



In the Matter of:

ANGELINA ZINN,

ARB CASE NO. 13-021

COMPLAINANT,

ALJ CASE NO. 2009-SOX-025

v.

DATE: December 17, 2013

AMERICAN COMMERCIAL LINES INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Stuart M. Nelkin, Esq. and Carol Nelkin, Esq.; *Nelkin & Nelkin, P.C.*, Houston, Texas

For the Respondent:

Stanley J. Brown, Esq.; *Hogan Lovells US LLP*, New York, New York

BEFORE: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under Section 806, the employee protection provision of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (Thomson/West Supp. 2013), and implementing regulations at 29 C.F.R. Part 1980 (2013). Angelina Zinn filed a complaint alleging that American Commercial Lines Inc. (ACL) violated the SOX when it discharged her from employment. After a hearing, a Department of Labor Administrative Law Judge (ALJ) determined that Zinn failed to show her employer violated Section 806, and dismissed her complaint. Zinn petitioned for review. On March 28, 2012, we entered an order vacating the ALJ's decision, and remanded for further proceedings. The ALJ held further briefing and on

November 19, 2012, entered a Decision and Order on Remand holding that Zinn failed to prove that ACL violated the SOX whistleblower provision. Zinn again petitioned for review. We affirm.

BACKGROUND

A. Facts

The facts set out below are taken from the ALJ's prior orders in this case.¹ ACL is a publicly-traded company with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78l, and is required to file reports under section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78o(d). ACL's business includes contracting with customers to transport various industrial products, including liquid cargo, by barges on waterways. The company uses its own tugboats or hires other tugboats to transport its barges to and from locations as required in its customer contracts. ACL hired Zinn in November 2007 as a corporate attorney in its Liquids Division in Houston, Texas. D. & O. at 3.

As part of her job, Zinn reviewed root cause analyses incident reports which detailed collision incidents involving ACL barges or barges the company hired. Zinn testified that several of the incident reports involved a tugboat vendor that ACL hired, DRD Towing, and indicated that DRD had used unlicensed personnel on their tugboats. ACL was required to vet or audit the tugboat vendors it hired to ensure that their tugboats were seaworthy and safe and that the personnel used were properly licensed, as ACL's customer contracts required. D. & O. at 8-10; Hearing Transcript (HT) at 55, 57-60, 74-75.

Zinn testified at the administrative hearing that in late April or early May 2008, she contacted supervisors Dan Jaworski, vice president of the Liquids Division, and Doug Ruschman, vice president in the legal department, to express her concerns that ACL had not properly vetted or audited DRD. Zinn stated that because ACL's annual Securities Exchange Commission Form 10-K had been reporting that ACL was upholding safety despite ACL's failure to properly vet DRD, ACL's Form 10-K may have misrepresented the fact that it was actually using unlicensed personnel. D. & O. at 10-11; HT at 79-82, 84-85.

In May 2008, ACL hired Dawn Landry as General Counsel and Senior Vice President. D. & O. at 33. Zinn testified that her supervisor, Ruschman, informed her of Landry's hiring and that ACL did not want to file a SEC Form 8-K to announce her hiring at that time because it would look like ACL had instability in its upper management. D. & O. at 12; HT at 101-104. Zinn later sent an e-mail to Ruschman on May 13, 2008, inquiring whether ACL should file a SEC Form 8-K to announce Landry's appointment, and offered to call a securities lawyer, one of her former colleagues, for advice. Ruschman replied that ACL's counsel told the company's

¹ See *Zinn v. American Commercial Lines Inc.*, ALJ No. 2009-SOX-025 (ALJ Nov. 5, 2009)(D. & O.); *Zinn v. American Commercial Lines Inc.*, ALJ No. 2009-SOX-025 (ALJ Nov. 19, 2012) (D. & O. on Rem.).

CEO that disclosure of Landry's appointment on the Form 8K was not required. Although Zinn's former colleague advised her that the appointment may be reportable, Zinn did not inform Ruschman. D. & O. at 12, 57, 61; HT at 105, 108, 111, 116, 118; Respondent's Exhibit (RX) 1-2; Complainant's Exhibit (CX) 115.

Shortly after she raised her concerns regarding ACL's failure to properly vet DRD and the representations it made on its Form 10-K, and whether the company should file a Form 8-K to announce Landry's hiring, Jaworski reduced Zinn's work responsibilities, and she was required to take a drug test. After the test came back negative, ACL subjected Zinn to increased job performance monitoring and performance standards. D. & O. at 11, 14-15; HT at 99-100, 131-134. ACL terminated Zinn's employment in July 2008 for poor job performance and insubordination. D. & O. at 11, 14-16, 37; HT at 99-100, 131-134, 144-150, 409.

B. Proceedings Below

1. ALJ November 5, 2009, Decision and Order

Following a two-day administrative hearing, the ALJ issued a Decision and Order on November 5, 2009, dismissing Zinn's complaint. The ALJ determined that Zinn failed to show that she engaged in any SOX-protected activity, and that, even if she did, she failed to show that any such activity was a contributing factor in any of the adverse employment actions she alleged. The ALJ also determined that ACL proved that it would have "taken the same adverse employment actions regardless of Zinn's engagement in protected activity." D. & O. at 67.

2. ARB March 28, 2012, Decision and Order of Remand

Zinn petitioned for review, and included exhibits that were not admitted at the administrative hearing. ACL moved to strike the exhibits.

On March 28, 2012, we entered a decision remanding the case for further proceedings.² We held that, contrary to the ALJ's holdings, the SOX whistleblower statute did not require Zinn to demonstrate a reasonable belief of fraud against shareholders, securities fraud, or an actual violation of a specific law to prove protected activity. ARB Order at 6-10, citing *Sylvester v. Paraxel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042 (ARB May 25, 2011). We also held that the ALJ used an incorrect legal standard for determining whether Zinn's alleged protected activity was a contributing factor to her termination. *See* ARB Order at 10-12. We stated that the contributing factor standard under SOX requires "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision," *id.* at 11, and that Zinn can make that showing by "providing either direct or indirect proof of contribution," *id.* at 11-12 (internal quotations and citation omitted).

² *Zinn v. American Commercial Lines, Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025 (ARB Mar. 28, 2012) (ARB Order).

We further determined that the ALJ abused his discretion by refusing to admit a Congressional Staff Report detailing an investigation of an oil spill in New Orleans that occurred on July 23, 2008, a few days after Zinn's discharge, which involved an ACL barge that a DRD tugboat was transporting with an unlicensed pilot. ARB Order at 13-15. We held that the Report was "material and relevant to the issues Zinn raised in her complaint" and that the ALJ abused his discretion by failing to admit the Report into evidence. *Id.* at 15.

3. ALJ November 19, 2012, Decision and Order on Remand

On remand, the ALJ permitted further briefing, and allowed the admission of new evidence. Zinn moved to strike the newly submitted evidence as inadmissible under 29 C.F.R. § 18.54, and, alternatively, immaterial to issues in the case. After further briefing on remand, the ALJ entered a decision on November 19, 2012. The ALJ admitted the disputed evidence as "material to the issue of credibility," but the ALJ "place[d] little to no value on [the] evidence." D. & O. on Rem. at 5. On the merits, the ALJ held again that Zinn failed to prove a SOX violation, and that in any event ACL proved by clear and convincing evidence that it would have terminated Zinn's employment even absent any protected activity. D. & O. on Rem. at 25.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board authority to issue final agency decisions under the SOX. 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 also* 29 C.F.R. § 1980.110. The ARB reviews the ALJ's factual findings for substantial evidence, and legal conclusions de novo. 29 C.F.R. § 1980.110(b); *Getman v. Sw. Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

DISCUSSION

A. The ALJ was within his discretion to reopen the record on remand, but in this case if the ALJ erred in admitting new evidence, any such error was harmless

Zinn argues that the ALJ abused his discretion by permitting new evidence on remand. (Zinn's Appeal Brief (Br.) at 13). There was no abuse of discretion.

On remand, the ALJ issued an order "allowing the parties to file any new relevant evidence" and required further briefing on the issues presented on remand. D. & O. on Rem. at 4. Zinn argues that 29 C.F.R. § 18.54(c) precluded the ALJ from reopening the record on remand. This reliance is misplaced. The regulation reads: "When there is a hearing, the record shall be closed unless the [ALJ] directs otherwise." 29 C.F.R. § 18.54(a). Here the ALJ was well within his discretion to reopen the record on remand for the submission of additional pertinent evidence that was relevant to the issues raised in the ARB's remand order.

Zinn contends that the new evidence admitted into the record on remand was not relevant or material to the whistleblower case. (Br. at 15-17). Zinn moved below to strike the submission of additional evidence related to a misdemeanor charge relating to a false police report after her 2008 termination from ACL, and a document relating to her previous employment as improper. An ALJ's evidentiary rulings are reviewed for abuse of discretion. *Baiju v. Fifth Ave, Comm.*, ARB No. 10-094, ALJ No. 2009-LCA-045, slip op. at 5 (ARB Mar. 30, 2012). The ALJ was well within his discretion to admit the new evidence. The ALJ stated that the issue was material to her credibility, but he placed "little to no value on [the] evidence." D. & O. on Rem. at 5.

While Zinn challenges the ALJ's admission of new evidence on remand, any error was harmless. The harmless error determination is "highly sensitive to the unique context of the particular case, including the one-sided or closely-balanced nature of the evidence." *Malek v. Fed. Ins. Co.*, 994 F.2d 49, 55 (2d Cir. 1993) (internal quotations omitted). To find that erroneously admitted evidence was harmless, a court is "not required to conclude that it could not have had any effect whatever." *United States v. Rea*, 958 F.2d 1206, 1220 (2d Cir. 1992). Instead, it is sufficient if the evidence at issue was "unimportant" relative to "everything else . . . considered on the issue in question." *Id.* (quoting *Yates v. Evatt*, 500 U.S. 391, 403 (1991)). Here, the ALJ's admission of the misdemeanor evidence, and evidence of her prior employment, was harmless because the ALJ placed little to no value on that evidence, at least with respect to assessing whether ACL showed clear and convincing evidence that it would have terminated Zinn even absent any protected activity. *See, e.g., Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 765 (9th Cir. 1986) (agency may rely on harmless error rule when its mistake does not affect the result). This dispositive aspect of the ALJ's decision instead relies predominantly on employee e-mails during Zinn's employment period, Zinn's testimony, and testimony of other witnesses. *See infra* at 5-9.

B. Substantial evidence fully supports the ALJ's determination that there is clear and convincing evidence that ACL would have discharged Zinn even absent any protected activity

To prevail in a SOX proceeding, an employee must prove by a preponderance of the evidence that she: "(1) engaged in activity or conduct that the SOX protects; (2) the respondent took an unfavorable personnel action against . . . [her]; and (3) the protected activity was a contributing factor in the adverse personnel action." *Sylvester*, ARB No. 07-123, slip op. at 10. If the employee proves these elements, the employer may avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of the protected] behavior." 29 C.F.R. § 1980.104(c); *see also Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003; ALJ No. 2007-SOX-005, slip op. at 11 (ARB Sept. 13, 2011).

Zinn challenges the ALJ's rulings on protected activity and causation. The ALJ determined that the temporal proximity of Zinn's alleged protected activity to her termination might have been sufficient to support a finding of causation. D. & O. on Rem. at 20, 24. The ALJ nonetheless determined that there were other bases "for each of the personnel actions taken by [ACL]," and because of these bases Zinn failed to prove causation. *Id.* at 24-25. For purposes of resolving this case, however, we will assume, without deciding, that Zinn proved

that she engaged in protected activity that contributed to adverse action that ACL took against her. On remand, the ALJ determined that ACL “satisfied its burden of rebuttal by showing through clear and convincing evidence that it would have taken the same adverse employment action regardless of [Zinn’s] engagement in protected activity.” *Id.* at 25. The ALJ’s clear and convincing evidence determination was based on the following findings:

Her work was reduced because she requested a reduction. She was administered a drug test because she exhibited signs of being “under the influence” as defined by Respondent’s drug policy. Landry monitored her after the negative drug test to encourage a greater performance. Finally, Complainant’s employment was ultimately terminated because of direct insubordination to senior vice president and general counsel Dawn Landry.

Id. There is substantial evidence in the record to fully support that determination.

The record shows that Zinn’s performance problems began after her mother died suddenly in December 2007 when a hair dryer exploded in her hand and caused a house fire. *See* RX 3 at 1; Letter from Zinn to ACL CEO Michael Ryan, dated July 1, 2008; *see also* HT at 125-126. Zinn had a history of depression. HT at 126-127. In June 2008, a few months after her mother’s death, and when her family’s insurance company had not yet closed the case, Zinn learned that her mother had been burned alive because she had hit her head after the blow dryer exploded, and she was unconscious when the fire started in the home. HT at 126. Zinn learned that “the reason . . . AllState hadn’t closed [the case] is because four other people had died under very similar circumstances with the same dryer.” *Id.* The information “reopened the . . . whole tragedy [for Zinn] all over again.” *Id.* Zinn informed Jaworski about the faulty hair dryer, and sought further professional help. *Id.* at 126-127. Zinn was prescribed Klonopin by her doctor. *See* RX 3 at 1; HT at 128. Klonopin is used to prevent and control seizures, and to treat panic attacks. RX 10 at 3.

Zinn continued to take the Klonopin, and “suffered the following side effects: drowsiness, dizziness, blurred vision, weight change, loss of coordination, slurred speech, and severe dizziness.” HT at 128; *see also* RX 10 at 2-3. Zinn told her supervisor, Jaworski, about the medication she was taking, but asked that he not tell anyone in the office. HT at 129. Zinn testified that she told Sharon Brooks, head of Human Resources at the Houston Office, about the medicine the doctor prescribed for her. Zinn stated that Brooks responded: “[I]sn’t six months enough time to get over a death?” HT at 130. Zinn testified that four days later, Brooks informed her that she had to be drug tested. Zinn was tested that day, and the testing was negative for illegal substances. HT at 133.

First, there is substantial evidence to support the ALJ’s finding that Zinn’s work on projects was reduced because she requested the reduction, not due to any initial action by the company. D. & O. on Rem. at 25. On June 20, 2008, Zinn wrote an e-mail to Jaworski informing him that she understood that her “productivity is down and [she] need[s] some time to [her]self.” RX 4 at 1. In the e-mail, Zinn told Jaworski:

I am burned out and a few less products [or projects] would be great. And, as the Company hired outside counsel specifically with the issues, I have to face the facts. And, I would never want your productivity/reputation brought down by mine. I apologize for overeating [sic]. And, going forward, I will support anything anyone does/does not put me on. I will not complain or be upset anymore, things always happen for a reason.

Id.; see also HT at 188. Zinn testified that there were problems with delays in her work on the Ineos Nova contract, which she had worked on for months, HT at 188-189, and that her emotional condition affected her ability to complete a short-term contract project during a weekend, HT at 189-190.

Second, substantial evidence supports the ALJ's finding that Zinn was administered a drug test because she showed signs of being under the influence as defined by the company's drug policy. D. & O. on Rem. at 25. The company's drug policy states:

No employee will be permitted to work while under the influence of illegal or controlled drugs or alcohol or when illegal or controlled drugs or alcohol are present in the employee's system. The company will test employees for drug or alcohol use under certain circumstances, report the results of those tests, and take corrective action as needed. . . . For the purpose of this Policy, "under the influence" means that an employee's conduct as demonstrated by physical, behavioral, or performance indicators suggest probable use of alcohol or drugs.

RX 95 at 2. On cross-examination, Zinn admitted that her speech was slurred in conversation with other ACL employees. HT at 195. Landry testified that she observed Zinn's unusual behavior. HT at 385 ("she was slurring her words, and she was . . . just didn't seem very coherent, she was not focused at all. It seemed hard for her to put words together in a complete sentence."). Zinn further admitted that her reaction to prescription medication caused people to think that she was on drugs or alcohol. HT at 195-197. Zinn admitted that a company should be concerned when an in-house lawyer appears to be confused and has slurred speech. HT at 198. Based on Landry's observations of Zinn, she asked Brooks to require that Zinn take a drug test. HT at 387-388. Zinn had not told Landry about the medication that her doctor prescribed. HT at 390 (Landry); HT at 134 (Zinn).

Third, substantial evidence supports the ALJ's finding that after the negative drug testing, Landry monitored Zinn's work productivity because she had been falling behind. D. & O. on Rem. at 25. Landry testified that after the negative drug test results, Zinn returned to work. HT at 393. After Zinn's return, Jaworski informed Landry that Zinn's projects were falling behind, and the company had to "move the workload around a little bit." HT at 394. She testified that the company "move[d] the O'Rourke deal from her plate to Brooke so that we could try to get it

done.” *Id.* Landry also testified that the “Ineos Nova contract took weeks, and it was actually a fairly short contract, and I know that folks had a hard time getting that finished.” *Id.*

Finally, substantial evidence supports the ALJ’s determination that Zinn’s termination was due to insubordination directed at Landry, and her failure to complete work for a meeting in Indiana. The sequence of communications that led to Zinn’s termination is set out in a series of e-mails between her and Landry. *See* D. & O. on Rem. at 23; RX 18 at 1-7; *see also* HT at 397-405 (discussing the sequence of events leading to Zinn’s refusal to do work and attend the Indiana meeting).

As the ALJ explained on remand, Zinn was scheduled to travel to Indiana on Tuesday July 8, 2008, for a department meeting with Landry and the company’s legal team. D. & O. on Rem. at 23. Her flight was scheduled for 10:30 a.m. that morning, and she would arrive in Indiana at 1:52 p.m. *Id.* The department meeting was scheduled for the next day, Wednesday July 9. *Id.* (citing RX 18 at 1 (*see* Landry’s July 8, 2008, 7:52 a.m. e-mail)). Landry asked Zinn to put together a strawman for contracts issues, check lists, and form clauses. *Id.* Landry stated that “[t]hese will be different for various types of contracts, but it will be helpful to have something to start with.” *Id.* Zinn responded at 8:02 a.m. that she “never realized this was what you wanted. I wish I knew this sooner.” *Id.* Zinn e-mailed again 8 minutes later, at 8:10 a.m.: “I am shocked. This is not what we talked about. I’m about to get on a plane and this is what you send me? Should I even come?” RX 18 at 2. Later that afternoon, at 12:42 p.m., Landry sent Zinn the dial-in number for the Wednesday meeting. RX 18 at 3. Zinn responded at 12:53 p.m., “Is this a joke? If so, I do not find it funny and frankly it’s slightly abusive.” *Id.* Landry e-mailed Zinn at 1:04 p.m.: “No Angelina, I am not canceling our meetings. We’ve put together a schedule for good discussions on important topics for the department. You are part of the legal department and I expect you to participate. I understand that you decided not to come to Jeffersonville, so I have provided a dial in number.” RX 18 at 4. Zinn responded to Landry at 1:20 p.m.: “You don’t understand the severity of this. I’m done with the way you break all the rules. I can’t respect you.” RX 18 at 5. Zinn again e-mailed Landry at 1:58 p.m., stating: “I’m sorry, I’m taking time off. I’m drained from today and I need time to think about things. It’s not a good idea for me to be around work under the conditions.” RX 18 at 7; *see also* D. & O. on Rem. at 23-24 (detailing e-mail exchange between Landry and Zinn regarding July 8, 2008, meeting in Indiana). Based on this discourse, ACL terminated Zinn’s employment.

Zinn argues that this evidence is not clear and convincing because it partially stems from Landry’s testimony, which the ALJ determined in the November 5, 2009, Decision and Order reflected a lack of credibility. (Br. at 29). This argument fails for two reasons:

First, the ALJ’s statements as to Landry’s credibility center on when Landry became aware of Zinn’s use of her anti-anxiety medication, and whether Zinn volunteered for a drug test, as Landry testified, or was required to submit to a drug test by the company. D. & O. on Rem. at 27. The ALJ’s questioning of Landry’s credibility did not relate to testimony concerning the quality of Zinn’s work, Zinn’s decreasing productivity, or the veracity of the July 8, 2008, e-mail chain – facts that led to Zinn’s termination. Moreover, Zinn admitted that she suffered from

slurred speech at work, and that it was reasonable to require that she be tested for drugs given her behavior at the office. *Supra* at 7.

Second, the ALJ relied on the July 8, 2008, e-mail chain between Landry and Zinn as evidentiary support for the determination that ACL would have terminated Zinn in any event due to her refusal to complete the strawman on contract issues, and attend the July 9 legal department meeting. The e-mail chain is substantial evidence that Zinn “was ultimately terminated because of direct insubordination to senior vice president and general counsel Dawn Landry.” D. & O. on Rem. at 25.

CONCLUSION

For the foregoing reasons, the ALJ’s Decision and Order on Remand dismissing the complaint is **AFFIRMED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge