U.S. Department of Labor

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

In the Matter of:

PETER SPELSON,	**ARB CASE NO. 09-063**
COMPLAINANT,	**ALJ CASE NO. 2008-STA-039**
v.	**DATE: February 23, 2011**
UNITED EXPRESS SYSTEMS and PML,	
RESPONDENTS.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondents:
Bernard K. Weiler, Esq., ***Mickey, Wilson, Weiler, Renzi & Andersson, P.C.*****, Aurora, Illinois**

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****, Joanne Royce,** ***Administrative Appeals Judge, and*** **Luis A. Corchado,** ***Administrative Appeals Judge***

FINAL DECISION AND ORDER

Peter Spelson filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on August 1, 2007. Spelson alleged that his employers, United Express Systems and PML (collectively, UES), violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified, when it terminated his employment. 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2010). The STAA protects employees from discrimination when they report violations of commercial motor vehicle safety rules or when they refuse to operate a vehicle when such operation would violate those rules or it would be unsafe. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Spelson's complaint because he found that the

Respondents did not terminate Spelson's employment because he engaged in protected activity. We agree with the ALJ and affirm his Recommended Decision and Order (R. D. & O.). In summarily affirming the ALJ's R. D. & O., we limit our comments to the most critical points.

Spelson asserts that UES fired him because he engaged in protected activity. To prevail on his claim, Spelson must prove several elements: (1) he engaged in protected activity; (2) UES knew of his protected activity; and (3) UES took adverse employment action against him because of the protected activity. *See Peters v. Renner Trucking & Excavating*, ARB No. 08-117, ALJ No. 2008-STA-030, slip op. at 4 (ARB Dec. 18, 2009).

The ALJ found that Spelson engaged in protected activity when he submitted driver vehicle condition reports (DVCRs) and made oral reports to UES about the condition of some of the trucks he drove. R. D. & O. at 13. Substantial evidence in the record supports the ALJ's finding that these DVCRs and oral reports constituted protected activity.[1] RX 3. Additionally, substantial evidence supports the ALJ's finding that UES terminated Spelson's employment, which is obviously an adverse action. Neither Jan Chase (UES General Manager), nor Eugene Rennels (UES Dispatcher) knew of Spelson's protected safety reports when they recommended his discharge for insubordination. R. D. & O. at 16. However, Brad Westrom, UES's owner and president, knew of some of Spelson's protected activity when Westrom made the final decision to terminate Spelson's employment. R. D. & O. at 16, 7-8. We therefore agree with the ALJ's finding that UES knew of Spelson's protected activity.

The ALJ ultimately dismissed the case, however, because Spelson failed to prove causation, i.e., that he was discharged *because* of his protected activity. Substantial evidence in the record supports this conclusion: UES actively encouraged the filing of DVCRs, R. D. & O. at 15; Spelson had never been reprimanded for his DVCRs prior to his discharge, R. D. & O. at 7; Spelson had been orally reprimanded about a late delivery and failure to use his radio phone prior to his discharge, R. D. & O at 8, 17; one UES customer complained about Spelson's behavior and asked that he be reassigned, R. D. & O. at 10; Spelson admitted arguing with his dispatcher/supervisor and telling him to "shut up," R. D. & O. at 8; and Spelson was loud, angry, argumentative, and demonstrated defiance to managerial authority in his interaction with Chase on the day of his discharge, R. D. & O. at 9. The ALJ concluded that Westrom fired Spelson for insubordination, a legitimate, non-discriminatory reason, and that Spelson was unable to establish pretext. R. D. & O at 18. Finally, the ALJ ruled that UES would have fired Spelson for

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[1] Substantial evidence in the record also supports the ALJ's findings that Spelson did not meet the evidentiary or legal standards necessary to establish a "refusal to drive" under the STAA. R. D. & O. at 14. We note in this regard that the ALJ misstated our holding in *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037 (Dec. 31, 2002), *aff'd sub nom. Harrison. v. Roadway*, 390 F.3d 752 (2d Cir. 2004). R. D. & O. at 17. We did not hold in *Harrison* that the labor law concept allowing some leeway for intemperate behavior in the context of protected activity applies only to the STAA's "refusal to drive" provision, not to the "filed a complaint" provision. Rather, we declined to apply the "intemperate but protected" theory because the complainant's conduct was unemotional, deliberate, and repeated, rather than impulsive, emotionally motivated conduct incidental to protected activity. *Harrison,* ARB No. 00-048, slip op. at 15. The ALJ's error had no effect on the outcome of the case and is therefore harmless.

insubordination, even absent protected activity.[2] *Id.* Substantial evidence supports the ALJ's findings of fact, and we agree with the ALJ's conclusions on causation. We furthermore agree with the ALJ's legal conclusions that Spelson's discharge was based, not on his safety complaints, but instead because of gross insubordination; Spelson failed to prove an essential element of his claim, the element of causation.[3]

CONCLUSION

The ALJ found that Spelson engaged in STAA-protected activities, that UES knew about his protected activity, and that UES took adverse action against Spelson. However, the ALJ also found that UES did not discharge Spelson because he engaged in protected activities, but

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[2] Once an ALJ finds that a respondent terminated a complainant's employment solely for legitimate, non-discriminatory reasons, a mixed motive analysis finding that a respondent would have fired a complainant absent protected activity is unnecessary. At that point, the complainant has already failed to prove his case. "[W]here a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination, and it is unnecessary to rely on a 'dual motive' analysis." *Mitchell v. Link Trucking, Inc.*, ARB No. 01-059, ALJ No. 2000-STA-039 (ARB Sept. 28, 2001); see also *Ridgley v. USDOL*, No. 07-3917, 2008 WL 4646891 (6th Cir. Oct. 21, 2008) (unpublished) (case below ARB No. 05-063; ALJ No. 2004-STA-053).

[3] We note that an inference of likely causation is permissible because of the proximity in time between Spelson's safety complaints and his discharge. However, temporal proximity alone cannot support such an inference in the face of compelling evidence to the contrary. In this case, the potential inference is reasonably rejected by the ALJ's finding, supported by substantial evidence in the record, that Spelson's employment was terminated for gross insubordination. An inference of causation is decisive at the prima facie level of proving a case, but is not dispositive at the merits stage, when a complainant is required to prove each element by a preponderance of the evidence. *Luckie v. United Parcel Serv., Inc.*, ARB Nos. 05-026, 05-054; ALJ No. 2003-STA-039, slip op. at 6-7 (ARB June 29, 2007) ("To establish a prima facie case of unlawful discrimination under the whistleblower statutes, a complainant need only to present evidence sufficient to raise an inference, a rebuttable presumption, of discrimination.") (citations omitted). *See Jackson v. Arrow Critical Supply Solutions, Inc.*, ARB No. 08-109, ALJ No. 2007-STA-042, slip op. at 7 n.5 (ARB Sept. 24, 2010) "Although temporal proximity may support an inference of retaliation, the inference is not necessarily dispositive; temporal proximity is 'just one piece of evidence for the trier of fact to weigh in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.'" (quoting *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010)).

terminated his employment instead for solely legitimate, non-discriminatory reasons. Substantial evidence in the record supports these findings. Accordingly, we affirm the ALJ's order dismissing the complaint and **DENY** Spelson's complaint.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge