



In the Matter of:

BARRETT RIESS,

ARB CASE NO. 11-032

COMPLAINANT,

ALJ CASE NO. 2008-STA-011

v.

DATE: December 19, 2012

**NUCOR CORPORATION-
VULCRAFT-TEXAS, INC.,**

RESPONDENT.

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., and David Mincec, Esq.; Alaniz & Schraeder, L.L.P., Houston, Texas

BEFORE: Luis A. Corchado, Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals Judge.

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (STAA),¹ as amended, and its implementing regulations.²

¹ 49 U.S.C.A. § 31105 (Thomson/West 2012).

On February 15, 2007, Barrett Riess filed a complaint alleging that his former employer, Nucor Corporation-Vulcraft-Texas (Nucor or Vulcraft), violated the STAA when it terminated his employment in retaliation for engaging in STAA-protected activity.³

On September 23, 2008, an Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) concluding that Riess engaged in STAA-protected activity when he reported safety concerns, and that Nucor was aware of these concerns. The ALJ also concluded that there were “intervening events” that caused Riess’s termination, and therefore Nucor did not violate the STAA by terminating his employment. Riess appealed the ALJ’s ruling to the Board.

Following our review of the record, we issued an Order of Remand on November 30, 2010, remanding this case to the ALJ. We concluded that the ALJ erred by failing to apply the burdens of proof contained in the STAA as amended in 2007, i.e., that Riess must prove that his protected activity was a contributing factor in his discharge. We also held that the ALJ failed to provide sufficient findings of fact with respect to the issues of causation and pretext. We affirmed the ALJ with respect to his finding of protected activity, adverse employment action, and knowledge by the employer of the protected activity, and reversed and remanded the case to allow the ALJ to provide additional findings on causation and pretext.

On February 23, 2011, the ALJ issued a Decision and Order on Remand (D. & O. R.), in which he provided additional findings of fact and conclusions of law in support of his dismissal of Riess’s case. We have reviewed the D. & O. R., and we affirm the ALJ’s conclusion that Riess’s protected activity was not a contributing factor in his discharge.⁴

² 29 C.F.R. § Part 1978 (2012).

³ Riess alleged that Nucor discharged him for reporting violations of the Federal Motor Carrier Safety Regulations. Complaint at 2-4. OSHA investigated his complaint and 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.

⁴ We reviewed the record in this case and returned it to the ALJ in conjunction with our November 30, 2010 Order of Remand. The ALJ has been unable to locate the record and has not sent it back to the Board. We therefore allowed the parties to supplement the appendices they submitted with their briefs with any parts of the original record as they deemed necessary. Nucor submitted additional documents, and Riess informed the Board that he neither opposed Nucor’s submissions nor wished to submit additional evidence. After considering the responses of the parties, and having previously reviewed the record in this matter, we see no reason preventing us from fully considering and deciding the pending appeal.

BACKGROUND

Nucor produces and transports steel joists and steel decking. The company hired Riess in February 1992, and in August 2002 promoted him to Traffic Department Manager.⁵ His duties included ensuring that his department complied with Federal safety laws. James Landrum, Vulcraft General Manager, was Riess's supervisor. Riess supervised approximately 50 employees, including Truck Shop Supervisors McArther Walker (in 2005) and Joey Word (in 2006).

Walker resigned from Nucor in November 2005. According to Walker, he resigned three years short of his anticipated retirement "because [he] could no longer work with Barrett Riess."⁶ Walker had a disagreement with Riess in December 2004 when Riess was responsible for the purchase of a new fleet of trucks. Landrum instructed Riess to solicit feedback from other employees regarding the type of trucks to purchase. Walker told Riess that the drivers and mechanics preferred Kenworth trucks, which the company had relied upon for 20 years. Riess instead purchased Peterbuilt trucks despite several employees' concerns about the Peterbuilt exhaust systems and muffler design.⁷ Upon Walker's departure, Word took over as Truck Shop Supervisor.

In August 2006, Riess and eight other Vulcraft employees participated in a leadership development survey designed to assess their strengths and weaknesses so that a development plan could be formulated to improve their performance.⁸ Riess received poor ratings in the categories of judgment, managing execution, providing direction, fostering teamwork, and motivating others.⁹ Riess received extremely low scores, and his results were considered "quite low for a department manager."¹⁰ Between October and December 2006, Riess reviewed his survey results with Dr. Stephen Macnair-Semands, a licensed psychologist, and attended a meeting with Landrum and Macnair-Semands to discuss plans for improving his leadership skills.

During the first week of January 2007, Riess confronted Sue Larue, a Traffic Department employee, about her decision to attend a funeral despite her efforts to work a full shift on the day of the funeral. He accused Larue of "not doing her share of work."¹¹ According to Larue, Riess

⁵ R. D. & O. at 4 (Stipulated Facts).

⁶ Respondent's Exhibit (RX) 12 (Affidavit of McArther Walker) at 2.

⁷ Hearing Transcript (Tr.) at 478.

⁸ *Id.* at 357.

⁹ R. D. & O. at 12.

¹⁰ Tr. at 373, 385-86.

¹¹ *Id.* at 537.

had been “riding her for a while” and this incident was “the last straw.”¹² She informed Word that she was considering quitting because of Riess’s treatment, and Word passed that information to Landrum.

On January 9, 2007, a Nucor driver told Riess that a trailer he had recently driven had an expired inspection sticker. Word, as truck shop supervisor, was ultimately responsible for trailer inspection.¹³ According to Riess, he spoke to Word, who admitted that he frequently approved the use of trailers with expired stickers. According to Landrum, Word decided that he could no longer work with Riess, and that same day decided to resign from the company because of Riess’s management style. Landrum spoke to Riess, Word, and other employees between January 9 and 11, who told him about (1) the inspection sticker issue; (2) Word’s decision to resign; (3) Larue’s desire to resign; and (4) Riess’s instruction to his staff that they not disclose their opposition to his purchase of Peterbuilt trucks.¹⁴

Landrum contacted McNair-Semands to ask if Riess could overcome his management deficits. McNair-Semands opined that Riess could not do so.¹⁵ Landrum also concluded that Riess had “been unable to gain the respect of most of the employees in the traffic department” and “created an environment where the other department managers do not respect him.”¹⁶ In a document titled “Termination of Employment,” Nucor discharged Riess on January 15, 2007, for “failure to fulfill department manager responsibilities.”¹⁷

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under STAA.¹⁸ The ARB reviews the ALJ’s factual findings for substantial evidence and conclusions of law de novo.¹⁹

¹² *Id.* at 539.

¹³ Word did not testify at the hearing.

¹⁴ R. D. & O. at 10-11; D. & O. R at 4.

¹⁵ Tr. at 251-54, 405-07, 433.

¹⁶ Complainant’s Exhibit (CX) 4.

¹⁷ CX 3.

¹⁸ Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1978.109(a).

¹⁹ *Myers v. AMS/Breckenridge/Equity Grp. Leasing I*, ARB No. 10-144, ALJ Nos. 2010-STA-007, -008; slip op. at 3 (ARB Aug. 3, 2012).

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.²⁰ 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.”²¹

To prevail on his STAA claim, Riess must prove by a preponderance of the evidence that (1) he engaged in protected activity, (2) Nucor took an adverse employment action against him, and that (3) Riess’s protected activity was a contributing factor in the discharge.²² If Riess does not prove one of these requisite elements, the entire claim fails.²³

In his D. & O. R., the ALJ describes his reasoning for concluding that Riess’s protected activity did not contribute to his discharge. He indicates that he was persuaded by the testimony provided by Landrum, Walker, McNair-Semands, and Larue, who described their dissatisfaction with Riess’s behavior and performance.²⁴ He also indicates that he relied upon testimony provided by Allen Cheatham, Nucor Production Manager, and Vern Zwingman, a Traffic Department Manager. The ALJ states that all of these witnesses testified in a “straight forward and sincere manner” and that their testimony was “consistent, corroborative, and logical.”²⁵ In contrast, the ALJ found that Riess’s “attempt to portray himself as a model employee and manager was far from the truth and [his] testimony was inconsistent . . . and unsupported by any other witness.”²⁶ The ALJ stated that the testimony provided by the witnesses provided him with “no credible basis to believe that Riess’s discharge had anything to do with protected activity.”²⁷

²⁰ 49 U.S.C.A. § 31105(a)(1).

²¹ *Id.*

²² *Villa v. D.M. Bowman, Inc.*, ARB No. 08-128, ALJ No. 2008-STA-046, slip op. at 3 (ARB Aug. 31, 2010).

²³ *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).

²⁴ D. & O. R. at 2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 4.

The ALJ also provided further findings on the issues of causation and pretext. He found that Landrum blamed Riess for the loss of Walker and Word, and the near-resignation of Larue. He also found that “Landrum had more than sufficient or legitimate grounds for Riess’s discharge.”²⁸ He relied upon Landrum’s conclusion that Riess was a poor manager who neither listened to nor developed the confidence of others Nucor employees. The ALJ referred to Riess’s decision to contact Word to prepare a routine purchase requisition while Word was on vacation, Walker’s early retirement due to Riess’s treatment of him, and Riess’s purchase of the Peterbuilt trucks as examples of managerial missteps that led to Riess’s discharge.²⁹

The ALJ discredited Riess’s testimony that Landrum was not serious about safety compliance, and cited testimony indicating that Landrum was committed to safety and encouraged employees to come forward with safety concerns.³⁰ He also noted that Nucor did not have a history of allowing uninspected trailers to travel over the road, and that the company “had a surplus of trailers (88) and only 14 trucks which was more than it needed to do its business.”³¹ Finally, the ALJ found that Landrum and McNair-Semands had concluded that “it would take a long time for Riess to change his management style because it stemmed from intractable personality traits of being tough minded, self-centered and thus unlikely to be seen as emotionally supportive.”³²

In proving indirectly a whistleblower claim, an employee can prove that the employer’s proffered reasons are pretextual or not credible. If pretext is shown, the factfinder may infer that whistleblower discrimination was a reason.³³ In his this case, the ALJ has identified the evidence he relied upon to conclude that Nucor’s reasons for discharging Riess were not pretextual. In sum, the ALJ concluded, based on his review of the evidence and observation of the demeanor of the witnesses, that Nucor fired Riess because he was unable to perform his managerial duties, and not because he engaged in STAA-protected activity.

²⁸ *Id.* at 3.

²⁹ *Id.*

³⁰ *Id.* at 2, citing Tr. at 305-07, 612-13.

³¹ D. & O. R. at 2.

³² *Id.* at 4, citing Tr. at 405-07, 433.

³³ *See, e.g., Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011) (circumstantial evidence related to the issue of causation includes a wide variety of evidence, including shifting explanations, pretext evidence, and temporal proximity).

CONCLUSION

Riess's protected activity was not a factor in Nucor's decision to terminate his employment. Accordingly, we **AFFIRM** the ALJ's orders dismissing Riess's complaint.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge