U.S. Department of Labor

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

In the Matter of:

HAROLD ECHOLS,

COMPLAINANT,

v.

GRAND TRUNK WESTERN RAILWAY, CO.,

RESPONDENT.

ARB CASE NO. 16-022

ALJ CASE NO. 2014-FRS-049

DATE: October 5, 2017

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Robert B. Thompson, Esq.; *Harrington, Thompson, Acker & Harrington, Ltd.*; Chicago, Illinois

For the Respondent:
Mary C. O'Donnell, Esq.; *Durkin McDonnell, P.C.*; Detroit, Michigan

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

FINAL DECISION AND ORDER

This case arises under the Federal Rail Safety Act of 1982 (FRSA).[1] Complainant Harold Echols filed a complaint alleging that Grand Trunk Western Railway (GTW) retaliated against

[1] 49 U.S.C.A. § 20109 (Thomson Reuters 2016), as implemented by federal regulations at 29 C.F.R. Part 1982 (2016) and 29 C.F.R. Part 18, Subpart A (2016).

him in violation of FRSA's whistleblower protection provisions for reporting an injury. Echols appeals from a Decision and Order (D. & O.) issued by a Department of Labor Administrative Law Judge (ALJ) on November 19, 2015, dismissing Echols's complaint after a hearing on the merits. We summarily affirm.

BACKGROUND

On November 16, 2011, Echols sustained a groin injury while he was at work as a brakeman for GTW.[2] He attempted to push a misaligned drawbar into place and could not do so, so he lifted the drawbar into place in violation of GTW's safety Rule T-2 (which prohibits lifting a drawbar). Echols reported both 1) that he was injured and 2) that he had lifted the drawbar. GTW began a disciplinary investigation process against Echols, but offered to waive the investigation and hearing if Echols admitted that his misconduct resulted in the injury. Echols signed the waiver and was suspended without pay.

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.[3] The Board reviews the ALJ's factual determinations under the substantial evidence standard.[4] The Board reviews an ALJ's conclusions of law de novo.[5]

DISCUSSION

The FRSA prohibits 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 protected activity.[6] The FRSA is governed by the legal burdens of proof set forth under the Wendell H. Ford

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[2] The citations in this paragraph are to D. & O. at 9.

[3] Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); see 29 C.F.R. § 1982.110(a).

[4] 29 C.F.R. § 1982.110(b).

[5] *Hamilton v. CSX Transp., Inc.,* ARB No. 12-022, ALJ No. 2010-AIR-025, slip op. at 2 (ARB Apr. 30, 2013) (citations omitted).

[6] 49 U.S.C.A. § 20109(a), (b), (c).

Aviation Investment and Reform Act for the 21st Century, at 49 U.S.C.A. § 42121(b) (West 2007).[7] To prevail, an FRSA complainant must establish by a preponderance of the evidence that protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint."[8] If a complainant meets his burden of proof, the employer may avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected activity.[9]

Initially, the ALJ found that: (1) Echols engaged in protected activity when he reported an injury at work on November 16, 2011; (2) GTW knew about Echols's protected activity, (3) the waiver of investigation Echols signed was an adverse action and (4) Echols's protected activity was a contributing factor in the adverse action since the injury report set the disciplinary process in motion and triggered GTW's offer of waiver.[10] GTW has not appealed these findings, and we affirm them as supported by substantial evidence in the record.

The ALJ concluded however, that GTW proved by clear and convincing evidence that it would have taken the adverse action absent any protected activity, and dismissed Echols's complaint.[11] Supporting this conclusion, the ALJ found that GTW routinely monitors compliance with Rule T-2, formally trains employees on compliance with the rule, and consistently imposes equivalent discipline on employees who violate the rule in the absence of an injury report.[12] The ALJ also found that "Rule T-2 is not vague or subject to manipulation and use as pretext for unlawful discrimination."[13] Finally, the ALJ found that GTW did not use Echols's injury as pretext to find a basis on which to punish Echols for his injury report.[14] Echols appeals the ALJ's conclusion that GTW proved its affirmative defense by clear and convincing evidence, and it is this issue that we briefly discuss.

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7 49 U.S.C.A. § 20109(d)(2)(A)(i).

8 49 U.S.C.A. § 42121(b)(2)(B)(iii).

9 49 U.S.C.A. § 42121(b)(2)(B)(iv).

10 D. & O. at 9-12.

11 *Id.* at 15.

12 *Id.* at 9-10, 14.

13 *Id.* at 14.

14 *Id.*

Circumstantial evidence can be used to prove what an employer "would have done" in its efforts to prove its affirmative defense.[15] The circumstantial evidence it presents can include, "among other things: (1) evidence of the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee's work record; (3) statements contained in relevant office policies; (4) evidence of *other similarly situated employees* who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions."[16]

To conclude that GTW proved its affirmative defense, the ALJ analyzed the facts using factors set forth in *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 11-12 (ARB Sept. 30, 2015).[17] The parties do not dispute the ALJ's use of the *DeFrancesco* factors, but rather, one aspect of their application relating to similarly situated employees, the fourth type of circumstantial evidence listed above. Echols argues that when it comes to similarly situated employees, the railroad must prove that other employees engaged in the identical conduct that the complainant engaged in to support its affirmative defense, while GTW argues that showing that comparators also violated the more general rule, (in this case, Rule T-2, which also includes prohibitions against other actions) but in the absence of an injury report were also punished, should be sufficient to support its position. The ALJ agreed with GTW, having held that "there was no meaningful distinction between the various subsections of

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[15] *Speegle v. Stone and Webster Constr. Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB Apr. 25, 2014).

[16] *Id.* (emphasis added).

[17] The *DeFrancesco* factors are:

(1) Whether the railroad monitors for compliance with the work rules the complainant is charged with violating in the absence of an injury? Does the railroad routinely monitor the manner in which employees perform the action the complainant was performing?

(2) Whether the railroad consistently imposes equivalent discipline against employees who violate the work rules the complainant was cited for violating but who are not injured as a result of the violation?

(3) Are the work rules the complainant was charged with violating routinely applied?

(4) Are the work rules the complainant was charged with violating vague and thus subject to manipulation and use as pretext for unlawful discrimination? If they are general safety rules, how has the railroad applied the rules in situations that do not involve an employee injury?

(5) Does other evidence suggest that in conducting its investigation the railroad was genuinely concerned about rooting out safety problems? Or does the evidence suggest that its conduct of the investigation was pretext designed to unearth some plausible basis on which to punish the complainant for the injury report?

Rule T-2."[18] Both parties argue that their positions are supported by *DeFrancesco*, which admittedly contains some equivocal language. In *DeFrancesco*, the Board stated both that 1) the employer must present evidence that clearly and convincingly establishes that it would have taken the same action against an employee who did not report an injury who had engaged in "*identical unsafe conduct*," and 2) that the respondent is "required to demonstrate through factors extrinsic to [complainant's] protected activity that the discipline to which [complainant] was subjected was applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the *same or similar violations*."[19] The Board, in citing *DeFrancesco*, has espoused the "same or similar violations" language in at least two cases, and we do so again here, this time explicitly disavowing the "identical" language.[20]

With regard to the question of whether comparators in a given case are similarly situated to the complainant, we are "hesitant to find the need for a bright-line rule in our administrative process," but rather allow for "an ALJ to have the flexibility to weigh the significance of comparators case-by-case, depending on the level of similarity or lack of similarity among the comparators."[21] In any event, "similarly situated" comparator employees must have enough in common to allow for a meaningful comparison.

Substantial evidence supports the ALJ's factual findings. We affirm the ALJ's conclusion that GTW proved that it would have taken the same adverse actions against Echols absent any protected activity by clear and convincing evidence and the ALJ's dismissal of Echols's whistleblower complaint.

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[18] *Id.* at 13.

[19] *DeFrancesco*, ARB No. 13-057, slip op. at 10, 13-14.

[20] See *Armstrong v. Flowserve US, Inc.*, ARB No. 14-023, ALJ No. 2012-ERA-017, slip op. at 14 (ARB Sept. 14, 2016); *Pattenaude v. Tri-Am Transp., LLC*, ARB No. 15-007, ALJ No. 2013-STA-037, slip op. at 16-17 (ARB Jan. 12, 2017). See *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1373-74 (Fed. Cir. 2012), for problems that arise with the highly restrictive "identical" language.

[21] *Speegle v. Stone and Webster Constr. Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 n.66 (ARB Apr. 25, 2014).

CONCLUSION

The ALJ's Decision and Order dismissing Echols's complaint is **AFFIRMED.**

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge