U.S. Department of Labor

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

In the Matter of:

DAVID M. HAMILTON, **ARB CASE NO. 12-022**

COMPLAINANT, **ALJ CASE NO. 2010-FRS-025**

v. **DATE: April 30, 2013**

CSX TRANSPORTATION, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
David M. Hamilton, ***pro se*****, Delmar, New York**

For the Respondent:
Jacqueline M. Holmes, Esq.; Jennifer M. Bradley, Esq.; ***Jones Day*****, Washington, District of Columbia**

Before: E. Cooper Brown, ***Deputy Chief Administrative Appeals Judge*****; Joanne Royce,** ***Administrative Appeals Judge*****; and Luis A. Corchado,** ***Administrative Appeals Judge.***

FINAL DECISION AND ORDER

This case arises under the Federal Rail Safety Act of 1982 (FRSA).[1] Complainant David Hamilton alleges that his employer, Respondent CSX Transportation, retaliated against him by reprimanding him for engaging in FRSA whistleblower protected activity. In a Decision and

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[1] 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2012), as implemented by federal regulations at 29 C.F.R. Part 1982 (2012) and 29 C.F.R. Part 18, Subpart A (2012).

Order (D. & O.) issued November 17, 2011, following an evidentiary hearing, the presiding Administrative Law Judge (ALJ) found that Hamilton engaged in protected activity but that his protected activity did not contribute to his reprimand. For the reasons discussed below, we summarily affirm the ALJ's dismissal of Hamilton's complaint.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to issue final agency decisions under the FRSA.[2] The Board reviews the ALJ's factual determinations under the substantial evidence standard.[3] The Board reviews an ALJ's conclusions of law de novo.[4]

DISCUSSION

The FRSA prevents a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity.[5] The FRSA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, at 49 U.S.C.A. § 42121(b)(West 2007). To prevail, an FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. If a complainant meets his burden of proof, the employer may nevertheless avoid liability if it proves by clear and convincing evidence that it

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[2] Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1982.110.

[3] 29 C.F.R. § 1982.110(b). In the review of an ALJ's Decision and Order, the ARB is bound by the ALJ's factual findings if the findings are supported by substantial evidence of record. "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

[4] *Rooks v. Planet Airways, Inc.,* ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006) (*citing Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4 (ARB Dec. 30, 2004)).

[5] See 49 U.S.C.A. § 20109(a), (b).

would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior.[6]

The ALJ found, based upon the parties' stipulation, that Hamilton engaged in a series of FRSA-protected activities between March and October of 2008, including the submission of safety-related complaints to the Federal Railroad Administration and internally to the Respondent. The ALJ also found that a reprimand that Hamilton received from the Respondent on or about December 11, 2008, constituted an adverse personnel action within the meaning of the FRSA. Nevertheless, the ALJ dismissed Hamilton's complaint based upon the ALJ's determination that Hamilton failed to establish by a preponderance of the evidence that his protected activity was a contributing factor in the reprimand that he received. D. & O. at 27. Hamilton concedes that he "expressed frustration by banging his hands on his desk and making a loud growling sound." The ALJ noted that Kiner and Hamilton differed on the degree to which Hamilton expressed his frustration. The ALJ held that it was a matter of credibility and determined that Kiner's testimony is more likely to be accurate. *Id.* at 24. Ultimately, the ALJ was not persuaded that protected activity contributed to the reprimand.

Having reviewed the evidentiary record as a whole, and upon consideration of the parties' briefs on appeal, we conclude that the ALJ's findings of fact, upon which the ALJ determined that Hamilton failed to prove that his protected activity was a contributing factor in the reprimand that he received, are supported by substantial evidence of record. We further conclude that the ALJ's legal analysis and conclusions of law on the three essential elements (protected activity, adverse action, and causation) are in accordance with applicable law.[7]

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[6] *Henderson v. Wheeling & Lake Erie R.R.,* ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012). See 49 U.S.C.A. § 42121(b)(2)(B)(iii).

[7] The ALJ and the parties cite four elements, tracking the elements necessary to raise an inference for an OSHA investigation. 29 C.F.R. § 1982.104(e)(3). But we are reviewing a decision on the merits, not OSHA's investigation decisions. *Cf. Moon v. Transp. Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir. 1987) (citing three elements for a whistleblower claim under the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2012)). Case law demonstrates how the final-decision-maker's "knowledge" and "animus" are factors to consider in the causation analysis but not always dispositive factors. *See, e.g.*, *Staub v. Proctor*, 131 S. Ct. 1186 (2011) (under a different anti-retaliation statute, the final decision-maker may have unlawfully discriminated where a subordinate supervisor proximately caused retaliation); *Bobreski v. J. Givoo Consultants, Inc.,* ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 29, 2011) (remanded to the ALJ to reconsider under the totality of circumstances the respondent's potential influence on the final decision-maker's hiring choices).

Accordingly, for the reasons articulated in the Decision and Order, based upon the ALJ's findings of fact and conclusions of law, we affirm the ALJ's dismissal of Hamilton's complaint.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge