U.S. Department of Labor

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

In the Matter of:

MICHAEL MADONIA,

COMPLAINANT,

v.

DOMINICK'S FINER FOOD, INC.,

and

MAVO LEASING, INC.,

RESPONDENTS.

ARB CASE NO. 00-003

ALJ CASE NO. 98-STA-2

DATE: July 26, 2002

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Michael Madonia, *pro se*

For Respondent Dominick's Finer Food, Inc.:
Paul F. Gleeson, Esq., James E. Bayles, Jr.,
Vedder, Price, Kaufman & Kammholz, Chicago, Illinois

For Respondent Mavo Leasing, Inc.:
Anthony S. Graefe, Esq., *Anthony S. Graefe & Associates*

FINAL DECISION AND ORDER

Complainant Michael Madonia alleged that his employers violated the employee protection provisions of the Surface Transportation Assistance Act ("STAA") of 1982, 49 U.S.C.A. § 31105 (West 1996). STAA prohibits employers in the motor transportation industry from discharging employees in retaliation for filing complaints alleging that the employer is not complying with applicable safety standards. 49 U.S.C.A. § 31105(a)(1)(A). In his 1999 Recommended Decision and Order on Remand, the ALJ recommended dismissal of Madonia's complaint against Dominick's Finer Foods, Inc., and Mavo Leasing, Inc. We agree with the ALJ's recommendation and dismiss this case.

PROCEDURAL HISTORY

Michael Madonia was employed by Mavo Leasing, Inc., and leased to Dominick's Finer Foods, Inc. (collectively referred to as "Respondents"),[1] to work as a truck driver until August 25, 1997, when Respondents terminated his employment. Madonia filed a complaint with the Secretary of Labor alleging that his employment was terminated in violation of STAA. The Department of Labor's Occupational Safety and Health Administration ("OSHA") investigated the complaint and determined that it was without merit. Madonia objected to OSHA's determination and requested a formal hearing before an ALJ; a two-day hearing was held in February 1998.

On October 5, 1998, the ALJ issued a Recommended Decision and Order ("1998 Rec. Dec.") finding that the termination of Madonia's employment violated STAA, and ordering Respondents to reinstate him as a truck driver. The ARB issued a notice of review[2] on October 15, 1998, but two weeks later, Respondents moved the Board to remand the case to the ALJ for reconsideration in light of new evidence. By Order of January 29, 1999, the ARB remanded the case, requesting the ALJ to admit the new evidence and to reconsider his decision in light thereof.

On April 13, 1999, in a one-day supplemental hearing, the ALJ reviewed and admitted the new evidence, and on October 29, 1999, issued a Recommended Decision and Order on Remand ("1999 Rec. Dec."), finding no violation and recommending that Madonia's complaint be dismissed. On November 5, 1999, the Board again issued a notice of review of the Madonia matter.

FACTUAL BACKGROUND

Beginning in 1986, Michael Madonia was employed as a truck driver for Dominick's Finer Foods, a grocery business headquartered in Northlake, Illinois. Mavo Exhs. 13, 13a;[3] Tr. I at 28, 32; 1998 Rec. Dec. at 2. Respondents fired him twice: in November 1996 and in August 1997. Compl. Exhs. 6, 15; 1998 Rec. Dec. at 4, 8. In 1996 he was fired because he started a fight with a fellow employee. Tr. I at 170-172; Dom. Exh. 1; 1998 Rec. Dec. at 4. Madonia grieved his termination, and at a November 1996 grievance meeting with company and union officials, Madonia broke down and cried. Tr. I at 176; 1998 Rec. Dec. at 4. After a private discussion with Madonia, the union officials told the company officials that Madonia had personal problems which required medical

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[1] In a 1998 Recommended Decision and Order, the ALJ found that Dominick's Finer Foods, Inc., and Mavo Leasing, Inc., are joint employers of Madonia for purposes of this action. 1998 Rec. Dec. at 3.

[2] Review of the ALJ's decision in STAA cases is automatic. The regulation found at 29 C.F.R. § 1978.109(c) (2001) provides that a final decision and order will be issued by the Secretary under STAA within 120 days after issuance of the recommended decision and order of the ALJ.

[3] Citations to the record are as follows:

Compl. Exh. - Complainant's Exhibit
Dom. Exh. - Dominick's Finer Foods Exhibit
Mavo Exh. - Mavo Leasing's Exhibit
Tr. I - Hearing Transcript, February 3, 1998
Tr. II - Hearing Transcript, February 27, 1998
Tr. III - Hearing Transcript, April 13, 1999

attention. Tr. I at 177-178; 1998 Rec. Dec. at 4. As a result of the meeting, Madonia was sent to be examined and evaluated by Dr. Ready, Mavo's medical review officer. Tr. I at 61-62, 177-178; Tr. II at 39; 1998 Rec. Dec. at 4.

On December 3, 1996, Dr. Ready examined Madonia, diagnosed depression, and referred him to a psychiatrist, Dr. Steven Cochran. Compl. Exh. 8; 1998 Rec. Dec. at 4. Cochran concurred with Ready's diagnosis of depression and personality disorder, recommended individual psychotherapy sessions and a daily dose of an antidepressant, and noted that Madonia should not drive a truck unless he continued receiving treatment for his psychiatric problems. Compl. Exh. 8; 1998 Rec. Dec. at 4. Dr. Ready agreed with Dr. Cochran and reported the findings to Mavo Leasing on December 10, 1996. Compl. Exh. 8.

Based on the doctors' findings, Mavo agreed conditionally to reinstate Madonia. Before his reinstatement, however, Mavo Leasing required Madonia to sign an agreement which provided, *inter alia*, that the Company had the right to discharge Madonia if he failed to complete the psychotherapy program recommended by the physicians.[4] Tr. I at 67-68; Compl. Exh. 9. The agreement, signed on December 23, 1996, resolved the grievance and Madonia was reemployed, without loss of seniority or benefits, retroactive to December 3, 1996. Compl. Exh. 9.

For a number of years before his first termination, Madonia drove Tractor T-150. Tr. I at 52; 201-202. While he had complained at various times, including during the November 1996 grievance meeting, that the T-150 leaked antifreeze, he still wanted to drive it. Compl. Exh. 16; Mavo Exhs. 3, 10; Tr. I at 203, 210-211. At the time of their initial diagnoses of Madonia, however, Drs. Ready and Cochran advised Respondents that Madonia should not drive T-150 regardless of whether it was actually leaking antifreeze. Compl. Exh. 8.

In August 1997, Madonia made two safety complaints, each about Tractor T-147. First, on August 7, 1997, Madonia reported that for two months T-147 had been leaking exhaust fumes into his truck cab. Compl. Exh. 14; 1998 Rec. Dec. at 7. As soon as he submitted the injury form regarding the fumes, Madonia's supervisor took him to the hospital to determine if there was any evidence of the fumes in his system. Madonia's blood was tested and found to be normal. Mavo Exh. 11. His second safety complaint was on August 14, 1997, when Madonia wrote on his daily dispatch sheet that he was driving T-147 "under protest" because of "safety, health and discrimination concerns." Compl. Exh. 13.

After making an inquiry in June or July, Mavo Leasing, on August 8, 1997, received a letter regarding Madonia from Dr. Cochran, the psychiatrist to whom he had been sent for treatment. Tr. II at 13-14, 76; Mavo Exh. 6; 1998 Rec. Dec. at 8. Although received on August 8, Dr. Cochran's letter was dated July 7, 1997. In it Cochran had noted that Madonia had failed to follow through with the psychotherapy sessions and that he had stopped taking the prescribed antidepressant medications. Mavo Exh. 6; 1998 Rec. Dec. at 8.

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[4] The agreement provided: "If [Madonia] fails to complete the program currently assigned by Drs. Ready and Cochran, or if he assaults or batters anyone while on duty, he may be discharged immediately." Compl. Exh. 9.

Because Mavo's attorney and various company and union officials were on vacation during the period when the Cochran letter was received, no action was taken on the doctor's information until August 19, 1997, when officials from Mavo, Dominick's, and the union met to discuss Madonia's situation. Tr. II at 15-16; 1998 Rec. Dec. at 8. At that meeting, Respondents also discussed a letter from Dr. Ready indicating that Dr. Cochran had also informed him that Madonia had not completed his therapy sessions and was not taking his medications. Mavo Exh. 7; Tr. I at 125; 1998 Rec. Dec. at 8. Based on the doctors' reports, Respondents determined that Madonia had failed to comply with the 1996 agreement, and therefore, he would be fired. Tr. I at 91; Tr. II at 34; Compl. Exh. 15. Because Madonia was on vacation from August 16 through August 24, he was not fired until his return on August 25, 1997. Tr. I at 90; Compl. Exh. 15.

On October 14, 1997, Madonia, contending that he was fired because of his safety-related complaints, initiated the whistleblower action reviewed here.

BOARD'S AUTHORITY AND STANDARD OF REVIEW

A. The Board's Authority

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, *inter alia*, the Surface Transportation Assistance Act of 1982, 49 U.S.C.A. §31105, and the regulations promulgated thereunder, 29 C.F.R. Part 1978. Secretary's Order 2-96 (Apr. 17, 1996), Fed. Reg. 19978 (May 3, 1996).

B. Standard of Review

Pursuant to the STAA implementing regulation at 29 C.F.R. § 1978.109(c)(3), an ALJ's factual findings are conclusive if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans., Inc. v. United States Dep't of Labor,* 160 F.3d 38, 46 (1st Cir. 1998); *Roadway Express, Inc. v. Dole,* 929 F.2d 1060, 1063 (5th Cir. 1991).

In reviewing an ALJ's conclusions of law, the Administrative Review Board, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1995), *quoted in Goldstein v. Ebasco Constructors, Inc.,* No. 86-ERA-36 (Sec'y Apr. 7, 1992) (applying analogous employee protection provision of Energy Reorganization Act, 42 U.S.C.A. § 5851 (West 1996); *see* 29 C.F.R. § 1978.109(b). The Board accordingly reviews questions of law *de novo*. *See Yellow Freight Systems, Inc. v. Reich,* 8 F.3d 980, 986 (4th Cir.1993); *Roadway Express, Inc. v. Dole,* 929 F.2d at 1063.

DISCUSSION

A. The 1998 Recommended Decision and the New Evidence

In his 1998 Recommended Decision, the ALJ, using a dual motive analysis, determined that Respondents' August 1997 termination of Madonia violated STAA. A dual motive analysis is appropriate when an adverse action is motivated in part by lawful reasons, and also in part by

unlawful reasons. *Mt. Healthy City School District Bd. of Educa. v. Doyle*, 429 U.S. 274 (1977). The ALJ specifically ruled that Madonia's termination was motivated in part by Respondents' discovery that he had failed to complete the course of psychotherapy, and in part by Madonia's safety-related complaints. 1998 Rec. Dec. at 15-16.

Critical to this finding was the ALJ's determination that it was only *after* Madonia filed a safety complaint on August 7, 1997, that Respondents tried to determine whether he was complying with the psychotherapy requirement of the 1996 agreement. This ALJ determination stood in opposition to the testimony of Respondents' officials who said that they had asked the doctor about Madonia's compliance in June or July 1997. The doctor's notification that Madonia had failed to complete the required treatment was contained in the psychiatrist's letter to Respondents dated July 7, 1997, but not received until August 8, 1997, as documented by a "received" date stamp. Because of the discrepancy between the typewritten date on the letter and the stamped date of receipt, the ALJ deduced that the "July date in Dr. Cochran's letter is a typographical error and the letter should read August 7 . . . ," the same date as Madonia's safety complaint. The ALJ further found that the safety complaint "prompted the Respondents to check on his [Madonia's] compliance with the settlement agreement . . . " and that they had violated STAA. 1998 Rec. Dec. at 14-15.

On October 20, 1998, some 15 days after the issuance of the 1998 Recommended Decision and after the case had been accepted for review, Respondents moved this Board to reopen the record to admit new evidence and to remand the case to the ALJ for reconsideration. The "new evidence" consisted of a letter and an envelope. The letter, dated July 7, 1997, was addressed to Madonia and was from Dr. Cochran, the psychiatrist, and stated that Cochran was dropping Madonia as a patient because of his refusal to follow the doctor's orders. The envelope for that letter was postmarked July 24, 1997.

On January 29, 1999, this Board ruled that the proffered materials required the reopening of the record,[5] and remanded the case to the ALJ with instructions to admit the proffered evidence, to reconsider his findings in light of the new evidence, and to issue a new or supplemental recommended decision.

In its Remand Order, the Board focused on the ALJ's finding that it was only ***after*** Madonia filed a safety complaint on August 7 that Respondents inquired whether Madonia was complying with the medical requirement of the 1996 settlement agreement. The July 7 letter from Cochran to Madonia[6] enhanced the importance of Cochran's letter to Respondents of the same date because in his letter to Respondents, Cochran had written that he would "be sending [Madonia] a letter advising him of his termination as a patient in this clinic in the near future . . . ." Respondents Exh. B-1. The newly discovered letter fulfilled that promise.

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[5] The Board ordered the reopening of the record because the proffered evidence was relevant and material and had not been available prior to the closing of the record. 29 C.F.R. § 18.54(c) (2001).

[6] Neither the letter nor the envelope had been available to Respondents prior to the close of the record. Madonia had furnished them to Respondents in response to their discovery requests in an ADA case he had brought against them. ARB Order Remanding for Consideration of New Evidence, and Vacating Order of Reinstatement, January 29, 1999.

B. 1999 Recommended Decision on Remand

At the April 13, 1999, supplemental hearing the ALJ received into evidence the July 7, 1997, letter from Cochran to Madonia and the envelope, postmarked July 24, 1997, in which it was sent. Respondents Exh. B-1; 1999 Rec. Dec. at 4-5. In addition, the ALJ admitted another piece of evidence proffered by Respondents, namely, an envelope postmarked August 6, 1997,[7] in which Cochran had sent Respondents his letter dated July 7, 1997.[8]

In his 1999 Recommended Decision, the ALJ analyzed the import of the new evidence. He admitted that the August 6, 1997, postmark on the envelope addressed to Respondents from Cochran refuted his theory about the mistaken date on the letter; that is, he ruled that he had been wrong in finding (a) that the "July 7, 1997" date on Cochran's letter was a typographical error and (b) that the letter should have read "August 7, 1997." 1999 Rec. Dec. at 4-5. He further found that the envelope supported Respondents' position that they had inquired about Madonia's compliance with the doctor's instructions before Madonia filed the safety complaint on August 7, 1997.

Furthermore, the ALJ found significance in the letter from Cochran to Madonia which was dated July 7, 1997, postmarked July 24, 1997, and terminated the doctor-patient relationship. *Id.* at 5. The ALJ ruled that this letter was further proof that Respondents had made inquiries about Madonia's compliance with his psychotherapy program before the safety complaint of August 7, 1997, and that, although the letter to Madonia did not reference an inquiry by Respondents, the fact that both letters were written on July 7, 1999, supported the "likelihood that the Doctor wrote the letters in conjunction with each other after he was confronted with a question as to the status of the patient." *Id.*

As a result of the new evidence, the ALJ withdrew his earlier finding of liability, and concluded that Madonia's complaint should be dismissed. Using the burden-shifting analysis created by the Supreme Court for Title VII cases and set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Texas Dep't of Comm Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981), the ALJ found that Madonia had presented a *prima facie* case of discrimination and that Respondents had rebutted it by presenting a legitimate, non-discriminatory reason for terminating Madonia. The ALJ further found that the non-discriminatory reason Respondents provided was not pretext because Madonia had failed to show that the employers' proffered explanation was unworthy of credence or that it was a substitute for intentional discrimination. *Burdine*, 450 U.S. at 256; 1999 Rec. Dec. at 3-5.

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[7] Because of a typographical error in his 1999 Recommended Decision, the ALJ on page 2 refers to the envelope containing the letter from Cochran to Respondents as having a postmark date of August 7, 1997, rather than August 6, 1997. The ALJ refers to the correct date in subsequent pages of the opinion. 1999 Rec. Dec. at 2 and 4.

[8] Mavo found the envelope in its files after the motion for reconsideration was filed with the Board. Tr. III at 10-12. Although the ALJ admitted the envelope into evidence, it is not contained in the records transmitted to this Board.

We agree with the ALJ's use of the *McDonnell Douglas* and *Burdine* framework to evaluate "whistleblower cases" such as this.[9] *See Kahn v. U. S. Secretary of Labor*, 64 F.3d 271, 277 (7th Cir. 1995); *Moon v. Transport Drivers, Inc*., 836 F.2d 226, 229 (6th Cir. 1987). Under this burden shifting framework, a complainant in a whistleblower case may satisfy his initial burden of establishing a case of retaliatory discharge by showing: (1) his engagement in protected activity; (2) defendant's awareness of plaintiff's engagement in protected activity; (3) plaintiff's subsequent discharge; and (4) that the discharge followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Carroll v. Dep't of Labor*, 78 F.3d 352, 356, (8th Cir. 1996) *citing McDonnell Douglas Corp. v. Green*, 411 U.S. at 802-803 and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 255; *Clean Harbors Environ. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998). Madonia met his initial burden by showing that he engaged in protected activity by filing safety complaints on August 7 and August 14, that Respondents were aware of the safety complaints, and that his termination on August 25 was so close in time to the protected activity that it raised an inference of retaliatory motive. 1999 Rec. Dec. at 3.

Continuing his analysis of the case, the ALJ found that Respondents articulated a legitimate, non-discriminatory reason for discharging him by showing that they terminated Madonia because of his non-compliance with the 1996 settlement agreement; that is, contrary to the requirements of the settlement agreement, Madonia had failed to follow the course of treatment prescribed by the doctors. Finally, the ALJ completed the burden shifting analysis by ruling that Madonia failed to show that the reason Respondent gave for his discharge was pretext.[10] 1999 Rec. Dec. at 3-5.

CONCLUSION

After reviewing the record, considered as a whole, we determined that the ALJ's findings of fact are supported by substantial evidence, and we conclude that Madonia has failed to show by a

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[9] In each of his recommended decisions, the ALJ first analyzed the case under the burden shifting standard and then also analyzed it under the dual motive standard which is set out in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977). The dual motive analysis is applicable only when an employer's adverse action was motivated by two reasons, one legitimate and one prohibited. In the instant case, the ALJ determined that Respondents terminated Madonia for a legitimate reason only; thus, the dual motive analysis was unnecessary. Although the dual motive discussions were confusing, they were also harmless. *See Francis v. Bogan*, No. 1986-ERA-8, slip op. at n.2 (Sec'y April 1, 1988).

[10] On May 10, 2000, Dominick's Finer Foods submitted a district court Memorandum Opinion issued April 12, 2000, in *Madonia v. Mavo Leasing, Inc., and Dominick's Finer Foods, Inc*., No. 98 C 0601 (N.D. Ill.), Madonia's private ADA case against Respondents. In granting summary judgment to Respondents, the District Court concluded that Madonia was terminated because he had violated the terms of the 1996 agreement. In one line of their transmittal letter, Respondents stated that the Board was collaterally estopped from addressing the issue of pretext by the District Court's finding regarding the reason for the discharge. Because this simple statement was made without citation to authority or presentation of argument, because it was not repeated in a formal motion filed with the Board, and because of our determination that Madonia's complaint should be dismissed, we need not address the applicability of estoppel here.

preponderance of the evidence that Respondents fired him because of his protected activity. Accordingly, Madonia's complaint is dismissed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge