U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

PERRY ELLIOTT, **ARB CASE NO. 2018-0002**

COMPLAINANT, **ALJ CASE NO. 2013-ERA-00006**

v. **DATE: September 22, 2020**

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

Appearances:

For the Complainant:
Perry Elliott; *pro se*; Evensville, Tennessee

For the Respondent:
James S. Chase, Esq. and Frances Regina Koho, Esq.; *Tennessee Valley Authority Office of the General Counsel*; Knoxville, Tennessee

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (2005), and as implemented by regulations codified at 29 C.F.R. Part 24 (2019). The Complainant, Perry Elliott, filed a complaint alleging that his former employer, Tennessee Valley Authority (TVA), terminated his employment after he engaged in protected activity, in violation of the ERA's whistleblower provisions. On September 22, 2017, a Department of Labor

Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) denying the complaint. For the following reasons, we affirm the ALJ's denial of the complaint.

BACKGROUND

TVA employed Elliott as a Maintenance Specialist in the Work Control Group at its Watts Bar Nuclear Plant. He was responsible for writing and reviewing work orders related to maintenance and modification work at the plant. He was initially a contractor but in 2010 he applied for and gained full-time employment with TVA. On his application he indicated that he had twice been charged with driving under the influence of alcohol (DUI).[1]

As a Maintenance Specialist Elliott was required to maintain an unescorted access authorization (UAA) clearance, which allowed him to access the protected area of the plant.[2] To maintain a UAA, TVA employees must be "trustworthy and reliable, such that they do not constitute an unreasonable risk to public health and safety or the common defense and security."[3] Employees with UAAs are required to self-report any legal infractions they have committed.

In November 2011, Elliott sent an email to two TVA managers about a planned outage at the plant. In that email he stated that during a prior outage, he had been asked "to cover up a bunch of Work Orders than [sic] were not finished so some managers could get bonus" [sic].[4] On January 7, 2012, Elliott was again arrested for driving under the influence. Two days later he reported this third DUI charge to TVA, and that same day, TVA informed him that his UAA was suspended.

To have his access reinstated, Elliott was required to successfully complete a fitness-for-duty evaluation. He was interviewed by a psychologist and Dr. Brenda Sowter, TVA's Substance Abuse Expert. During his evaluation, he stated that when he was employed as a contractor, he had been instructed to "'cover-up' work orders 'in order to improve the incentive plans and bonuses'" for TVA managers.[5]

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1 Joint Stipulation of Agreed Facts (Joint Stipulation) at 1-2.

2 *Id.* at 2.

3 *Id.*

4 Respondent's Exhibit (RX) 25.

5 Joint Stipulation at 4; *see, e.g.*, D. & O. at 7-8, 41.

On February 29, 2012, the TVA Office of the Inspector General (OIG) interviewed Elliott about his assertion regarding the work orders. Elliott told OIG that he had been directed to use a computer to move "2 or 3 work packages" into the "Planning Complete" category even though they were not completed.[6]

Sowter recommended the denial of Elliott's UAA reinstatement, and on April 18, 2012, TVA informed Elliott that his UAA had been revoked due to his "continued alcohol abuse, repeated disregard of criminal law forbidding the operation of a motor vehicle while under the influence of alcohol, as well his admitted improper handling of work records over a period of time while employed at Watts Bar Nuclear Plant."[7] TVA also told him that, because maintaining the UAA was a requirement of his job, his employment would be terminated. On April 24, 2012, Elliott sought an independent review of the access denial. An independent review facilitator concluded that the UAA revocation was justified and on May 23, 2012, TVA informed him that the independent review upheld the UAA revocation.[8]

On October 18, 2012, Elliott filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his discharge violated the ERA. On February 21, 2013, OSHA found that Elliott's UAA revocation and discharge "were direct results of an expert assessment regarding Complainant's trustworthiness and reliability, as well as his self-reported fraudulent activity."[9] Elliott requested a hearing before an ALJ, which was conducted on March 30, 2016.

On September 22, 2017, the ALJ issued a D. & O. denying the complaint. The ALJ concluded that Elliott failed to prove that he engaged in ERA-protected activity or that any such activity was a contributing factor in his discharge. The ALJ also held that TVA established by clear and convincing evidence that it would have discharged Elliott absent any alleged protected activity because his discharge resulted from his inability to maintain his UAA. D. & O. at 45. Elliott appealed the D. & O. to the Administrative Review Board (ARB).

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6 RX 7.

7 Joint Stipulation at 4.

8 *Id*. at 5; RX 3.

9 OSHA Determination at 3.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to issue agency decisions under the ERA.[10] The ARB will affirm an ALJ's findings of fact when supported by substantial evidence.[11] The ARB reviews an ALJ's legal conclusions de novo.[12]

DISCUSSION

The ERA provides, in pertinent part, that "No employer may discharge or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954."[13] To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, suffered an adverse personnel action, and that his protected activity was a contributing factor in the adverse personnel action taken against him or her. If the complainant's protected activity was a contributing factor in the adverse action, the employer may avoid liability only if it demonstrates "by clear and convincing evidence that it would have taken the same unfavorable personnel action" in the absence of the protected activity.[14]

The ALJ held that TVA would have discharged Elliott even if he engaged in activities protected by the ERA, and we agree. Elliott's employment with TVA was contingent upon his ability to maintain his UAA. Sowter recommended the revocation of Elliott's UAA, and although she was aware of Elliott's claims of

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10 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); *see* 29 C.F.R. § 24.110.

11 29 C.F.R. § 24.110(b).

12 *Saporito v. Progress Energy Serv. Co.*, ARB No. 2011-0040, ALJ No. 2011-ERA-00006 (ARB Nov. 17, 2011).

13 42 U.S.C. § 5851(a)(1)(A).

14 42 U.S.C. § 5851(b)(3)(C), (D); 29 C.F.R. § 24.109(b)(1); *Hoffman v. NextEra Energy, Inc.*, ARB No. 2012-0062; ALJ No. 2010-ERA-00011, slip op. at 6 (ARB Dec. 17, 2013).

document falsification, she concluded that his raising of the issue was done to deflect attention from his alcohol abuse and violations of motor vehicle safety laws.[15]

TVA issued a Notice of Termination to Elliott on April 18, 2012, and in that notice stated that his UAA was revoked because of his "continued alcohol abuse, repeated disregard of criminal law forbidding the operation of a motor vehicle while under the influence of alcohol, as well [his] admitted improper handling of work records over a period of time while employed at Watts Bar Nuclear Plant."[16] Neither party has provided a clear explanation of the actions that constituted the "improper handling of work records," so it is unclear if those specific actions were in fact activities protected by the ERA.

What is clear is that the final decision that ended Elliott's employment did not include a consideration of activities protected by the ERA. The termination was not final until Elliott received an independent review of the UAA revocation. In that review the independent facilitator concluded that the UAA revocation was justified because of Elliott's "inability to establish trustworthiness and reliability due to [his] criminal history."[17] There is no mention in this final review of any activity resembling the "improper handling of work documents." On appeal to the Board, Elliott does not provide any argument or refer to any evidence indicating that the final decision to revoke his UAA and ultimately discharge him from employment involved any activities protected by the ERA.

In sum, we agree with the ALJ's conclusion that, even if Elliott engaged in ERA-protected activity prior to his discharge, TVA still would have terminated his employment after his third DUI.

CONCLUSION

We **AFFIRM** the ALJ's conclusion that Elliott has failed to prove that TVA violated the ERA, and the complaint in this matter is **DENIED**.

SO ORDERED.

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15 Tr. 106-07.

16 RX 7.

17 RX 5.