U.S. Department of Labor

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

In the Matter of:

ANDREW DeSALVO,

COMPLAINANT,

v.

WATERFRONT PROPERTY SERVICES, LLC,
d/b/a GATOR DREDGING,

RESPONDENT.

ARB CASE NOS. 2017-0044

ALJ CASE NO. 2016-ERA-0008

DATE: MAY 21 2019

Appearances:

For the Complainant:
Andrew DeSalvo; *pro se*; Santa Fe, New Mexico

For the Respondent:
William M. Woolman, Esq. and David G. Litman, Esq.; *Sagaser, Watkins & Wieland PC*; Fresno, California

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (2005), as implemented by regulations codified at 29 C.F.R. Part 24 (2017). The Complainant, Andrew DeSalvo, filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, Waterfront Property Services, LLC, d/b/a/ Gator Dredging (WPS), the Respondent, terminated his employment after he engaged in protected activity, in violation of the ERA's whistleblower provisions. OSHA found that there was no reasonable cause to believe that WPS violated the ERA's whistleblower provisions

because Complainant provided no evidence to prove that his protected activity was a contributing factor in his termination and that his refusal to sit down and discuss his job duties during his initial on-the-job meeting with WPS officials was the legitimate reason WPS terminated his employment. Complainant requested a hearing before an Administrative Law Judge (ALJ), who granted Respondent's motion for summary decision it has shown "by clear and convincing evidence that Respondent would have taken the same adverse action."[1] For the reasons stated below, we affirm.

BACKGROUND

The key facts in this case appear to be undisputed. Complainant was hired as the Survey Crew Chief at the WPS Turkey Point Jobsite in Homestead, Florida. He reported to work on September 2, 2015, where he met Lawrence Naeder, Assistant Operation Engineer at WPS, and William Coughlin, President and Chief Executive Offer of WPS. As Naeder and Coughlin attempted to explain the details of Complainant's job duties and the company's survey process, Complainant repeatedly cut them off and became argumentative. At one point, Complainant rose from his chair and asked to speak with Coughlin alone, but Coughlin told him that Naeder must be included in the conversation. Complainant was also instructed to sit down and listen to Coughlin and Naeder or leave the trailer and be terminated. Complainant chose to leave the trailer and was terminated that day. Complainant filed his complaint with OSHA on January 8, 2016.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB) authority to review ALJ decisions in cases arising under the ERA and issue final agency decisions in these matters.[2] The ARB reviews an ALJ's grant of summary decision de novo, applying the same standard that ALJs employ.[3] Pursuant to 29 C.F.R. § 18.72 (2018), summary decision must be entered if the

---

1 Decision and Order (D. & O.) at 7.

2 Secretary's Order No. 1-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019); *see* 29 C.F.R. § 1982.110(a) (2018).

3 *Siemaszko v. FirstEnergy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012).

pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.[4]

DISCUSSION

The ERA provides, in pertinent part, that "No employer may discharge or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954." 42 U.S.C. § 5851(a)(1)(A). To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, suffered an adverse personnel action, and that his protected activity was a contributing factor in the adverse personnel action taken against him or her. If the complainant's protected activity was a contributing factor in the adverse action, the employer may avoid liability only if it demonstrates "by clear and convincing evidence that it would have taken the same unfavorable personnel action" in the absence of the protected activity.[5]

The ARB reviews complaints and papers filed by pro se complainants "liberally in deference to their lack of training in the law and with a degree of adjudicative latitude."[6] But we are also mindful of our duty to remain impartial,

---

[4] We note that the ALJ did not provide in his D. & O. the standard for granting summary decision, nor provide complete cites to the relevant statutes. Moreover, he did not identify the authors of the affidavits he cited. In addition, we note that neither the parties nor the ALJ identified or described Complainant's alleged protected activity in this case. Without this information, it is difficult for the Board to analyze the elements of the complaint, including whether any alleged protected activity contributed to the adverse personnel action. However, we hold that these omissions, although serious, do not constitute reversible error because we are able to identify and evaluate the evidence of record in support of the motion for summary decision.

[5] 42 U.S.C. § 5851(b)(3)(C), (D); 29 C.F.R. § 24.109(b)(1); *Hoffman v. NextEra Energy, Inc.*, ARB No. 12-062; ALJ No. 2010-ERA-011, slip op. at 6 (ARB Dec. 17, 2013).

[6] *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 7 (ARB Apr. 30, 2010) (quotation omitted).

and thus, we must refrain from becoming an advocate for the pro se litigant."[7] Similarly, an ALJ "must accord a party appearing pro se fair and equal treatment, but a pro se litigant cannot shift the burden of litigating his case to the courts, or avoid the risks of failure that may result from his decision to forego expert assistance."[8]

The ALJ reviewed the facts outlined in the pleadings and attachments in the light most favorable to Complainant and assumed both that Complainant engaged in protected activity and that WPS was aware of it. The ALJ then summarily concluded that WPS had shown by clear and convincing evidence that it would have taken the same adverse action regardless of the existence of any protected activity. While the ALJ did not directly address this evidence, we note that WPS submitted affidavits from Naeder and Coughlin which detailed the sequence of events on September 2, 2015, and these affidavits are not contradicted by allegations from Complainant.[9] In addition, WPS submitted a copy of its employee handbook explaining the termination process, which specifically mentions termination on account of insubordination. Complainant signed this handbook indicating that he received it earlier that day. Finally, WPS submitted evidence that the company had previously terminated the employment of one of its employees for insubordination, albeit under different circumstances than in this case. In our de novo review of these submissions, as the well as the pleadings filed with the ALJ, we hold that WPS has established by clear and convincing evidence that it would have terminated Complainant's employment for insubordination, irrespective of whether he had engaged in protected activity.

---

7 *See Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-047, slip op. at 2 (ARB Apr. 26, 2005).

8 *Pik v. Credit Suisse, AG*, ARB No. 11-034, ALJ No. 2011-SOX-006, slip op. at 5 (ARB May 31, 2012) (quotation omitted) ("pro se litigants have the same burdens of proving the necessary elements of their cases as litigants represented by counsel")

9 We do not, however, agree with the ALJ that Complainant "admitted" that he was insubordinate on September 2, 2015. Rather, Complainant's statements in response to the affidavits and pleadings filed in support of the Motion for Summary Decision do not contradict WPS's evidence. It is uncontradicted that a confrontation between Complainant and Naeder and Coughlin occurred. The uncontradicted evidence also shows that Complainant chose to leave the trailer after being warned not to do so or be terminated. Finally, the WPS employee handbook in affect at the time of the incident which Complainant received explained the consequences of employee insubordination.

CONCLUSION

WPS presented uncontradicted evidence that it would have taken the same adverse action against Complainant in the absence of any protected activity he may have engaged in. Therefore, WPS is entitled to summary decision as a matter of law. Accordingly, we **AFFIRM** the ALJ's decision and **DISMISS** this complaint.

SO ORDERED.