U.S. Department of Labor

Administrative Review Board
200 Constitution Ave., N.W.
Washington, DC 20210

In the Matter of:

KEITH J. FOLGER, **ARB NO. 15-021**

COMPLAINANT, **ALJ NO. 2013-SOX-042**

v. **DATE: February 18, 2016**

SIMPLEXGRINNELL, LLC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Daniel J. Hurson, Esq.; *Law Offices of Daniel J. Hurson, LLC,* Washington, District of Columbia

For the Respondent:
John B. Flood, Esq.; Denise E. Giraudo, Esq.; *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*; Washington, District of Columbia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Anuj C. Desai, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Keith Folger filed a complaint with the Occupational Safety and Health Administration (OSHA) against his former employer, SimplexGrinnell, LLC (Simplex), after Simplex terminated his employment. Folger claimed that he had reported violations of the Sarbanes-

Oxley Act of 2002 (SOX) to Simplex and that Simplex then fired him in retaliation, thereby violating SOX's whistleblower provision.[1] Because the only issues raised on appeal involve factual disputes and because the record, when viewed in its entirety, contains substantial evidence to support the Administrative Law Judge's (ALJ) determination that Folger's SOX allegations played no role in the decision to terminate his employment, we summarily affirm the ALJ's decision to dismiss Folger's complaint.[2]

DISCUSSION

To prevail on his SOX whistleblower complaint, Folger must prove by a preponderance of the evidence that (1) he engaged in activity or conduct that SOX protects; (2) Simplex took some adverse personnel action against him; and (3) Folger's protected activity was a contributing factor in Simplex's adverse personnel action.[3] If Folger fails to prove any of these elements, his

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[1] 18 U.S.C. § 1514A (2012).

[2] Decision and Order (D. & O.) at 47-48. Because our conclusion on this issue is sufficient to affirm the ALJ's order to dismiss, we make no determinations on any of the other issues raised on appeal. Therefore, other than our conclusion on this issue, our affirmance of the order dismissing Folger's complaint should not be viewed as agreeing with, or adopting, anything in the ALJ's D. & O.

[3] *See Stewart v. Lockheed Martin Aeronautics, Co.*, ARB No. 14-033, ALJ No. 2013-SOX-019 (ARB Sept. 10, 2015). The ALJ and the parties cite four prongs, tracking the requirements necessary to raise an inference for an OSHA investigation, with the employer's "knowledge" as a separate requirement. *See* 29 C.F.R. § 1980.104(e) (2015). Courts have at times also described the law as having four requirements. *See, e.g., Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 259 (5th Cir. 2014). We avoid that formulation here. For one, the statute does not include any explicit knowledge requirement, *see* 18 U.S.C. § 1514A; *see also* 49 U.S.C. § 42121 (2012), although it might be implicit in the causation requirement, *see* 18 U.S.C. § 1514A(a) (violation only if adverse personnel action taken "because of" whistleblowing); 49 U.S.C. § 42121(b)(2)(B)(iii) (violation only if complainant establishes that whistleblowing was a "contributing factor" in adverse personnel action). Second, there are times when the complainant need not show that the ultimate decision maker in fact had knowledge of the protected activity. *See, e.g., Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 24, 2011) (under the whistleblower provisions of the Energy Reorganization Act (ERA), knowledge of the protected activity on the part of an individual who has some influence on the ultimate decision maker can suffice to satisfy the complainant's burden to show the protected activity was "a contributing factor" in the adverse personnel action, even if the ultimate decision maker had no knowledge of the protected activity); *cf. also Staub v. Proctor, Hosp.*, 562 U.S. 411 (2011) (similarly interpreting Uniformed Services Employment and Reemployment Rights Act, a law prohibiting employment discrimination "on the basis of" membership in, or obligation to perform services, for a uniformed service).

whistleblower complaint must be dismissed. The parties do not dispute that Folger engaged in protected activity—he complained to co-workers and some supervisors about alleged financial shenanigans at Simplex—and that he suffered an adverse personnel action—Simplex required him to participate in a company-sponsored counseling program and then fired him when he refused. Though they do dispute the question of Simplex's constructive knowledge of Folger's protected activity, the only issue we need address on appeal is whether Folger's protected activity was a contributing factor in the adverse personnel action.

Folger argues that "the record is sufficient to raise an inference that [his] protected activity was likely a contributing factor in the unfavorable employment action by Simplex." That argument, however, misstates the standard on appeal. On appeal, we review the ALJ's factual findings for substantial evidence.[4] It is irrelevant whether the record is "sufficient to raise an inference" in Folger's favor. After an ALJ has made factual findings, the question is simply whether, when viewing the record as a whole, there is substantial evidence to support those findings. Thus, Folger needs to show not that the record is "sufficient to raise an inference" in his favor, as he argues, but instead that the record is *insufficient* to support the ALJ's finding that Folger's protected activity was not a contributing factor in his termination.[5] Here, the record contains plenty of evidence to support the ALJ's finding that Folger's protected activity was not a contributing factor.

First, there was no evidence that any of the decision makers involved in Folger's termination even knew that he had engaged in any protected activity.[6] Folger himself conceded

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[4] *See* 29 C.F.R. § 1980.110(b) (2015).

[5] *Henrich v. Ecolab, Inc*., ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)) (noting that the ARB will uphold an ALJ's factual finding 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.").

[6] D. & O. at 42. The ALJ concluded that Simplex had neither actual nor constructive knowledge of Folger's protected activity. Although we conclude that the ALJ had substantial evidence (in fact, as best we can tell, *all* the evidence) to support her finding that Simplex had no *actual* knowledge, we make no conclusion on the question of constructive knowledge. The ALJ's decision wrongly assumed that a lack of evidence of *actual* knowledge suffices to demonstrate lack of *constructive* knowledge, *see* D. & O. at 42, and the parties seem to conflate the two questions as well. Constructive knowledge is a "should have known" standard, not a "did know" standard. *See* BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "constructive" as "legally imputed; existing by virtue of legal fiction *though not existing in fact*" (emphasis added)). Constructive knowledge is a legal determination, not a factual determination, and so evidence about lack of actual knowledge is insufficient for establishing whether Simplex had constructive knowledge. Because we conclude that the record contains substantial evidence to sustain the ALJ's finding that Folger's protected activity

as much: he had not shared his fraud allegations with anyone involved in the decision to fire him, and he could point to nothing indicating when or how any of them would have learned of his protected activity either.

Second, the record contains sufficient evidence for the ALJ to have believed Simplex's non-retaliatory reasons for the termination: the record contained evidence that Folger was experiencing stress and had seriously threatened a co-worker; that almost immediately after the threats (three business days later), Simplex required him, as a condition of continued employment, to participate in a free and confidential counseling program operated by Aetna; that Simplex has a policy against workplace violence and had required other employees who had shown similar tendencies to participate in the same counseling program; that Folger refused to participate in the counseling program; and that it was only after his refusal, about three weeks later, that Simplex terminated his employment. On appeal, Folger questions many of the ALJ's factual findings; he wrongly assumes, however, that it is our job to determine the facts. For example, he claims that the co-worker who accused him of threatening behavior lied under oath to divert attention from her own wrongdoing. But the ALJ found that Folger's attempt to cast his co-worker "as the villain was sheer speculation" and that his claim that she perjured herself was a "scandalous accusation . . . based on nothing but Mr. Folger's imagination."[7] 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.[8] To reject Folger's argument, we need not—and we do not—conclude that the ALJ was correct, only that there was sufficient evidence to support her findings.

Third, the record contains sufficient evidence to sustain the ALJ's finding that the full timeline of all relevant facts undermined, rather than supported, any causal connection between Folger's protected activity and Simplex's actions. It is undisputed that Folger had been making

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was not a contributing factor in his termination, we need not make any determination about whether Simplex should have known, as a matter of law, about Folger's protected activity.

[7] D. & O. at 43-44.

[8] *See Johnson v. Wellpoint Cos.*, ARB No. 11-035, ALJ No. 2010-SOX-038, slip op. at 10 (ARB Feb. 25, 2013) ("An ALJ is afforded great deference in assessing credibility of witnesses."); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 14 (ARB Aug. 29, 2014) ("We treat even more carefully the ALJ's credibility determinations based on demeanor and overturn such findings only if they conflict with a clear preponderance of the evidence or are inherently incredible or patently unreasonable." (internal citations and quotation marks omitted)); *Chen v. Dana Farber Cancer Inst.*, ARB No. 09-058, ALJ No. 2006-ERA-009, slip op. at 9 (ARB Mar. 31, 2011) ("The ARB generally defers to an ALJ's credibility determinations, unless they are inherently incredible or patently unreasonable, because the ALJ, unlike the ARB, observes witness demeanor in the course of the hearing." (internal citations and quotation marks omitted)).

allegations of "book cooking" as far back as 2006, five years before his October 2011 termination, and that he nonetheless continued to get "exceedingly positive evaluations" in 2007 and 2009, i.e., for years after his protected activity began.[9] The ALJ concluded that these facts overcame any inference that there was a temporal proximity between his protected activity and his termination. Why, she reasoned, would Simplex have waited five years to fire him?[10] Folger does not dispute this—in fact, he testified to just that—but his theory is that he made more allegations in 2010 and 2011, and that these were much more serious and thus "an entirely different situation." There is some evidence to support Folger's view, but all of it comes from Folger himself, some of it is hearsay, and the evidence of exactly when this alleged protected activity occurred is vague. Moreover, given that the ALJ found that the first step in his termination—the requirement that he participate in the counseling program—was a mere three business days after he threatened a co-worker, the record obviously contains sufficient evidence of a plausible intervening non-retaliatory cause.[11] At best, Folger's theory raises a factual dispute about whether there was in fact temporal proximity between his protected activity and the adverse personnel action, but a factual dispute is insufficient to overturn an ALJ's findings of fact. Even if we were to assume some temporal proximity, an "inference" created by temporal proximity is just that, an inference. It is not, by itself and as a matter of law, conclusive evidence sufficient to meet Folger's burden to show that his protected activity was in fact a contributing factor in his termination.[12] The ALJ found that Folger's claim of temporal proximity was "unconvincing,"[13] and there is substantial evidence to support that finding.

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[9] *See, e.g., Moticka v. Weck Closure Sys.*, 183 F. App'x 343, 353 (4th Cir. 2006) (noting that when an employee received favorable treatment after the alleged protected activity, "the inference of retaliatory motive [was] undercut"); *cf. also Ameen v. Merck & Co., Inc.*, 226 F. App'x 363, 376 (5th Cir. 2007) (finding that employee's receipt of "favorable treatment," including positive reviews after the alleged protected activity is "utterly inconsistent with an inference of retaliation").

[10] *See, e.g., Wiest v. Tyco Elecs. Corp.*, ___ F.3d ___ , ___ , 2016 WL 386088, *11 (3d Cir. 2016) (noting that ten-month gap between protected activity and adverse personnel action meant that "any inference of causation gleaned from temporal proximity [was] minimal" and further citing *Riddle v. First Tenn. Bank*, 497 F. App'x 588, 596 (6th Cir. 2012) (finding four-month gap insufficient to infer causation); *Miller v. Stifel, Nicolaus & Co.*, 812 F. Supp. 2d 975, 988-89 (D. Minn. 2011) (finding eight-month gap insufficient to infer causation)).

[11] *See, e.g., Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 348-49 (4th Cir. 2014) (noting that "[t]he causal connection may be severed by the passage of a significant amount of time, or by some legitimate intervening event").

[12] *See Robinson v. Northwest Airlines*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005) ("While an inference of discrimination may arise when the adverse action closely follows protected activity, temporal proximity is not always dispositive."); *see also Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13-14 (ARB Jan 31, 2006) (noting that "[t]emporal proximity between protected activity and adverse personnel action 'normally' will satisfy the burden of *making a prima facie showing* of knowledge and causation," but

In short, the record contains substantial evidence supporting the ALJ's finding that Folger's protected activity was not a contributing factor in Simplex's decision to terminate his employment. We emphasize that our decision is based on the standard of review. We make no determination about the facts, concluding only that substantial evidence supports the ALJ's findings. She may have overstated it when she wrote that there was "*no* evidence, direct or circumstantial" connecting Folger's protected activity and any adverse action,[14] since, as Folger points out on appeal, there arguably was some circumstantial evidence. But all of it came from Folger, and some of it was hearsay; as the fact-finder, the ALJ was entitled to disbelieve it.

CONCLUSION

Substantial evidence supports the ALJ's finding that Folger's protected activity was not a contributing factor in Simplex's decision to require him to participate in a company-sponsored counseling program and then, when he refused, to fire him. Accordingly, we **AFFIRM** the ALJ's order dismissing Folger's complaint.

SO ORDERED.

ANUJ C. DESAI
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

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then distinguishing between the prima facie case necessary at the investigation stage and the burden of proof at the hearing stage (emphasis added)).

[13] D. & O. at 45.

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