobb's argument of temporal proximity and also identified the intervening event of Cobb's violation of the shipping policy. D. & O. at 7. The ALJ's grant of summary decision was based solely on the absence of contributing factor causation. Cobb appealed the ALJ's decision to the ARB.

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 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."³

¹ *Cobb v. FedEx Corp. Servs. Inc.*, ARB No. 12-052; ALJ No. 2010-AIR-024, slip op. at 8 (ARB Dec. 13, 2013).

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.

³ The Office of Administrative Law Judges adopted new rules of evidence and procedure in July 2015.

DISCUSSION

1. Statutory and regulatory background

Under AIR 21, a complainant engages 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 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;

(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.

49 U.S.C.A. § 42121(a).

To prevail on his whistleblower complaint Cobb 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. 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). A contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision. If the complainant proves that protected activity was a contributing factor in the personnel action, the respondent may nevertheless avoid liability if it proves by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity. See 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a).

Pursuant to 29 C.F.R. § 18.72, the ALJ may issue summary decision if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. At this stage of summary decision, the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings, but must set forth specific

facts on each issue upon which he would bear the ultimate burden of proof. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *see also* Fed. R. Civ. P. 56(e). If the non-moving party fails to establish an element essential to his case, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). But in assessing the record to determine whether there is a genuine issue to be tried as to any material fact, the ARB resolves ambiguities and draws factual inferences in favor of the party against whom summary judgment is sought. *Anderson*, 477 U.S. at 255. Accordingly, the Board will affirm an ALJ’s summary decision order if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law. *Allison v. Delta Air Lines, Inc.*, ARB No. 03-150; ALJ No. 2003-AIR-014 (ARB Sept. 30, 2004).

2. Cobb failed to create a genuine issue of fact that his protected activity contributed to his termination

The ALJ held that assuming Cobb engaged in protected activity he did not provide any record support to create a genuine issue of fact that his protected activity contributed to his termination. ALJ D. & O. at 8. For the following reasons, we agree.

A. FCS decision-makers did not know of Cobb’s protected activity

Cobb claims that he submitted his study to FedEx Express safety director Scott Mugno (December 2006/January 2007), and to FedEx Express Senior Manager Randy DiGirolamo (October 2008). FCS counters that it is not enough for Cobb to show that he submitted his report to some other affiliated corporate entity but he must show a closer connection to Stewart or to Crockum-King, the FCS managers who terminated his employment. FCS states that Cobb has not shown that anyone at FCS knew of his reporting, as Rodriguez-Chapman no longer worked for FCS at the time of the termination.

The ALJ agreed with FCS and held that Cobb failed to provide evidence or argument that any of the persons, who had received Cobb’s protected activity (Rodriguez-Chapman, Mugno, or DiGirolamo), were involved in the decision to terminate his employment or communicated that protected activity to Crockum-King or Stewart before Stewart terminated Cobb’s employment. D. & O. at 7.

The ALJ’s finding of no genuine issue of disputed fact as to whether Stewart or Crockum-King had knowledge of Cobb’s protected activity is supported by the record. Cobb provides no connection between his reporting and those making the termination decision. Stewart said in sworn interrogatory responses and in an affidavit that he had not seen Cobb’s report, and no one, including Cobb, had informed him of Cobb’s safety concerns prior to this litigation. Mot. Summ. Dec., Exs. P, R. Crockum-King also was unaware of Cobb’s complaints concerning the Tunnel and runway. D. & O. at 5, 7; Mot. Summ. Dec. Ex. O.

B. Cobb has not provided any evidence that Townsend orchestrated the termination of his employment

Cobb argues that Bruce Townsend, FedEx Corporate's Vice President of Security, orchestrated his termination. Cobb states that Townsend received the alert line complaint concerning Cobb's violation when the complaint was forwarded to Townsend. Cobb speculates on appeal that the decision to terminate his employment was created within the FedEx Corporate security group either prior to or after receiving the shipping violation alert line complaint.

In discovery, Cobb asked for and argued that Townsend's e-mails were important because they provided a link between his termination and protected activity. FedEx sought a protective order that Townsend and FedEx's CEO had nothing to do with the shipping discount privilege or the decision to terminate Cobb's employment. The ALJ allowed limited production of Townsend's e-mails based on relevant search terms for the period October-November 2009. FCS identified and produced five Townsend e-mails for *in camera* review. The ALJ reviewed the e-mails and concurred with FCS that the e-mails were not connected to Cobb's case. On appeal, Cobb states that the e-mails FCS produced were from the specified months of 2013 and not from 2009. Cobb Br. Ex. 3. FCS responds that the e-mails were from 2009, though the attached cover letter incorrectly states they were from 2013, which FedEx notes is a typo.

We agree with FCS that Cobb has failed to provide any direct or circumstantial evidence that Townsend orchestrated his termination. Townsend's Declaration stated that he has no recollection of any role in the termination decision and he does not remember receiving Cobb's study or complaint or sending notice of it to anyone. Mar. 23, 2015 Mot. to Quash and for Prot. Order, Ex. (Townsend Declaration).

C. Temporal proximity and intervening event

The ALJ held that the discovery and investigation into the shipping violation breaks any inference of causation stemming from Cobb's dissemination of the EVS study. D. & O. at 7. Cobb argues on appeal that the ALJ erroneously rejected Cobb's temporal proximity argument. FCS highlights that temporal proximity is not met here because there is a three-year gap between the Hurricane Creek Tunnel study and the termination. We note that while FCS terminated Cobb's employment nearly three years after the initial protected activity, Cobb continued his complaints into 2007 and at the least mentioned or refreshed the issue in 2008 and early 2009.⁴ Nonetheless, we find that the circumstantial evidence of contributing factor causation from temporal proximity is weak. Cobb's protected activity was in the first quarter of 2007. Cobb was promoted shortly thereafter in December 2007. Cobb's Resp. Mot. Summ. Dec. at 4. Cobb received an award in January 2009. There was a long gap with no protected reports concerning the Hurricane Creek Tunnel from March 2007 to October 2008. The final two reports for reinforcements and cameras were reminders or follow-ups to the first protected activity. But more importantly, there was an intervening event of the shipping-privilege violation with strong causal connection to the terminating event. As stated above, FCS investigated Cobb following the discovery of the violation and terminated his employment after the investigation. The human

⁴ *Supra* page 2.

resources department and Cobb's supervisor testified that they did not know of his protected activity before terminating Cobb's employment for the shipping privilege violation.

Accordingly, we affirm the ALJ's determination that there was no genuine issue of material fact as to whether Cobb's protected activity associated with the Hurricane Creek Tunnel contributed to his termination.

CONCLUSION

As the ALJ found, the evidentiary record establishes that Cobb was concerned about the safety of Runway 9/27 and communicated those concerns to FedEx executives. The evidence of record, however, does not create a genuine issue of material fact that would permit a finding that FCS terminated Cobb's employment, in whole or in part, because of his protected reporting concerning the runway and the Hurricane Creek Tunnel culvert. Accordingly, the ALJ's Decision and Order granting Respondent's motion for summary decision and dismissing Cobb's complaint is **AFFIRMED**.

SO ORDERED.



LEONARD HOWIE III
Administrative Appeals Judge



PAUL M. IGASAKI
Chief Administrative Appeals Judge



JOANNE ROYCE
Administrative Appeals Judge