



In the Matter of:

TRACIE AUSTIN (deceased),

ARB CASE NO. 2017-0024

ALJ CASE NO. 2016-FRS-00013

COMPLAINANT,

DATE: MAR 11 2019

v.

BNSF RAILWAY COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jerry Easley, Esq.; *Rome, Arata & Baxley, L.L.C.*; Pearland, Texas

For the Respondent:

Paul S. Balanon, Esq., and Jacob E. Godard, Esq.; *BNSF Railway Co.*; Fort Worth, Texas

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

PER CURIAM

FINAL DECISION AND ORDER

This case arises under the Federal Rail Safety Act of 1982 (FRSA).¹ Complainant Tracie Austin filed a complaint alleging that the Respondent, BNSF Railway Company, retaliated against her in violation of the FRSA's whistleblower protection provisions because she reported

¹ 49 U.S.C. § 20109 (2008), as implemented by federal regulations at 29 C.F.R. Part 1982 (2018) and 29 C.F.R. Part 18, Subpart A (2018).

a safety hazard, she reported an injury she sustained because of that hazard, and she sought medical treatment regarding her injury.² Complainant appeals from a Decision and Order (D. & O.) issued by a Department of Labor Administrative Law Judge (ALJ) on February 1, 2017, dismissing the complaint because Complainant failed to demonstrate that any protected activity was a contributing factor in Respondent's decision to terminate her employment, or in the alternative, that Respondent proved by clear and convincing evidence that it would have taken the same action absent any protected activity.

Unrelated to the substance of this complaint, Sean Lawson has moved to substitute himself as the Complainant, because Complainant (Tracie Austin), his wife, died after the ALJ issued his D. & O.

BACKGROUND³

The Respondent hired Complainant on September 3, 2007.⁴ She worked the night shift as a dispatcher for Respondent in Texas and her regular hours were from 10:30 p.m. to 6:30 a.m.⁵

² While Complainant argues that the Administrative Law Judge (ALJ) did not make any finding of fact that she engaged in protected activity under 49 U.S.C. § 20109(c)(2), it is clear from the ALJ's decision that he found that Complainant sought and received medical treatment at the hospital on the day she was injured. *See* Decision and Order (D. & O.) at 58-61 (in which the ALJ describes how Complainant sought and received medical treatment):

- (1) "Complainant was examined at First Choice ER, prescribed Norco, and was advised . . ." (*Id.* at 58),
- (2) when Complainant was at the hospital, "an x-ray of [her] lumbar spine was also administered," (*Id.* at 59),
- (3) "when Complainant sought medical treatment or followed a treatment plan." (*Id.* at 61).

The ALJ also considered Complainant's request for treatment as a protected activity in his analysis. D. & O. at 81, 82 ("The evidence demonstrably shows Complainant's reporting of a work-related injury or requesting medical treatment on October 11, 2012, did not set in motion the chain of events eventually resulting in the allegation of rules violation . . ." *Id.* at 82).

³ The Board has taken the background information from sections of the ALJ's D. & O. titled "Summary of the Evidence," "Credibility," and "Elements of FRSA Violations and Burdens of Proof." While we were able to discern the ALJ's findings of fact to a great extent from these sections, a more tightly focused findings of fact section would have aided us in our review of whether the ALJ findings of fact are supported by substantial evidence in the record. We further note that a summary of the record is not necessary as we assume that the ALJ has reviewed and considered the entire record in making his or her decision.

⁴ D. & O. at 7.

⁵ *Id.* at 7.

On October 11, 2012, Complainant slipped and fell on a puddle in the women's restroom at around 2:00 a.m. and injured her tailbone.⁶ She reported both the puddle hazard and her fall and injury to a chief dispatcher for Respondent. Joshua Stout, the chief dispatcher at the time, offered Complainant transportation by ambulance to the nearest hospital, but she refused. After informing the Respondent's supervisors, including Robert McConaughy, that she planned to seek medical care on her own, Complainant went to an urgent care facility across the street from her workplace for medical treatment. The medical providers told Complainant to stay out of work for two days and she did so, returning to work on October 13, 2012. So McConaughy, a general superintendent for transportation with Respondent and one of Complainant's supervisors, was notified about Complainant's fall and injury within twenty-four hours of its occurrence.

At the hearing, Complainant testified that Stout told her that the only way she could leave work was by ambulance. But in her deposition testimony Complainant acknowledged that he offered her medical attention but she declined because she thought it would be "ridiculous."⁷ Erin Elledge, Complainant's co-worker and friend, testified that after Complainant's fall, Complainant told her that she was okay and only had a headache.

On October 21, 2012, Elledge discovered after getting home from work that an Advil pill bottle, which contained miscellaneous medications including prescription Fiorinal, was missing from her purse.⁸ Elledge called the Respondent's police to report the Advil bottle missing, and the police reported the theft to John Davidson, the Respondent's Assistant General Superintendent on Duty. Davidson asked June Fife, the Respondent's Manager of Dispatcher Practice and Rules, to watch surveillance video taken of the area around Elledge's work space. After doing so, Fife identified Complainant taking the pill bottle from Elledge's purse. The police contacted Stout to tell him Complainant was identified taking the pill bottle. When Complainant arrived at work the next day, Stout asked her to go to the conference room for an interview about personal property missing from a dispatcher's desk area.⁹ During that interview, Complainant asked if Elledge's property was missing and the interviewers confirmed that it was. Complainant explained that she had a headache the day before, so she took Elledge's pill bottle and forgot to return it because she was very busy. She further explained that she had borrowed Advil from Elledge before. While Complainant admitted she did not tell Elledge that she took the pill bottle during their shift, she indicated that she tried to let Elledge know after work via a Facebook message the next day. Complainant called Elledge after the interview at around 10:30 p.m. to inform her that she took the pill bottle, apologize, and explain the situation.

⁶ The references in this paragraph are to D. & O. at 7, 48, 57-59, 65, and 71.

⁷ The references in this paragraph are to D. & O. at 48.

⁸ The references in this paragraph are to D. & O. at 3, 17, 26, and 29.

⁹ The references in this paragraph are to D. & O. at 6, 9, and 10.

Thereafter, Respondent's representatives interviewed Elledge about the missing medication incident.¹⁰ Elledge stated in her interview that as far as she was concerned it was a non-issue because Complainant had permission to use her medications. And Elledge said that she did not want to pursue the matter. McConaughy was present at Elledge's interview and remembered Elledge saying that while she had given Complainant permission in the past to take her medications, she had not given Complainant permission to do so on the night of the incident.¹¹

Elledge testified that she had told Complainant that she could use her (Elledge's) Advil or Aleve "anytime."¹² Elledge further testified that if she had known Complainant had taken the bottle, she would have handled the situation differently. However, she confirmed that she had never consented or allowed anyone to go in her purse or to take her Fiorinal medication.¹³ After viewing the video, Elledge testified she was not sure why Complainant hid the bottle after taking it.

The ALJ viewed the video and relied upon it in his decision.¹⁴ He wrote that the video first shows Complainant looking into Elledge's desk area while Elledge is at her desk. A short while later, Elledge leaves and Complainant again looks into Elledge's desk area. Next, Complainant leaves her desk area, stands outside of Elledge's desk area, looks around in several directions, and hesitates before going into Elledge's desk area. Complainant then looks around several times and goes into Elledge's purse and takes a bottle. She then leaves Elledge's desk area, walks away from the area, and then later returns to her own desk area. Less than two minutes later, Elledge returns to her desk area. Approximately ten minutes later the two women have a conversation in front of Complainant's desk and then sit down at their respective desks.

On October 23, 2012, the Respondent issued a Notice of Investigation.¹⁵ After several postponements, the formal investigation or hearing was conducted on November 16, 2012. The

¹⁰ The references in this paragraph are to D. & O. at 4 and 36-37.

¹¹ D. & O. at 36-37 (citing Hearing Transcript ("Tr.") at 520). The ALJ also cited Complainant's Exhibit (CX) 55, McConaughy's deposition, but this exhibit was not admitted at the hearing and is not in the record. *See* D. & O. at 2 ("the exhibits admitted into evidence on behalf of Complainant were exhibits 1-8, 9-19, 21-26, 29-32, 37, 39-47, 49-50, and 54."). We conclude that it was harmless error when the ALJ cited CX 55 as it was duplicative of McConaughy's hearing testimony for the ALJ's purposes. *See, e.g., Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001) (quoting *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979) (observing that the court will not reverse an agency action due to a mistake where that mistake "clearly had no bearing on the procedure used or the substance of decision reached.")).

¹² The references in this paragraph are to D. & O. at 3-6.

¹³ *Id.* at 5-6 (Tr. at 45).

¹⁴ The references in this paragraph are to the ALJ's D. & O. at 49-50; *see also* Respondent's Exhibit (RX) 7K.

¹⁵ The references in this paragraph are to D. & O. at 10 and 74.

Respondent's official Dennis Mead presided over the formal investigation. Complainant was called as the first witness at the formal investigation.¹⁶

At the formal investigation, Complainant testified that she would have to stand on her desk in order to see over into Elledge's work space, but the surveillance video showed that that this was not the case.¹⁷ The video showed that about ten minutes after Complainant took the pill bottle, she and Elledge met briefly outside of their desk spaces before they each sat down.¹⁸ Complainant testified that she did not take any medication from the pill bottle for thirty minutes after she took the bottle from Elledge's purse.¹⁹

At the hearing, Complainant explained that she decided to get the pills from Elledge's purse because she had "a really bad headache," but then explained that she did not take the medication for a half hour "because her headache was 'not bad enough.'"²⁰ The ALJ found the following:

- (1) Complainant waited for Elledge to leave to take the pills,²¹
- (2) Complainant was not as she stated, "too busy" to report that she took the bottle to Elledge,²²
- (3) Complainant was untruthful when she stated she did not have time to go to the "community drawer" to get medicine from it,²³ and

¹⁶ D. & O. at 74. Kevin Porter, Complainant's union representative at the formal investigation, stated that this was the first formal investigation he participated in where the charged employee initially testified. *Id.* However, Derek Cargill, the Respondent's Director of Employee Performance and Labor Relations, testified that it was not unusual for a charged employee to testify first. Moreover, the collective bargaining agreement between the Respondent and the union representing Complainant, the American Train Dispatchers Association (ATDA), does not contain a provision requiring that witnesses testify in a particular order. *Id.*

¹⁷ *Id.* at 13; RX 7K.

¹⁸ D. & O. at 13, 38.

¹⁹ *Id.* at 13.

²⁰ *Id.* at 49.

²¹ *Id.* at 50.

²² *Id.* at 51.

²³ *Id.*

- (4) Complainant was inconsistent in giving her reason for needing the medication, at one point saying she had a headache and at another saying that her back hurt.²⁴

The Respondent terminated Complainant on December 4, 2012.²⁵ McConaughey was the ultimate decision-maker in Complainant's termination. The ALJ found that McConaughey reasonably believed that the video of Complainant taking Elledge's pill bottle was determinative "because it did not depict a person who was given consent to take a co-worker's personal property."²⁶ McConaughey also relied heavily on the fact that Complainant never answered three questions he asked her repeatedly: "(1) if she needed Advil, why take the entire bottle; (2) why did she conceal her actions; and (3) why did she not tell Elledge that she took the Advil bottle[?]"²⁷ In asking Complainant these questions, he was seeking any circumstances that would explain her actions, but he never got any explanation or answers. In deciding to terminate Complainant, McConaughey believed that Complainant took Elledge's personal property without her consent and, therefore, violated Rule 1.6 of the Respondent's General Code of Operating Rules (GCOR) against dishonesty and theft.

Complainant presented evidence that she was treated differently than other workers who had violated Rule 1.6.²⁸ Her first example was a worker, D. L., who took water bottles from the Respondent's grain department and gave them to other dispatchers. No adverse action was taken against him. The second example was an employee, S.K., who secretly eavesdropped on his ex-fiancée's radio conversations at work. S.K. admitted to the eavesdropping and was fired two weeks later but was later rehired into a different job that was considered a demotion.

Finally, Complainant presented an alternative argument, contending that in finding that she also violated Rule 40.23 of the train dispatchers operations manual, which prohibits dispatchers from entering unoccupied work areas not pertinent to their work duties, Respondent treated her differently than other workers because no other worker had ever been charged with violating Rule 40.23.²⁹ Evidence showed it was, in fact, common at the Respondent's office for dispatchers to frequently enter other work areas. Robert Newlun, a senior manager, testified that the rule against entering unoccupied areas was adopted because of complaints that office equipment, like staplers, tape, and scissors, were missing from employee's desks and that Complainant was informed of the rule in her initial training.

²⁴ *Id.* at 53.

²⁵ The references in this paragraph are to D. & O. at 66, 71-73, and 80.

²⁶ *Id.* at 72.

²⁷ *Id.* at 73.

²⁸ The references in this paragraph are to D. & O. at 75-77.

²⁹ The references in this paragraph are to D. & O. at 75.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to review decisions by ALJs arising under the FRSA and issue final agency decisions.³⁰ The Board reviews the ALJ's factual determinations under the substantial evidence standard.³¹ The Board reviews an ALJ's conclusions of law de novo.³²

DISCUSSION

1. Motion to Substitute Complainant

Between the date of the hearing in this matter and the date that Complainant's petition for review was filed, Complainant died on February 1, 2017, the same day that the ALJ's D. & O. was issued. Subsequent to the filing of the petition for review, Complainant's counsel filed a notice of suggestion of death and ninety days after the filing of that notice, filed a motion to substitute Complainant Tracie Austin's putative widower, Sean Lawson, as the Complainant in this case.

The Federal Rules of Appellate Procedure allow for substitution of a party when a party dies during the pendency of an appeal.³³ Rule 43(a)(2) states that "[i]f a party entitled to appeal dies before filing a notice of appeal," "the decedent's attorney of record" "may file a notice of appeal," and after that point, pursuant to Rule 43(a)(1), "the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party." Fed. R. App. P. 43(a)(1)-(2). Sean Lawson and Complainant's attorney assert that Lawson and Complainant (Tracie Austin's) minor child are Complainant's only successors and

³⁰ 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); see 29 C.F.R. § 1982.110(a).

³¹ 29 C.F.R. § 1982.110(b). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). An ALJ's factual finding will be upheld where supported by substantial evidence even if there is also substantial evidence for the other party, and even if we "would justifiably have made a different choice had the matter been before us de novo." *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera*, 340 U.S. at 488)).

³² *Hamilton v. CSX Transp., Inc.*, ARB No. 2012-0022, ALJ No. 2010-AIR-00025, slip op. at 2 (ARB Apr. 30, 2013) (citations omitted). Specifically, the Administrative Procedure Act provides, at 5 U.S.C. § 557(b) (1976), that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision"

³³ In the absence of its own rule, the Board has customarily used principles employed by federal courts under the Federal Rules of Appellate Procedure. See *OFCCP v. Florida Hosp. of Orlando*, ARB No. 11-011, ALJ No. 2009-OFC-002, slip op. at 4 (ARB July 22, 2013) (Order Granting Motion for Reconsideration and Vacating Final Decision and Order Issued October 19, 2012).

requested that Lawson be substituted as the Complainant in this case. But Lawson's motion does not identify him as Complainant (Tracie Austin's) personal representative, nor does it identify the "minor child" or explain how the child's interest would be protected if Lawson were named as the substitute Complainant.³⁴ Thus, Lawson's motion is denied.

2. Contributing factor causation

The ALJ concluded that Complainant failed to demonstrate by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.³⁵ On appeal, Complainant does not argue that the ALJ's decision is not supported by substantial evidence. Instead, Complainant asserts that substantial evidence supports that Respondent treated Complainant differently than various other employees. The reasoning underlying this argument is that because the Respondent treated Complainant differently, it must have been discriminating against Complainant for reporting an injury at work, medical treatment, and a work hazard. But this argument misconstrues our standard of review.

The ARB reviews an ALJ's decision on the merits to determine whether substantial evidence in the record supports any factual findings. Even if there is also substantial evidence for the other party and even if we as the trier of fact might have made a different choice, the standard of review is unchanged. *See Henrich*, ARB No. 05-030, slip op. at 8. On the issue of causation, the ALJ found, after lengthy examination of the evidence and analysis, that the Respondent fired Complainant for "dishonesty and theft."³⁶ While the ALJ acknowledged that the Respondent had knowledge of Complainant's protected activity and while there is a degree of temporal proximity between the protected activity and the adverse action, the ALJ did not find these two facts determinative because of other significant facts.³⁷ The ALJ was persuaded in large part by the

³⁴ Under intestate succession law in Texas, if a married person dies without a will, the spouse of the decedent receives one-half of the couple's community property and one-third of the decedent's personal property, while the decedent's child who is not the child of the decedent's spouse inherits everything else. *See* Tex. Est. Code §§ 2001.002(b), 2001.003(c) (2014). While the Board has chosen to include a reference to Texas law by way of illustration, we do not intend to impose upon the Board or upon Administrative Law Judges any obligation to research, construe, or apply State law in this or similar matters. The preferred practice is clear that interested persons should open an estate for a deceased party and that the executor or personal representative should proceed in the interest of the estate. In this way legally sufficient documentation can be provided to the ALJ or the Board as necessary.

³⁵ D. & O. at 80-81.

³⁶ *Id.* at 81.

³⁷ *Id.* at 70, 80-81. We are cognizant of the low standard of proof commonly deemed to be sufficient to meet Complainant's burden of proof concerning the causal relationship between her protected activity and the adverse action: a contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008). That being noted, the evidence Complainant proffered on this point is not viewed in isolation – the trier of fact and this Board can consider all relevant evidence in determining whether there was a causal relationship between Complainant's protected activity and the adverse employment action alleged. *Powers v. Union Pacific R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-

testimony of McConoughy, the video, and the demeanor of Complainant as a witness, which we discuss later in this opinion.

The ALJ relied heavily upon McConaughy's testimony, whom he found credible. He found that "McConaughy had a good faith belief that Complainant had taken Elledge's personal property without consent, and thus, he genuinely believed Complainant violated GCOR Rule 1.6."³⁸ McConaughy's belief that Complainant engaged in theft was supported by the surveillance video and Elledge's testimony that Complainant did not have consent to enter her purse while she was not present.³⁹ The ALJ correctly stated that even if Complainant had sincerely believed she was not stealing, it would not change the effect of McConaughy's belief that Complainant was stealing in making his decision to terminate her employment.⁴⁰ The ALJ found that there was no pretext in the Respondent's reasons for making its decision to fire Complainant.⁴¹

The ALJ thoroughly analyzed Complainant's counter-arguments regarding disparate treatment to find the following:

- 1) that Complainant was not ambushed when the Respondent called her as the first witness at the internal hearing because it is not an uncommon practice for impeachment purposes,⁴²
- 2) that he was not persuaded by Complainant's argument of disparate treatment due to her being the only dispatcher ever charged with violating Rule 40.23 prohibiting entry into unoccupied work areas not pertinent to duties because the purpose of the rule was to prevent the same type of taking of personal property that Complainant engaged in,⁴³ and

030, slip op. at 21 (ARB Jan. 6, 2017), *aff'd*, *Powers v. U.S. Dep't of Labor*, No. 17-70676, 723 Fed. Appx. 522, 2018 IER Cases 180, 768 (9th Cir. May 22, 2018) (unpub.). Under the facts of this case and the totality of the relevant evidence, there is more than substantial evidence to support the ALJ's conclusion that Complainant's protected activity did not affect in any way the decision to terminate Complainant.

³⁸ D. & O. at 72-73.

³⁹ *Id.*

⁴⁰ *Id.* at 73.

⁴¹ *Id.* at 80-81.

⁴² *Id.* at 74-75.

⁴³ *Id.* at 75.

- 3) that the examples of other employees misconduct that Complainant cited were not similar to her case because the other employees were not accused of stealing another employee's personal property and lying about it.⁴⁴

Significantly, the ALJ found Complainant's testimony to be at times, "evasive, contradictory, inconsistent, and unpersuasive concerning the most significant factual issues" in this case.⁴⁵ He found that inconsistencies and contradictions in her testimony, as compared to that of other witness testimony, the documentary evidence, and the surveillance video, all detracted from her overall credibility and called into question her version of significant events. The ALJ detailed several of the most significant discrepancies at D. & O. at 48 to 55, to conclude that Complainant's statements "were largely incredulous and unpersuasive, and her demeanor suspicious, which significantly call[ed] into question the veracity of much of her testimony surrounding the most crucial factual issues."⁴⁶ He found that factual omissions by Complainant and her body language on the video all demonstrated that it "was unnatural, unreasonable, and improbable that Austin had Elledge's consent" to go into her purse and take her pill bottle from it.⁴⁷ As a result, and because of discrepancies between Complainant's version of events and that of her witness and work-friend, Elledge, the ALJ found that Complainant's testimony had little probative value.⁴⁸ On matters of witness credibility, especially with regard to demeanor, the ARB affords great deference to the ALJ.⁴⁹

We affirm, therefore, the ALJ's conclusion that Complainant failed to prove that protected activity was a contributing factor in any adverse action taken against her as supported by substantial evidence in the record. Thus, we need not discuss the ALJ's alternate holding that the Respondent proved by clear and convincing evidence that it would have taken the same action absent any protected activity or make any assignments of error in regard to that issue.

CONCLUSION

The ALJ's conclusion that the Complainant failed to prove by a preponderance of the evidence that any protected activity was a contributing factor to the Respondent's decision to

⁴⁴ *Id.* at 75-79.

⁴⁵ *Id.* at 47.

⁴⁶ *Id.* at 54.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Folger v. Simplexgrinnell, LLC*, ARB No. 2015-0021, ALJ No. 2013-SOX-00042, slip op. at 4 (ARB Feb. 18, 2016) ("Making credibility determinations of this sort is exactly why ALJs hold elaborate, trial-like hearings (in this case, two days long with eight testifying witnesses and over fifty exhibits) and exactly why we afford great deference to an ALJ's credibility determinations.") (citations omitted).

take action against her is supported by substantial evidence in the record and is legally correct. Accordingly, this complaint is **DISMISSED**.

SO ORDERED.
