U.S. Department of Labor

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

In the Matter of:

CLOVIS COLLEY,

COMPLAINANT,

v.

UNION PACIFIC RAILROAD COMPANY,

RESPONDENT.

ARB CASE NO. 2018-0063

ALJ CASE NO. 2017-FRS-00071

DATE: November 6, 2020

Appearances:

For the Complainant:
Fredric A. Bremseth, Esq. and David H. Stern, Esq.; *Bremseth Law Firm, P.C.*; Minnetonka, Minnesota

For the Respondent:
Ryan D. Wilkins, Esq. and Sierra M. Poulson, Esq.; *Union Pacific Railroad*; Omaha, Nebraska

BEFORE: James D. McGinley, *Chief Administrative Appeals Judge*, James A. Haynes, Thomas H. Burrell, Heather C. Leslie and Randel K. Johnson, *Administrative Appeals Judges*

ORDER REVERSING AND REMANDING

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).[1] Clovis Colley (Complainant) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Union Pacific Railroad Company (Respondent) violated the FRSA by terminating him in retaliation for activity protected by the

[1] 49 U.S.C. § 20109 (2008), as implemented by federal regulations at 29 C.F.R. Part 1982 (2019) and 29 C.F.R. Part 18, Subpart A (2019).

FRSA. In November of 2016, Respondent upheld disciplinary charges and dismissed Complainant from service for falsifying a personal injury report. OSHA determined that there was no reasonable cause to find that Respondent violated the FRSA. Complainant appealed the OSHA finding and an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) reversing OSHA and ruling in favor of the Complainant. [2]

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB or Board) to review ALJ decisions in cases arising under the FRSA and to issue agency decisions in these matters.[3]

In this matter, the ALJ found on August 8, 2019, that Complainant proved by a preponderance of the evidence that his protected activity was a contributing factor to the termination. Specifically, the ALJ found the adverse action and protected activity in the present matter are "inextricably intertwined" because all of the events related to the ultimate dismissal would not have been discovered, or would not have occurred but for Complainant's protected activity of filing a report of injury.[4]

The ALJ issued her decision before November 25, 2019, when the Board held in *Thorstenson* that ALJs should not apply the "inextricably intertwined" or "chain of events" analysis, noting that the plain language of the statute does not include the term "inextricably intertwined."[5] The Board rejected these theories of causation because they depart from the FRSA's text regarding contributing factor causation.

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[2] The ALJ's finding that Complainant engaged in protected activity is supported by substantial evidence. The ALJ reviewed the video footage of the alleged incident and found that Complainant's testimony corroborated the video footage. Respondent concedes that upsetting the ALJ's conclusion as to protected activity is an uphill battle under the substantial evidence standard. Brief at 19. We affirm as to protected activity.

[3] 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. 13186 (Mar. 6, 2020); see 29 C.F.R. § 1982.110(a).

[4] D. & O. at 25.

[5] *Thorstenson v. BNSF Ry. Corp.*, ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052 (ARB Nov. 25, 2019).

The Board made clear that applying either or both of the "inextricably intertwined" or "chain of events" theories to create a presumption of causation would be legal error.

On a larger scale, we acknowledge that the U.S. Court of Appeals for the Eighth Circuit has held that an employee must prove intentional retaliation by the employer, because the employee engaged in protected activity, in order to meet the contributing factor element requirement under FSRA.[6] The case before us arises within the Eighth Circuit's jurisdiction, and the law of that Circuit applies. The Eighth Circuit has held that without evidence of intentional retaliation, the FRSA's contributing factor causation standard is not met.[7]

Accordingly, the ALJ erred as a matter of law in finding that Complainant established that his protected activity was a contributing factor in his termination. Therefore, the Board remands this case to the Office of Administrative Law Judges for further proceedings consistent with the ARB's decision in *Thorstenson* and the Eighth Circuit's causation analysis.[8]

We **REVERSE** and **REMAND** for proceedings consistent with this opinion.

SO ORDERED.

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[6] *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014).

[7] *BNSF Ry. Co. v. U.S. Dep't of Labor Admin. Review Bd.*, 867 F.3d 942, 946 (8th Cir. 2017); see also *Dakota, Minn. & E. R.R. Corp. v. U.S. Dep't of Labor Admin. Review Bd.*, 948 F.3d 940, 947 (8th Cir. 2020) (unequivocally rejecting the chain-of-events and inextricably intertwined theories of causation).

[8] The Board has chosen this abbreviated form of remand because it serves the important purposes of allowing for a more prompt decision for the parties involved in this claim. We are also mindful that the ALJ can correctly apply the standards set in *Thorstenson* and the law of the Eighth Circuit.

Thomas H. Burrell, Administrative Appeals Judge, concurring

I concur with the majority's order of remand. I write separately to address a few points in the ALJ's D. & O. and ARB precedent concerning the employer's affirmative defense. The FRSA provides that if a complainant successfully proves that protected activity was a contributing factor in the adverse action, the respondent can avoid relief by proving, by clear and convincing evidence, that it would have taken the same action in the absence of protected activity.[9] The FRSA's implementing regulation states:

> (b) If the complainant has satisfied the [contributing factor] burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.[10]

In analyzing the Respondent's affirmative defense in this case, the ALJ wrote:

> Respondent asserts it had a lawful and valid reason to terminate Complainant pursuant to its Code of Operating Rules, Rule 1.6 prohibiting dishonesty, based on numerous inconsistencies between Complainant's report of injury forms and the video of his trip on November 17, 2015. . . . However, in establishing the affirmative defense, "it is not enough to confirm the rational basis of [Respondent's] employment policies and decisions. Instead, [the ALJ] must assess whether they are so powerful and clear that termination would have occurred apart from the protected activity." . . . Thus, even assuming Respondent reasonably and sincerely believed that Complainant violated company rules on dishonesty and had a legitimate and rational basis for imposing discipline as a result of the dishonesty, this alone does not satisfy Respondent's burden on the affirmative defense. Respondent must also establish "through factors extrinsic to [complainant's] protected activity that the discipline to

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[9] 49 U.S.C. § 20109(d), citing 49 U.S.C. § 42121 (AIR 21's burden-shifting framework).

[10] 29 C.F.R. § 1982.109(b).

> which [complainant] was subjected was applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations but were not injured."[11]

In *Speegle*, the ARB held:

> To sum up the factors that must be considered in applying the "clear and convincing" defense, we find that the statute requires us to consider the combined effect of at least three factors applied flexibly on a case-by-case basis: (1) how "clear" and "convincing" the independent significance is of the nonprotected activity; (2) the evidence that proves or disproves whether the employer "would have" taken the same adverse actions; and (3) the facts that would change in the "absence of" the protected activity.[12]

The ARB in *Speegle* stated that it is not enough that the employer "could have" imposed the adverse action but it must show that it "would have."[13]

I would characterize these as factors that may assist a fact-finder and may be

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[11] D. & O. at 26-27 (citations omitted).

[12] *Speegle v. Stone & Webster Constr., Inc*., ARB No. 2013-0074, ALJ No. 2005-ERA-00006, slip op. at 11-12 (ARB Apr. 25, 2014) (footnotes omitted); *see also DeFrancesco v. Union R.R. Co.*, ARB No. 2013-0057, ALJ No. 2009-FRS-00009, slip op. at 13-14 (ARB Sept. 30, 2015).

[13] *Speegle*, ARB No. 2013-0074, slip op. at 11 ("In addition to the high burden of proof, the express language of the statute requires that the 'clear and convincing' evidence prove what the employer 'would have done' not simply what it 'could have' done."); *Brucker v. BNSF Ry. Co.*, ARB No. 2014-0071, ALJ No. 2013-FRS-00070, slip op. at 14 (ARB July 29, 2016) ("To prove what BNSF would have done, it is not sufficient for it to establish that it had an honesty policy in place under which it could have terminated Brucker's employment. Instead it must convincingly demonstrate that it was highly probable that it would have terminated Brucker's employment for failing to check the correct box on his employment application, after nineteen years of employment.") (emphasis omitted).

appropriate in some cases but are not necessarily required as a bright-line rule for all cases. A fact-finder may simply apply the statutory and regulatory text without additional nonstatutory and nonregulatory factors. We stated in *Clem v. CSC Computer Sci. Corp*. that "these [*Speegle*] factors are not expressly prescribed in the statutory text and such a rule was not necessary to resolve the matter at issue . . . . A fact-finder must holistically consider any and all relevant, admissible evidence when determining whether an employer would have taken the same adverse action against an employee in the absence of any protected activity."[14]

The *Speegle* factors may illuminate an employer's insufficient evidence in a particular case, for example, when the employer merely, in retrospect, offers reasons that could have justified the adverse action but were not manifest in the actual decisionmaking. But the factors also have the potential to obscure the ALJ's analysis. The "could-would" factor, for example, has prevented the fact-finder from freely analyzing the employer's nonretaliatory decisionmaking for imposing the adverse action through its unclear guidance on the meaning of "would have." Unlike the framework for analyzing after-acquired evidence, where the employer must demonstrate that its policies and practice would have generated an outcome if discovered beforehand,[15] the employer proving its affirmative defense will not have to justify its basis in the abstract. Rather the successful employer can satisfy its affirmative defense by clear and convincing evidence in the record demonstrating why it imposed the adverse action, including a reasonable and honest belief that the employee violated company policy.[16]

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[14] ARB No. 2016-0096, ALJ No. 2015-ERA-00003, -00004, slip op. at 18 n.8 (ARB Sept. 17, 2019).

[15] *Clemmons v. Ameristar Airways, Inc*., ARB No. 2008-0067, ALJ No. 2004-AIR-00011, slip op. at 2-3 (ARB Apr. 27, 2012) ("[W]here there is after-acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it," back pay should be limited to the period "from the date of the unlawful discharge to the date the new information was discovered.").

[16] *Contra Kao v. Areva Inc*., ARB No. 2016-0090, ALJ No. 2014-ERA-00004, slip op. at 8 (ARB Apr. 30, 2018) ("[B]y the same token, it is not enough for an employer to show merely that the employee's conduct violated company policy or constituted a legitimate business reason justifying the adverse personnel action.").