U.S. Department of Labor

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

In the Matter of:

BARRETT RIESS,

COMPLAINANT,

v.

NUCOR CORPORATION-VULCRAFT-TEXAS, INC.,

RESPONDENT.

ARB CASE NO. 08-137

ALJ CASE NO. 2008-STA-011

DATE: November 30, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Dennis G. Herlong, Esq., ***Law Offices of Dennis Herlong*****, Houston, Texas**

For the Respondent:
John K. Linker, Esq., David Minces, Esq., ***Alaniz & Schraeder*****, L.L.P., Houston, Texas**

Before: Luis A. Corchado, ***Administrative Appeals Judge,*** **E. Cooper Brown,** ***Deputy Chief Administrative Appeals Judge*****, and Joanne Royce,** ***Administrative Appeals Judge***

ORDER OF REMAND

Barrett Riess filed a complaint against Nucor Corporation-Vulcraft-Texas (Nucor) under the whistleblower provisions of the Surface Transportation Assistance Act of 1982 (STAA)[1], as amended and recodified, 49 U.S.C.A. § 31105 (Thomson/West 2007), and

[1] Congress amended the STAA in August 2007 to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act

its implementing regulations, 29 C.F.R. Part 1978 (2010) on February 15, 2007. He alleged that Nucor violated the STAA when it terminated his employment allegedly because he engaged in STAA-protected activities. The Occupational Safety and Health Administration (OSHA) investigated his complaint and ultimately dismissed it on October 15, 2007. Riess requested a hearing before a Department of Labor Administrative Law Judge (ALJ), which the ALJ conducted on April 1 and May 28, 2008. On September 23, 2008, the ALJ ruled against Riess. The case is now before the Administrative Review Board (ARB) pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and the automatic appeal provisions of 29 C.F.R. § 1978.109(c)(1). On appeal, Riess argues that the ALJ failed to make sufficient findings on material issues of fact. We agree and, therefore, we affirm the uncontested conclusions, and vacate and remand the remainder of the issues for further findings and analysis.

BACKGROUND[2]

Nucor produces and transports steel joists and steel decking. One Nucor division is located in Grapeland, Texas. Complainant's Exhibit (CX) 8; Hearing Transcript (Tr.) at 38. Beginning on August 4, 2002, Riess worked at Nucor as a Traffic Department Manager. R. D. & O. at 4 (Stipulated Facts). Riess held this position from August 4, 2002, until Nucor discharged him on January 15, 2007. *Id.*; Tr. 38-40. There is substantial unresolved evidence in the record that Riess was a long-term employee, had been promoted at least twice, and had no prior discipline before Nucor fired him.

The ALJ found that Riess engaged in protected activity by raising safety concerns on January 9, 2007. R. D. & O. at 17. The parties do not appear to dispute this finding. The evidence related to the detail and significance of those safety concerns is unresolved. Riess was fired less than one week after engaging in protected activity. R. D. & O. at 4 (Stipulation of Facts). The ALJ concluded that Riess's protected activity was not a contributing factor in the termination of his employment. He found that there were "intervening events" presumably causing the termination, but he did not identify those events. R. D. & O. at 17.

James Landrum, Grapeland Division Vice President and General Manager, was Riess's supervisor and made the decision to fire Riess. The ALJ found Landrum to be credible. R. D. & O. at 17. By Landrum's own admission, he never considered firing Riess before January 9, 2007. The ALJ identified Landrum's stated reasons for terminating Riess's employment as the following: (1) employees had quit or threatened

---

for the 21st Century (AIR 21), 49 U.S.C.A. § 42121(b) (Thomson/West 2007). *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007); 49 U.S.C.A. § 31105(b)(1)(Thomson/West Supp. 2010).

[2] Given that most of the material facts are unresolved, we can only provide a limited background based on the stipulated facts, the patently undisputed background facts, and few uncontested legal conclusions.

to quit because of Riess; (2) Riess's abrasive management style; and (3) Landrum had previously warned Riess to get along with workers. Without making supporting findings of fact, the ALJ concluded that Landrum's reasons were not pretextual. R.D. & O. at 17.

As Riess argues, the majority of the ALJ's opinion is a copious summary of the testimony and evidence, leaving many material facts unresolved. The ALJ details the testimony from Riess, Landrum, Stephen Semands, McArthur Walker, Sue Larue, and two other Nucor employees, but he made no determinations on the credibility of these witnesses except as to Landrum. Because the parties do not dispute the ALJ's findings that Riess engaged in protected activity and suffered an adverse action, we affirm those conclusions. But without additional factual findings, we cannot agree that substantial evidence supports the ALJ's ultimate findings on causation and pretext. Accordingly, we remand for further findings on these issues.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.109(a).

In reviewing STAA cases, the ARB is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted). The ARB reviews the ALJ's conclusions of law de novo. *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004). To conduct a meaningful review, we need the ALJ's opinion to "include findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact or law presented on the record." 5 U.S.C.A. § 557(c)(West 1996); 29 C.F.R. § 18.57(b)(2010). Providing sufficient findings of fact and analysis also allows the parties to understand the ultimate findings and order. *See, e.g.*, *Guthrie v. Astrue,* 604 F. Supp. 2d 104, 112 (D.D.C. 2009) (under the Social Security Act).

DISCUSSION

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. 49 U.S.C.A. § 31105(a)(1). More specifically, the STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order." *Id.*

To prevail on his STAA claim, Riess must prove by a preponderance of the evidence that (1) he engaged in protected activity, (2) Nucor was aware of the protected activity, (3) Nucor took an adverse employment action against him, and that (4) Riess's protected activity was a contributing factor in the discharge. *Villa v. D.M. Bowman, Inc.*, ARB No. 08-128, ALJ No. 2008-STA-046, slip op. at 3 (ARB Aug. 31, 2010). If Riess does not prove one of these requisite elements, the entire claim fails. *See West v. Kasbar, Inc. /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005). If the ALJ concludes that the employer was motivated by both prohibited and legitimate reasons (has mixed or dual motives), the employer may escape liability only by proving with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Sacco v. Hamden Logistics, Inc.*, ARB No. 09-024, ALJ Nos. 2008-STA-043, -44, slip op. at 5 (ARB Dec. 18, 2009).

Nucor argues, on appeal, for the application of the STAA as it read before the amendments in August 2007, when Riess filed his complaint. Specifically, Nucor argues that Riess must show that his protected activity was the sole cause of the adverse action rather than a contributing factor. We disagree, and we direct the ALJ to again apply the STAA currently in effect for several reasons. First, we begin with the presumption that we should apply the law in effect at the time of our decision. *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 281-82 (1969) (generally, an appellate court should apply the law in effect at the time of the decision unless such application would create a manifest injustice). Second, we note that the ALJ announced at the very beginning of the hearing below that the applicable law was the STAA, as amended in 2007.[3] No one objected to his announcement. Third, the STAA language did not change in 2007; it always prohibited and still prohibits retaliation "because" of protected activity. 49 U.S.C.A. § 31105(a)(1). Fourth, the burden of proof remained with the employee to prove that his protected activity was a contributing factor to an adverse action. We do not see that the application of the 2007 STAA amendments in this case results in an impermissible retroactive effect. *See, e.g., Combs v. Commissioner of Soc. Sec.*, 459 F. 3d 640, 646 (6th Cir. 2006)(application of law existing at the time of a decision does not violate the presumption against retroactivity unless the statute in question has retroactive effects) citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed.2d 229 (1994). We believe these facts distinguish this case from cases in which the burden of proof switched from one party to the other. *See Raleigh v. Illinois Dept. of Revenue,* 530 U.S. 15 (2000) (Court found that transferring the burden of proof from one party to another is a subsequent change that cannot be applied retroactively). Consequently, we review the ALJ's decision under the STAA as amended in 2007. Specifically, we consider whether Riess failed to prove that his protected activity was a contributing factor in the termination of his employment. *See* 29 C.F.R. 1979.109(a).

[3] OSHA also applied the 2007 Amendments in its investigation of this case.

<u>Causation</u>

There are alternative methods by which an employee can prove that protected activity was a contributing factor to an adverse employment action. Where there is no direct evidence of illegal motive, the employer can use indirect, circumstantial evidence. One of the common sources of indirect evidence is "temporal proximity" between the protected activity and the adverse action. The closer the temporal proximity is, the stronger the inference of a causal connection. Such indirect evidence can establish retaliatory intent. *See, e.g., Negron v. Vieques Air Link, Inc.,* ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (ARB Dec. 30, 2004), *aff'd Vieques Air Link, Inc. v. U.S. Dept. of Labor*, 437 F.3d 102, 109 (1st Cir. 2006). A temporal connection between protected activity and an adverse action may support an inference of retaliation, but it is not necessarily dispositive. *See, e.g., Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005).

In *Negron,* temporal proximity was the key factor supporting the finding of causation. The employer in that case suspended Negron, a pilot, two days after he submitted a letter to the employer stating his intention to file a complaint with the Federal Aviation Administration. The ALJ concluded that the employer's contention that it suspended Negron for arguing in front of passengers was not rational. The Board affirmed the ALJ's conclusion that the temporal proximity between the complainant's safety reports and his suspension was sufficient to show that his protected activity was a contributing factor in the suspension. *Id*. at 6-8.

In a summary fashion, the ALJ concluded that Riess failed to present "any credible evidence that his protected activity was the reason or a contributing cause" for the termination of his job. R. D. & O. at 17. Nucor argues that substantial evidence supports this conclusion and repeatedly cites to evidence the ALJ left unresolved. For example, Nucor points to the testimony of "Mr. Walker, Ms. LaRue, Mr. Cheatham, and Mr. Zwingman" as evidence of Riess's poor management. Nucor also points to feedback Riess's job coach allegedly provided. The ALJ made no findings related to these witnesses. The ALJ concluded that "intervening events" led Landrum to fire Riess, but he did not explain which intervening events and why they were sufficiently intervening. R. D. & O. 17.

There is ample unresolved evidence pointing to the protected activity as a contributing factor. Riess's long tenure with Nucor, his lack of a history of disciplinary problems as well as the suspicious timing of his termination (two days after protected activity) all provide strong circumstantial evidence of a link between the protected activity and the adverse action. In addition, Riess's safety complaints were intricately intertwined with the alleged conflict that spiraled into Riess's dismissal. *Cf. Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-022 (ARB Nov. 30, 2009) (the protected activity was the "last straw" and contributed to the adverse action).

Without the benefit of the ALJ's careful weighing of the preceding evidence, we cannot agree that Riess "failed to present any credible evidence that his protected activity was the reason or a contributing cause …" for the termination of his employment. R. D. & O. at 17. We next examine the issue of pretext.

Pretext

An employee can prove illegal retaliation by proving that the employer's proffered reasons are pretextual or not credible. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 517 (1993). When the proffered reasons for the adverse action are proven to be false, the complainant's prima facie evidence may permit the trier of fact to find discrimination. *Id.* at 511. *See Priest v Baldwin Assocs*., 1984-ERA-030 (Sec'y June 11, 1986)(the Secretary reversed the ALJ's ruling through reliance on pretext evidence). In *Priest*, the Secretary found pretext where "several additional facts not mentioned by the ALJ" were "highly significant" and one of the employer's proffered reasons at hearing was not previously documented. *Id.*, slip op at 7, 10, citing *Marathon Le Tourneau Co., Longview Div. v. NLRB*, 699 F.2d 248, 252 (5th Cir. 1983). In *Speegle v. Stone & Webster Constr., Inc*., ARB No. 06-041, 2005-ERA-006 (ARB Sept. 24, 2009), the Board reversed the ALJ's denial of the complainant's claim because the ALJ failed to adequately explain his interpretation of the employer's shifting explanations for discharging the complainant but not others who were similarly situated.

Vague and subjective reasons about personality issues may also suggest that they are pretextual or in reality complaints about whistleblowing. *See, e.g., Dodd v. Polysar Latex*, 1988-SWD-004, slip op. at 8 (Sec'y Sept. 22, 1994) (supervisor claimed that he recommended termination after considering complainant's deteriorating relationships, attitude, and performance, but his testimony taken as a whole showed that he recommended termination solely because of complainant's conflict with another manager over complainant's protected complaints); *Timmons v. Franklin Elect. Coop.,* 1997-SWD-002, slip op. at 6 (ARB Dec. 1, 1998) (employer's expectation that an employee be a 'team player' to a point where it interferes with protected activity is prohibited); *Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 481 (3d Cir. 1993) (the alleged "personality" problem or deficiency of interpersonal skills was "reducible" to the problem of the inconvenience caused by the employee's pattern of complaints).

Upon reviewing the record, we conclude that it contains substantial unresolved evidence that could potentially prove pretext. For example, Nucor asserted Walker's retirement as one of its reasons for firing Riess. Yet, this rationale is made highly questionable by evidence in the record that Walker had retired more than one year before Nucor terminated Riess's employment. There is evidence that contradicts Nucor's assertion that Walker's retirement was related to Riess's management style. *See, e.g.*, CX-6 (exit interview form in which Walker wrote that the reason he was leaving Nucor was "Retirement" and that he had "very good supervisors during employment with Vulcraft"). Nucor also blamed Riess for Joey Word's threat to quit on January 9, 2005, but there is evidence that suggests that Word (a supervisor) had been preparing to leave

to work for himself regardless of Riess's actions. CX 7. The ALJ did not explain how he resolved these conflicts in the evidence.

Nucor emphasizes the criticism Riess received during his employment with Nucor and that he was told that he needed to improve his skills as a manager. For example, in the Leadership Development Survey, allegedly he was rated below average on the ability to foster teamwork. He was also criticized for the way he handled the purchase of Peterbuilt trucks. The ALJ did not make findings as to the credibility of these reasons. All of these alleged deficiencies were evident before January 9, 2007, and again, Landrum testified that he "never thought about terminating [Riess's] employment prior to January 9, 2007." Tr. at 225; R. D. & O. at 10. In addition, Landrum testified that he was not aware of the firing of any manager in any of the seven Vulcraft divisions, making Riess's case quite an anomaly. R. D. & O. at 10. Inconsistently, Vulcraft argues that the protected activity was not significant because there were "intervening events" in the few days before the termination date; yet, Vulcraft relied on events occurring years before the protected activity and found such stale events significant in firing Riess. Finally, Landrum testified that he spoke to several individuals between January 9 and 11, but at the hearing, he admitted that he "did not document that investigation." Tr. at 235. Landrum's lack of documentation calls his reasons into question, requiring the ALJ to explain how he resolved this apparent weakness in the testimony and the other inconsistencies in Nucor's stated reasons for the adverse action.

In sum, this case involves circumstances that create a very strong inference of retaliatory termination of employment, making the findings on causation and pretext evidence essential to a resolution of Riess's claim. While the record indicates that Riess's performance as a manager needed improvement, it also indicates that he was a long-term employee, with no history of discipline problems, who was discharged only a few days after making a STAA-protected complaint. There are insufficient findings of fact which allow us to understand (1) why Riess's protected activity was not a contributing factor in the termination decision in the face of strong temporal proximity; and (2) why Riess's evidence failed to establish proof of pretext with so many inconsistencies. Consequently, we must remand this case for further findings on the issues of causation and pretext.

CONCLUSION

Where an ALJ is called upon to determine whether or not an employee prevails on a STAA whistleblower claim, the ALJ's findings of fact must sufficiently address whether the employee proves that: (1) he engaged in protected activity; (2) that the employer was aware of the protected activity; (3) the employer took adverse employment action against the employee; and that (4) the employee's protected activity was a contributing factor in the discharge. The complainant's failure to prove any one of these requisite elements defeats the entire claim and findings of fact adequately addressing where the complaint failed may be sufficient. If the ALJ concludes that the complainant prevails with respect to the four identified issues, the ALJ's findings of fact must

sufficiently address whether the employer was motivated by both prohibited and legitimate reasons (i.e., has mixed or dual motives) with respect to the adverse employment action at issue. If the ALJ finds mixed motives, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's protected activity.

In this case, substantial evidence of record supports the ALJ's findings of fact that Riess engaged in STAA-protected activity, Nucor was aware of Riess's protected activity, and that Riess experienced adverse employment action in the form of discharge from employment. However, the ALJ's Recommended Decision and Order does not contain sufficient findings of material fact with respect to the issues of whether Riess's protected activity was a contributing factor in his discharge, whether Riess's employer was motivated in its discharge of Riess by prohibited and legitimate reasons, and whether the employer would have terminated Riess's employment in the absence of any protected activity. In the absence of sufficient findings of fact regarding these remaining issues, the Board is unable to render a ruling on whether or not the ultimate conclusions the ALJ reached as to these issues is supported by substantial evidence in the record and otherwise in accord with applicable law.

ORDER

For the foregoing reasons, the Recommended Decision and Order is affirmed in part, and reversed and remanded in part. The ALJ's R. D. & O. is **AFFIRMED** with respect to his finding of protected activity, adverse employment action, and knowledge by the employer of the protected activity. The R. D. & O. is **REVERSED** and **REMANDED** with respect to his finding on causation and pretext for further proceedings consistent with this Decision and Remand Order, including (but not necessarily limited to) making necessary findings of fact with respect to the issue of causation and pretext.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge