U.S. Department of Labor

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

In the Matter of:

HERIBERTO LATIGO, **ARB NO. 16-076**

COMPLAINANT, **ALJ NO. 2015-SOX-031**

v. **DATE: March 8, 2018**

ENI TRADING & SHIPPING,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Heriberto Latigo, *pro se*; Houston, Texas

For the Respondent:
Kate L. Birenbaum, Esq.; *Seyfarth Shaw, LLP*, Houston, Texas

Before: Joanne Royce, *Administrative Appeals Judge* and Leonard J. Howie III, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Heriberto Latigo filed a complaint with the Occupational Safety and Health Administration (OSHA) against his former employer, ENI Trading & Shipping (ETS), after ETS suspended and later terminated his employment. Latigo claimed that he had reported violations of the Sarbanes-Oxley Act of 2002 (SOX) to ETS and that ETS then fired him in retaliation, thereby violating SOX's whistleblower provisions. 18 U.S.C.A. § 1514A (Thomson Reuters 2015). OSHA dismissed his claim, and Latigo filed objections with the Office of Administrative

Law Judges requesting a hearing. The Administrative Law Judge (ALJ) assigned to the case granted ETS's motion for summary decision, finding that there was no genuine issue of material fact to warrant a hearing. ETS appealed to the Administrative Review Board (ARB or Board), and we affirm the ALJ's order.[1]

ETS hired Latigo in June 2013 as a trading analyst analyzing and reconciling crude oil production volumes and sales. On October 8, 2014, Latigo sent an email to his supervisor, Christian Schutz, asking to speak with him about a discrepancy between the oil volume measured and the amount invoiced to third parties. Latigo observed that the missing amount was not accounted for in ETS's profit and loss statement, and that profits were overstated. Schutz responded about a week later thanking Latigo for the observation and clarifying that the volume imbalance had been accruing as a future payable. Thus, the amounts were not in the profit and loss statement but there was no unaccounted-for discrepancy.

In October 2014, an employee notified ETS that Latigo had been blackmailing and harassing a female co-worker, who had attempted suicide because of the harassment. Decision & Order (D. & O.) at 2 n.3. ETS's President Giorgio Mari suspended Latigo on October 22, 2014. ETS hired outside counsel to investigate the issue. On October 25, outside counsel concluded that Latigo had behaved inappropriately by harassing a female co-worker. Outside counsel recommended terminating Latigo's employment and not allowing him to return to work. Mot. for Summ. Dec., Att. 1 to Ex. D. Latigo's behavior was corroborated by witness statements and documents. Based on this information, ETS fired Latigo on about November 19, 2014.

Latigo filed his complaint with OSHA on or about March 31, 2015. OSHA dismissed his complaint on August 25, 2015. Latigo filed objections, and the case was assigned to an ALJ. Before the ALJ, ETS moved for summary decision on April 12, 2016, alleging that Latigo failed to put forth facts showing a genuine issue of material fact sufficient to warrant a hearing. For those matters where Latigo bears a burden of proof, ETS claims that Latigo has not made a prima facie case that he engaged in protected activity or that such activity contributed to his discharge. ETS claims, assuming arguendo that Latigo avoided summary decision on the elements where he

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[1] The Secretary of Labor has delegated authority to issue final agency decisions under the SOX to the ARB. *See* 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); 29 C.F.R. Part 1980 (2017). The ARB reviews an ALJ's grant of summary decision de novo, applying the same standard that ALJ's employ under 29 C.F.R. Part 18. *Siemaszko v. FirstEnergy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012). Pursuant to 29 C.F.R. § 18.72 (2017), an ALJ may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. In assessing this summary decision, we view the evidence, along with all reasonable inferences, in the light most favorable to the non-moving party.

bears a burden, that it has provided sufficient evidence to carry its affirmative defense and that Latigo has not provided rebuttal evidence to generate a genuine issue of material fact.

Latigo responded to ETS's motion for summary decision by stating that the female co-worker and ETS were colluding and hacked his computer to prevent Latigo from reporting ETS to OSHA and federal securities authorities.

ETS counters that Latigo's response to its motion for summary decision fails to identify competent evidence that Latigo engaged in protected activity or that protected activity contributed to his suspension and discharge. Instead, Latigo answered ETS's motion with conspiracy theory and allegations of collusion between federal authorities and ETS's counsel.

On June 15, 2016, the ALJ granted ETS's motion. The ALJ agreed with ETS that Latigo has not satisfied its burden to rebut ETS's motion for summary decision. The ALJ noted that nonmoving parties cannot rely on conclusory allegations to create a genuine issue of material fact. Nonmoving parties must do more than recite mere allegations to avoid summary decision. The ALJ concluded that Latigo failed to generate a genuine issue of material fact on protected activity or contributing factor. Assuming for the sake of argument that Latigo had demonstrated a prima facie case, the ALJ also held that ETS had demonstrated that there was no genuine issue of material fact that it would have terminated him even if he had not engaged in protected activity.

CONCLUSION

Having reviewed the evidentiary record as a whole, and upon consideration of the parties' briefs on appeal, we conclude that the ALJ's granting summary decision in favor of ETS on the issue of ETS's affirmative defense is supported by the record.[2] None of Latigo's arguments demonstrate that the ALJ abused his discretion or that any alleged erroneous rulings preclude affirming the ALJ's award of summary judgment. We agree with the ALJ's finding that "Complainant did not provide any affidavits, sworn statements, or other admissible evidence" to rebut the clear and convincing evidence ETS adduced in support of its affirmative defense.[3] ETS

[2] While we affirm the ALJ's dismissal of Latigo's claim, we do not endorse every legal issue in the ALJ's analysis. We explicitly make no determination with respect to the ALJ's causation or protected activity analysis.

[3] Order Granting Motion for Summary Decision at 12.

successfully showed that there is no genuine issue of material fact that it would have terminated Latigo even if he had not engaged in protected activity.[4] Accordingly, we summarily affirm the ALJ's dismissal of Latigo's complaint.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge

[4] *Bozeman v. Per-Se Tech., Inc.*, 456 F. Supp. 2d 1282, 1360-61 (N.D. Ga. 2006) (assuming arguendo that complainant made out a prima facie case, summary judgment proper where employer would have taken the same action even if the employee had not engaged in protected activity).