



In the Matter of:

JAMES E. RATHBURN,

ARB CASE NO. 16-036

COMPLAINANT,

ALJ CASE NO. 2014-FRS-035

v.

DATE: DEC - 8 2017

**THE BELT RAILWAY COMPANY
OF CHICAGO,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Stacey E. Lynch, Esq.; Law Office of Stacey E. Lynch, LLC; Oak Forest, Illinois

For the Respondent:

Christopher R. Steinway, Esq.; The Belt Railway Company of Chicago, Bedford Park, Illinois

Before: E. Cooper Brown, Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Leonard J. Howie III, Administrative Appeals Judge

FINAL DECISION AND ORDER

This case arises under the Federal Rail Safety Act of 1982 (FRSA).¹ James E. Rathburn filed a complaint alleging that The Belt Railway Company of Chicago (Belt) retaliated against him in violation of FRSA's whistleblower protection provisions for reporting an injury and seeking medical treatment for the injury. Rathburn appeals from a Decision and Order (D. & O.) issued by a Department of Labor Administrative Law Judge (ALJ) on January 29, 2016, dismissing Rathburn's complaint after a hearing on the merits. For the following reasons, the ALJ's Decision and Order is affirmed.

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).

BACKGROUND

Belt employed Rathburn as a carman.² On Friday April 6, 2012, Rathburn and Mark Bradley were working at an inbound railyard where trains were arriving. They were conducting a Federal Railroad Administration mandated inspection of each incoming train, with each man working separate tracks.³ Each man placed his own blue-flag protections on the track on which they were working, which blocks entry to the track, providing safety for the worker inspecting cars on the track.

After Rathburn received a call from the railyard's Hump Tower requesting that Bradley's tracks be released for use, Rathburn released Bradley's blue-flag protections because he asserted that Bradley had informed him earlier that he was finished with his inspection work on the tracks. But Bradley later went back to those tracks to perform a re-inspection and only later realized, when he went to release the tracks, that Rathburn had already released them without his knowledge or permission.

Rathburn and Bradley got into a verbal confrontation about the release of Bradley's tracks. Later, the men became involved in a physical altercation.⁴ Arriving on the scene, Belt managers noted that Rathburn had sustained an injury to his forehead and they took both Rathburn and Bradley out of service pending an investigation.

Rathburn testified that the following Sunday he went to an emergency room where he was diagnosed with a concussion and was given pain medication. On the following Monday, Belt issued Rathburn a Notice of Discipline, advising Rathburn that he violated Belt's blue-flag protection rules, Belt's rules of conduct regarding altercations, Belt's Conduct and Altercation rules, and Belt's Workplace Violence Policy. Accordingly, Belt terminated his employment. Belt also issued a Notice of Discipline to Bradley the same day, advising Bradley that his job was also terminated for essentially the same violations. Rathburn's discharge was effective on April 20, 2012.⁵ Rathburn filed a FRSA whistleblower complaint on September 27, 2012.⁶

² D. & O. at 7.

³ The background in this section is found at D. & O. at 4-5.

⁴ While Bradley stated that Rathburn threw a water bottle at him, causing him to fend it off with his hands and possibly scratching Rathburn's forehead, Rathburn testified that Bradley punched him and in the process the water bottle flew from his hands. There were no other witnesses or evidence to verify what occurred during this physical altercation. See D. & O. at 4.

⁵ D. & O. at 2, n.1.

⁶ *Id.* at 2.

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.⁷ The Board reviews the ALJ's factual determinations under the substantial evidence standard.⁸ The Board reviews an ALJ's conclusions of law de novo.⁹ An ALJ's evidentiary rulings are reviewed for abuse of discretion.¹⁰

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.¹¹ 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, 49 U.S.C.A. § 42121(b) (Thomson Reuters 2016).¹² 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."¹³ 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.¹⁴

⁷ 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).

⁸ 29 C.F.R. § 1982.110(b).

⁹ *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-AIR-025, slip op. at 2 (ARB Apr. 30, 2013) (citations omitted).

¹⁰ *Irwin v. Nashville Plywood, Inc.*, ARB No. 16-033, ALJ No. 2014-STA-061, slip op. at 6 (ARB Sept. 27, 2017).

¹¹ 49 U.S.C.A. § 20109(a), (b), (c). Specifically, 49 U.S.C.A. § 20109(a)(4), protects an employee from retaliation if the retaliation is "in whole or in part" due to the employee's "lawful, good faith" effort, "to notify, or attempt to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee;" and 49 U.S.C.A. § 20109(c)(2) protects an employee from retaliation "for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician."

¹² 49 U.S.C.A. § 20109(d)(2)(A)(i).

¹³ 49 U.S.C.A. § 42121(b)(2)(B)(iii).

¹⁴ 49 U.S.C.A. § 42121(b)(2)(B)(iv).

Initially, the ALJ noted that the parties stipulated that Rathburn engaged in protected activities when he reported an injury at work on the day of the fight with his co-worker Bradley on Friday April 6, 2012, when he called his foreman to the scene of the incident and it was evident that he had sustained an injury to his forehead, and also when he sought treatment for the injury at an emergency room over the following weekend and advised the railroad of this at a meeting regarding the fight on the following Monday.¹⁵ The ALJ further found that Belt knew about Rathburn's protected activities.¹⁶ In addition, the ALJ found that Rathburn suffered adverse employment actions when Belt pulled him out of service on the day of the incident and when it terminated his employment on April 20, 2012.¹⁷ Belt has not appealed these findings, and we affirm them as supported by substantial evidence in the record.

But the ALJ further found that Rathburn failed to establish that his protected activities were a contributing factor in his termination for violating Belt's rules regarding "blue-flag" protections and workplace violence or, alternatively, that Belt demonstrated by clear and convincing evidence that Rathburn would have been terminated in any event due to his violation of Belt's rules.¹⁸

The ALJ did not abuse his discretion in crediting hearing testimony of Belt's Director of Human Resources Timothy E. Coffey

On appeal, Rathburn challenges the ALJ's reliance, in making his findings, on the hearing testimony of Timothy E. Coffey, Belt's Director of Human Resources and General Counsel.¹⁹ Prior to the hearing in this case, Rathburn's counsel filed a Motion *In Limine* requesting that Coffey and all witnesses be excluded from the hearing room during the testimony of other witnesses pursuant to Rule 615 of the Federal Rules of Evidence. As Belt had no objection provided that Coffey was allowed to testify, so long as he was not in the hearing room listening to other witnesses testify, the ALJ granted the motion.²⁰

At the hearing on August 20, 2014, Rathburn's counsel called and asked three witnesses about whether they had ever heard about a previous physical altercation between Belt employees at a safety meeting where punches and chairs were thrown.²¹ The next day at the hearing on

¹⁵ D. & O. at 3-4, 39-40.

¹⁶ *Id.* at 39-40.

¹⁷ *Id.* at 40.

¹⁸ *Id.* at 42-46.

¹⁹ *See Id.* at 44-46.

²⁰ Hearing Transcript (HT) at 15.

²¹ *See* HT at 218, 282, 298; D. & O. at 25, 30. In response, Thomas J. Sipple, a Belt Car Foreman, testified that he was one of the people involved, punches were thrown, he was removed

August 21, 2014, Rathburn's counsel called and asked Coffey about whether he had ever heard about a previous physical altercation at the safety meeting, and he testified "[t]he first time I heard about it was yesterday" and that he had no knowledge regarding any discipline occurring as a result.²² Rathburn's counsel did not raise any objection regarding Coffey's testimony at that time during the hearing, but did argue in Rathburn's post-hearing brief before the ALJ that Belt had violated the ALJ's order, as Rathburn's counsel alleged that Coffey had apparently heard the previous day's testimony about the previous physical altercation at the safety meeting.

On appeal, Rathburn's counsel reiterates her contention. Specifically, Rathburn's counsel argues that the ALJ erred in giving weight to Coffey's hearing testimony and that the violation of the ALJ's order casts doubt on the other witnesses' hearing testimony. While the Federal Rules of Evidence do not apply to FRSA proceedings before the ALJ,²³ one of the Rules of Practice and Procedure for the Department of Labor's Office of Administrative Law Judges (OALJ Rules) found at 29 C.F.R. Part 18 that does apply,²⁴ specifically 29 C.F.R. § 18.615, states that "[a]t the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses." But pursuant to 29 C.F.R. § 18.602, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."

Evidentiary rulings are within the ALJ's discretion and Rathburn has not shown how he was harmed or prejudiced as a result of Coffey's testimony or that the ALJ abused his discretion. Coffey testified that he had no knowledge about the previous physical altercation at the safety meeting and the ALJ only credited testimony from Coffey and other witnesses regarding matters that they had personal knowledge of. Consequently, because Rathburn has not shown that the ALJ abused his discretion, Rathburn's contention is rejected.

from service for six months, then was reinstated after receiving treatment, and did not know if the other employee involved was disciplined. HT at 317; D. & O. at 32.

²² HT at 402.

²³ See 29 C.F.R. § 18.104(a) (in making determinations on "[p]reliminary questions concerning the qualification of a person to be a witness," the ALJ "is not bound by the rules of evidence.").

²⁴ The OALJ Rules at 29 C.F.R. Part 18 set out the procedural and evidentiary rules for administering adjudicatory proceedings. *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 19 (ARB Apr. 21, 2015) (en banc). Subpart B of the OALJ Rules prescribes the Rules of Evidence that govern formal adversarial adjudications of the United States Department of Labor conducted before a presiding officer that is required by, inter alia, the Administrative Procedure Act, 5 U.S.C.A. §§ 554, 556 and 557 (West 1996). See 29 C.F.R. Subpart B, § 18.101.

While the ALJ's contributing factor analysis is flawed, the ALJ's findings of fact support the ALJ's conclusion that Belt demonstrated by clear and convincing evidence that Rathburn would have been terminated absent Rathburn's protected activities

Regarding any direct evidence that Rathburn's protected activities were a contributing factor in his termination, the ALJ noted that Rathburn testified that Belt managers reacted with displeasure when he reported, at a meeting on Monday with Belt management, that he went to the emergency room over the weekend for treatment for his injury.²⁵ But "[o]bserving the demeanor of the witnesses and assessing their credibility," the ALJ did not "find any reason to accept Rathburn's version of what transpired over that of the others."²⁶ Specifically, the ALJ found Rathburn's testimony unpersuasive, vague, and subject to interpretation, as he was unable to recall what was said exactly and was uncertain whether they were angry because he went to the emergency room or because he failed to notify them first.²⁷ In addition, no other participants of the meeting corroborated his account, nor did Rathburn's union representative, Reilly, who also did not recall any negative reaction after he had arrived at the meeting.²⁸ Although Rathburn argues on appeal that the ALJ erred in his consideration of the evidence regarding the altercation, the ALJ found Rathburn's testimony unpersuasive, and the Board generally defers to an ALJ's credibility determinations, unless they are inherently incredible or patently unreasonable.²⁹

Regarding any circumstantial evidence that Rathburn's protected activities were a contributing factor in his termination, the ALJ did find that temporal proximity was present, as Rathburn reported his injury and sought medical treatment for it before the investigation and subsequent discipline occurred.³⁰ But the ALJ found that any inference of causation such as temporal proximity might suggest was negated when viewed in context. Specifically, the ALJ found no evidence of disparate treatment because Belt also fired Bradley (for whom the ALJ found no evidence that he suffered any injury) pursuant to Belt's zero-tolerance policy as to workplace violence and Belt's history of dismissing employees who violated Belt's blue-flag rules.³¹ Thus, the ALJ found nothing pretextual, unreasonable, or unjustified in Belt's finding both Rathburn and Bradley responsible for their altercation and Belt's decision to fire both.³²

²⁵ D. & O. at 42.

²⁶ *Id.* at 43.

²⁷ *Id.* at 42-43

²⁸ *Id.*

²⁹ *Berroa v. Spectrum Health Hosps.*, ARB No. 15-061, ALJ No. 2013-AIR-021, slip op. at 2 (ARB Mar. 9, 2017).

³⁰ D. & O. at 43.

³¹ *Id.* at 44-45.

³² *Id.*

The ALJ noted hearing testimony indicating that the size of the bonus Belt gave to its managers could be affected by the number of FRSA-reportable injuries and, thereby, provide a motive to discourage the reporting of injuries.³³ But the ALJ found no evidence that Belt has an attitude or workplace culture that discourages the reporting of injuries, noting that Rathburn did not dispute that Belt's Repair Track Foreman, Robert M. Perham, and Car Foreman Sipple both asked Rathburn at the time of the incident if he wanted to go to the clinic for his wound.³⁴ Also, all of the witnesses at the hearing uniformly testified that Belt does not have a policy or culture of discouraging the reporting of injuries, or retaliating against those who do, including Reilly, Rathburn's union representative, who stated that he did not believe union members were afraid to report an injury, except those whose injuries arose from breaking safety rules.³⁵ Moreover, the ALJ credited the testimony of Coffey, Belt's Director of Human Resources, that Rathburn's injury and treatment for his injury played no role in his termination, as he had negotiated approximately 100 injury claims by employees, none of whom had been subjected to discipline.³⁶

The ALJ also found that Rathburn failed to establish that the reasons for his discharge were pretextual, finding that Rathburn's assertion that Belt's blue-flag rules allowed him to unlock Bradley's tracks was rejected by the testimony of all of the witnesses at the hearing, including Reilly, Rathburn's union representative. Specifically, the ALJ found the evidence supported the finding that Rathburn violated the blue-flag rules, as "almost every witness" testified that Rathburn was not working the same track with Bradley, so Bradley's blue-flag protections were not his to remove, despite even the Hump master's request to do so.³⁷ The ALJ also found the evidence (specifically the testimony of Bradley and John Schultz, who witnessed the argument) supported finding that Rathburn violated Belt's zero-tolerance policy against workplace violence.³⁸

While Rathburn again argues on appeal that the reasons for his termination listed in his Notice of Discipline are false and pretextual, he merely reiterates arguments made before the ALJ and, thereby, is asking the Board to reweigh the evidence, which it is precluded from doing.³⁹ The ALJ's weighing of the evidence and findings of fact are supported by substantial evidence.

³³ *Id.* at 45.

³⁴ *Id.* at 43-44.

³⁵ *Id.* at 44.

³⁶ *Id.* at 45.

³⁷ *Id.* at 44.

³⁸ *Id.*

³⁹ *See Clark v. Hamilton Hauling, LLC*, ARB No. 13-023, ALJ No. 2011-STA-007, slip op. at 4 (ARB May 29, 2014) (in conducting its review, the Board must uphold an ALJ's findings of fact to

The foregoing is not to say that the ALJ's finding of no contributing factor causation is without fault. In finding that Rathburn failed to prove that his protected activity was a contributing factor in his employment termination, the ALJ based his conclusion on the lack of any evidence, even of a circumstantial nature, "that the discipline here was *motivated* by Rathburn reporting an injury and seeking treatment"⁴⁰ and that Rathburn failed to establish a case of "*retaliatory intent*" based either on direct or circumstantial evidence.⁴¹ However, as the Board has repeatedly held, an employee need not prove retaliatory animus, or motivation or intent, to prove that his protected activity contributed to the adverse employment action at issue.⁴² Thus, we find fault with the ALJ's contributory factor analysis in finding that Rathburn failed to establish that his protected activities were a contributing factor in his termination for violating Belt's rules regarding "blue-flag" protections and workplace violence. The ALJ erroneously relied on Rathburn's inability to prove that the adverse actions he suffered were "motivated" by "retaliatory intent."

The ALJ's faulty "contributing factor" analysis does not warrant remand because the findings of fact upon which the ALJ based his contributing factor analysis are supported by substantial evidence that nevertheless supports the ALJ's further conclusion that Belt demonstrated by clear and convincing evidence that it would have taken the same adverse action against Rathburn in any event, had Rathburn not engaged in protected activity. Those findings of fact fully support the ALJ's conclusion that Belt would have terminated Rathburn's employment because of his "blue-flag" rules violation and Belt's zero-tolerance policy against workplace violence, regardless of his injury or decision to seek treatment.⁴³ Accordingly, the Board affirms the ALJ's conclusion that Belt proved that it would have taken the same adverse actions against Rathburn absent any protected activities by clear and convincing evidence, and further affirms the ALJ's dismissal of Rathburn's whistleblower complaint.

the extent they are supported by substantial evidence, even if there is also substantial evidence for the other party, and even if we justifiably disagree with the finding).

⁴⁰ D. & O. at 43 (emphasis added).

⁴¹ *Id.* at 46 (emphasis added); *see also Id.* at 45 ("direct evidence offered by Rathburn of *retaliatory intent*" and "circumstantial evidence of *retaliatory intent*," emphasis added).

⁴² *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012). *See also Menendez v. Haliburton, Inc.*, ARB No. 12-026, ALJ No. 2007-SOX-005, slip op. at 9 (ARB Mar. 15, 2013), *aff'd sub nom, Haliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 263 (5th Cir. 2014); *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. 7-9 (ARB June 20, 2012).

⁴³ D. & O. at 46.

CONCLUSION

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

SO ORDERED.



JOANNE ROYCE
Administrative Appeals Judge



E. COOPER BROWN
Administrative Appeals Judge



LEONARD J. HOWIE III
Administrative Appeals Judge