U.S. Department of Labor

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

In the Matter of:

THOMAS COMBS, **ARB CASE NO. 96-066**

COMPLAINANT, **ALJ CASE NO. 95-CAA-18**

v. **DATE: October 17, 1997**

LAMBDA LINK,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER OF DISMISSAL

This matter arises under the employee protection provisions of the Clean Air Act, 42 U.S.C. §7622 (1988), the Toxic Substances Control Act, 15 U.S.C. §2622, and the Federal Water Pollution Control Act, 33 U.S.C. §1367 (collectively "the Acts"), and the applicable implementing regulations at 29 C.F.R. Part 24. Complainant, Thomas Combs (Combs), alleges that Respondent, Lambda Link (Lambda), violated the employee protection provisions of the Acts when it terminated him from his position as an installer with the company after only two weeks of employment and shortly after he had engaged in activity protected by the Acts.

The Administrative Law Judge (ALJ), in a Recommended Decision and Order (R. D. and O.) issued on January 18, 1996, dismissed the complaint, finding that Combs would have been fired "regardless of the asbestos concerns because of his involvement in a drunken party that resulted in his filing a police complaint and having emergency treatment in a hospital." R. D. and O. at 2.

We conclude that the case should be decided pursuant to a dual motive analysis under the standards articulated in the case of *Dean Darty v. Zack Company of Chicago*, Case No. 82-ERA-2, Sec. Dec., Apr. 25, 1983. As modified below, we concur with the decision of the ALJ to deny the complaint.

BACKGROUND

Combs was hired as an installer on November 9, 1994. Within a week he was transferred to the Elmendorf Air Force Base Hospital job site in Alaska. The ALJ found that on the day Combs reported to the job site, November 15, 1994, the on-site foreman (John Nelson), "walked him through a portion of the job site, and pointed out certain tiles and told Tom Combs not to touch those because they contain asbestos." Transcript (T.) 93, R. D. and O. at 2. Regarding Combs' concerns over asbestos in the workplace, the ALJ found that:

> 1) Combs communicated those concerns to his co-worker, Joe Kelly, including the fact that Combs' father had "died of asbestos" and that the substance "scared the living hell out of [him]." CX 17, T. 64, R. D. and O. at 3;
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> 2) Kelly then communicated those concerns about asbestos to Lambda's chief executive officer (CEO) on November 16, 1994 and the CEO promised to supply the crew with protective masks. CX 17, T. 73-75, R. D. and O. at 3; and
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> 3) "On the same day complainant had told foreman Nelson that, '[i]f we don't get protection from asbestos, I'm going to the EPA.'" *Id.* T. 184.

The other crucial factual component in the case concerns the so-called "recreational activities" of Lambda's crew members and, in particular, a crew party which occurred on the evening of November 17 and the morning of November 18, 1994. We concur with the ALJ's findings regarding this event, as set forth at R. D. and O. at 3-6, summarized as follows.

Following the workday on the evening of the 17th, several members of the crew began a drinking binge, ostensibly in celebration of Tim Combs' (Complainant's brother) birthday. As the crew got increasingly drunk, their party moved from various Anchorage area clubs back to one of the company-rented motel rooms where they arrived at about 2 or 3 a.m. to continue drinking.

The drunken conversation turned to the subject of various crew members' ethnic origins and/or purity. At some point in this conversation, Combs was attacked by crew member Joseph Kelly who, upon being referred to by, "the N word," R. D. and O. at 4, hit Combs above his left eye. Combs was taken to the hospital where seven stitches were used to close the wound. The area police were summoned and issued a citation to Kelly. Both Kelly and Complainant were fired. Lambda's CEO noted that Combs was fired because of "the fight." *See* R. D. and O. at 3-4 and RX 1.

The ALJ found that, "[t]here were ample grounds to fire both Mr. Kelly and Mr. Tom Combs." R. D. and O. at 6. He found support for Lambda's decision in the provisions of its employee handbook (RX 1) despite his acknowledgment that "complainant did not receive a copy of the manual." RX 8, at 4, R. D. and O. at 6. The ALJ found that "the guidelines [the handbook] establishes for employee conduct are rather obvious." *Id.*

Finally, the ALJ found that the fighting which led to Comb's termination "took place in a motel room leased by Respondent for the use of its employees, which is company property." *Id.*[1/] The crux of these findings, taken together, is that Complainant Combs was properly terminated for provoking a fight with a co-employee.

DISCUSSION

In light of the undisputed nature of the adverse action in this case, as well as the presence of protected activity on Complainant's part,[2/] the ALJ properly framed the issues for decision as follows:

> a) whether a reasonable inference of retaliatory discharge may be made; and, if so,
>
> b) whether complainant would have been discharged absent his protected activity. R. D. and O. at 2.

The ALJ concluded that ". . . it is more probable than not that [Lambda] was aware of Tom Comb' [sic] concerns about asbestos, but that it is highly probable that [Lambda] would have fired Tom Combs regardless of the asbestos concerns because of his involvement in a drunken party that resulted in his filing a police complaint and having emergency treatment in a hospital." *Id.*[3/]

Dual Motive Analysis

[1/] While we agree that the employer's policies against certain unacceptable conduct, *i.e.*, fighting or instigating fights with co-employees are common sense provisions of shop discipline, *see infra* at 5, which were reasonably applied in this instance, we make no finding regarding the hotel room as "company property."

[2/] It is beyond dispute, as noted above, that Combs engaged in protected activity by raising issues of concern regarding the presence of asbestos and that his threat to go to the EPA took his complaint beyond its initial occupational focus to a broader environmental concern. *See Aurich v. Consolidated Edison Co.,* Case No. 86-CAA-2, Sec. Dec. Apr. 23, 1987, slip op. at 3-5.

[3/] In addition, the ALJ reached a conclusion which we must expressly reject. At page 7 of the R. D. and O., the ALJ held that a supervisor (Nelson) with more than three years on the job had a higher value to the company than Complainant and that this difference in "value" provided, "a rational legitimate business basis for treating the two differently."

Finally, with respect to the ALJ's disparate treatment analysis concerning other Lambda employees, we affirm his conclusion that the evidence concerning Nelson's drunkenness is inconclusive, R. D. and O. at 7, and that the incidents (alleged by Complainant to be comparable) involving employees Fisher and Bridgeman simply are not comparable, *i.e.* they failed to directly implicate the company.

Dual or mixed motive cases are traditionally analyzed under a two-part test as set forth by the Supreme Court in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). *See Clifton v. United Parcel Service*, Case No. 94-STA-0016, Sec. Dec. and Order of Remand, May 9, 1995, slip op. at 8-9 and cases cited therein. *See also* the burden of proof discussion in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); and *Dartey v. Zack Company of Chicago*, Case No. 82-ERA-2, Sec. Dec., Apr. 25, 1982. The *Mt. Healthy* test first requires the employee to show that protected activity "played a role" in the employer's decision. The burden then shifts to the employer to show by a preponderance of the evidence that it would have taken the same action against the employee even if the protected activity had not occurred. *Id.* at 9, citing *Mt. Healthy* at 287. We find that Combs has carried his burden of proof to show that his protected activity played a role in his discharge.[4/] Therefore, the burden is on Lambda to prove that Combs would have been discharged even if he had not engaged in protected activity. We find that Lambda has carried this burden.

In *Kenneway v. Matlock*, Case No. 88-STA-20, Sec. Dec., June 15, 1989, the Secretary held that the right to engage in statutorily protected activity permits some leeway for impulsive employee behavior which is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts. Citing *NLRB v. Leece-Neville Co.*, 396 F.2d 773, 774 (5th Cir. 1968), the Secretary stated that the key inquiry is whether the employee has "upset the balance that must be maintained between protected activity and shop discipline." *Kenneway, supra* at 6.

In the instant case, we find it beyond question that Combs' activity in instigating or provoking the brawl which resulted in his being injured superseded his protected activity and provided ample independent grounds for his discharge. In so holding, we do not rely on the specific provisions of the employee handbook because Combs was never given a copy of the handbook. We do, however, rely on common sense standards of employee conduct of which

[4/] We agree with the ALJ's conclusion that the temporal proximity between the protected activity and Combs' discharge, the employer's knowledge of his asbestos complaint, R. D. and O. at 6, and the ALJ's express and well supported rejection of the employer's denial of knowledge of the asbestos concerns, R. D. and O. at 4, is sufficient to establish that Combs' protected activity played a role in causing the adverse action.

Combs should have been aware, including an employee's obligation not to instigate a fight with a co-employee. The complaint in this case is **DENIED**.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member