U.S. Department of Labor

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

In the Matter of:

JAMES R. WETZEL,

COMPLAINANT,

v.

M & B ENVIRONMENTAL, INC. and MAB ENVIRONMENTAL, INC.

RESPONDENTS.

ARB CASE NO. 2019-0050

ALJ CASE NO. 2018-WPC-00001

DATE: November 18, 2020

Appearances:

For the Complainant:
Scott P. Stedjan, Esq.; *Killian & Gephart, LLP*; Harrisburg, Pennsylvania

For the Respondents:
James W. Maza, Esq.; *Maza, David & Hoeffel*; Lederach, Pennsylvania

BEFORE: James A. Haynes, Thomas H. Burrell, and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

This case arises under the Federal Water Pollution Control Act (WPC), 33 U.S.C. § 1367 (1972), and implementing regulations, 29 C.F.R. Part 24 (2017). James Wetzel (Complainant) filed a complaint with the United States Department of Labor alleging that his former employer, M & B Environmental (M&B or Respondents), violated the WPC by terminating his employment. On March 28, 2019, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) granting relief. Respondents appealed the ALJ's order to the Administrative Review Board (ARB). We affirm the ALJ's Order and deny Respondents' complaint.

BACKGROUND

Complainant was employed by MAB Environmental Services, Inc. (MAB or Respondents) from August 4, 2009, to February 22, 2011, at its BC Natural Chicken Plant ("BC Natural") in Lebanon, Pennsylvania, to manage BC Natural's wastewater treatment facility.[1] MAB was the predecessor company to Respondent M & B Environmental.

On September 15, 2010, Complainant tested a wastewater sample for ammonia. The result was above the limit.[2] Complainant alleges that he then called Matthew Brozena, the president and sole owner of MAB, who instructed him to dump the sample and resample later in the week.[3] Complainant discarded it and resampled two days later.[4]

On January 21, 2011, Pennsylvania Department of Environmental Protection ("PA DEP") issued a notice of violation to BC Natural for several permit violations. On May 20, 2011, BC Natural entered into a consent assessment of civil penalty for violations that occurred from September 2010 to April 2011.[5]

On February 22, 2011, MAB fired Complainant due to a loss of work. In 2012, Mr. Brozena purchased another company and changed the company name from MAB Environmental to M&B Environmental.[6] On June 4, 2012, Mr. Brozena hired Complainant to work for Respondent M & B Environmental, of which Mr. Brozena is also a co-owner.[7]

From 2011 to 2015, Complainant provided evidence to government officials and testified before a grand jury concerning violations of the Clean Water Act pursuant to a cooperation agreement with the U.S. Attorney.[8]

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1 ALJ's Decision & Order (D. & O.) at 2.

2 Tr. at 29.

3 *Id.*, CX 3.

4 Tr. at 32.

5 D. & O. at 2.

6 *Id.* at 6.

7 *Id.* at 2.

8 *Id.*

On December 15, 2015, MAB and Mr. Brozena were charged with conspiracy, violation of permit, tampering with required monitoring method, and false reporting.[9]

On February 3, 2016, Complainant pled guilty to violating 33 U.S.C. § 1319(c)(1)(A), a misdemeanor for negligently violating permit conditions.[10] On February 5, 2016, M&B fired him.[11] On February 24, 2016, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA).[12]

On November 2, 2016, MAB pled guilty two counts of violation of permit, two counts of tampering with required monitoring method, and three counts of false reporting. Mr. Brozena pled guilty to two counts of violation of permit. On April 6, 2017, Mr. Brozena was sentenced to three years of probation and a $100,000 fine and MAB was sentenced to five years of probation and a $50,000 fine.[13]

On January 31, 2018, OSHA dismissed the complaint. On February 26, 2018, Complainant requested a hearing before the OALJ.[14] After a hearing, the ALJ issued a D. & O. granting relief to Complainant.

On April 10, 2019, Respondents filed a petition for review with the Board. Both Respondents and Complainant filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the WPC.[15] The ARB reviews the ALJ's findings of fact

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[9] *Id.* at 3, 6-7.

[10] *Id.* at 2-3.

[11] *Id.* at 3, 5.

[12] *Id.* at 1.

[13] *Id.* at 3.

[14] *Id.* at 1.

[15] 29 C.F.R. § 24.110(a), *see also* 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).

under the substantial evidence standard and conclusions of law de novo.[16]

DISCUSSION

1. Legal Standard

The WPC's objective is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.[17] Under the WPC,

> [n]o person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.[18]

To prevail on his complaint of unlawful discrimination under the WPC's whistleblower protection provisions, Complainant must establish by a preponderance of the evidence that he engaged in activity the WPC protects, that Complainant suffered an adverse employment action, and that his protected activity was a motivating factor for the adverse action.[19]

2. Protected Activity

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[16] 29 C.F.R. § 24.110(b), (d); *Rooks v. Planet Airways, Inc.,* ARB No. 2004-0092, ALJ No. 2003-AIR-00035, slip op. at 4 (ARB June 29, 2006) (citing *Mehan v. Delta Air Lines*, ARB No. 2003-0070, ALJ No. 2003-AIR-00004, slip op. at 2 (ARB Feb. 24, 2005)); *Negron v. Vieques Air Links, Inc.*, ARB No. 2004-0021, ALJ No. 2003-AIR-00010, slip op. at 4 (ARB Dec. 30, 2004)).

[17] 33 U.S.C. § 1251(a).

[18] 33 U.S.C. § 1367(a).

[19] 29 C.F.R. § 24.109(b)(2).

Employers are prohibited from firing or in any other way discriminating against an employee who has "has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter."[20] "A proceeding includes all phases of a proceeding that relat[e] to public health or the environment, including the initial internal or external statement or complaint of an employee that points out a violation."[21]

The ALJ found that Complainant engaged in protected activity by providing information to federal investigators and testifying before a grand jury.[22] The ALJ discredited Mr. Brozena's testimony and further found that Complainant acted at Respondents' direction when he discarded the water sample.[23]

Respondents argue Complainant did not engage in protected activity. Respondents first contend that Complainant cannot have engaged in protected activity because his guilty plea to violating 33 U.S.C. § 1319(c)(1)(A) bars him from bringing this complaint. Notably, Respondents did not raise this argument before the ALJ. Therefore, Respondents have waived it.[24]

However, even if Respondents did not waive this argument, it still fails. The WPC provides that whistleblower protections:

> [S]hall have no application to any employee who, acting without direction from his employer (or his agent) deliberately violates any prohibition of effluent limitation or other limitation under section 1311 or 1312 of this title, standards of performance under section 1316 of this title, effluent standard, prohibition or pretreatment standard under section 1317 of this title, or any other prohibition or limitation

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[20] 33 U.S.C. § 1367(a).

[21] *Abdur-Rahman v. DeKalb Cnty.*, ARB Nos. 2008-0003, 2010-0074; ALJ Nos. 2006-WPC-00002, -00003 (ARB May 18, 2010).

[22] D. & O. at 12.

[23] *Id.* at 16.

[24] *See Schlagel v. Dow Corning Corp.*, ARB No. 2002-0092, ALJ No. 2001-CER-00001 (ARB Apr. 30, 2004) (stating that matters not raised to an ALJ are waived on appeal to the ARB).

established under this chapter.[25]

Mr. Brozena has acknowledged that he instructed Complainant to resample.[26] Respondents allege this instruction did not require Complainant dump the sample and that Complainant could have taken a sample every day and averaged the findings. However, Respondents did not present any evidence to support this understanding of BC Natural's permit. Rather, BC Natural's permit requires that the ammonia "be measured in a 24-hour composite sample taken once a week" and that, if additional tests are taken, "all instances of non-compliance be reported."[27] Thus, even if the samples were averaged, Mr. Brozena's instruction to Complainant to resample would still be sufficient to establish a violation. Thus, the ALJ properly found that Section 1367(d) does not apply as Complainant acted at the direction from his employer.

Respondents next argue that Complainant did not engage in activity because he did not "work positively" with the government. Rather, Respondents state that Complainant was contacted by the PA DEP and the Environmental Protection Agency and testified because it offered him a lesser sentence.

The WPC states that testifying in any proceeding is protected activity.[28] Further, a whistleblower's self-interest is only considered when assessing the credibility of the whistleblower's testimony.[29] Here, the ALJ found that Complainant's testimony was credible as he provided a "generally consistent theme," while the ALJ found that Respondents were less credible.[30] We have reviewed the record and find that substantial evidence supports the ALJ's credibility determinations.[31] Further, the record demonstrates that Complainant provided substantial assistance to the government in testifying against

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[25] 33 U.S.C. § 1367(d), *see also Lawrence v. City of Bethlehem*, No. 1997-CV-1824, 1997 WL 793012, at *5 (E.D. Pa. Dec. 4, 1997); *Lawrence v. City of Bethlehem*, No. 1997-CV-1824, 1999 WL 124471, at *7 (E.D. Pa. Mar. 1, 1999).

[26] CX 22 at 35, 37; Tr. at 110-112.

[27] JX 3.

[28] 33 U.S.C. § 1367(a).

[29] *See Johnston v. Merit Sys. Prot. Bd.*, 518 F.3d 905, 911 (Fed. Cir. 2008).

[30] D. & O. at 9-10.

[31] Complainant's testimony, phone call record, logbook, and pleading demonstrate a consistent narrative. CX 2 – CX 6; Tr. at 32-33, 58-59, 71-72.

Respondents as well as on his own conduct in the offense.[32] Thus, we find that substantial evidence supports the ALJ's finding that Complainant engaged in protected activity.

3. Motivating Factor

Complainant must next prove by a preponderance of the evidence that his protected activity was a "motivating factor" in the adverse action.[33] A "motivating factor" is conduct that is "a substantial factor in causing an adverse action."[34]

The ALJ determined that Complainant's protected activity was a motivating factor in his termination for several reasons. First, the ALJ found circumstantial evidence of retaliation due to the temporal proximity between when Mr. Brozena received Complainant's grand jury testimony and when M&B fired him. The ALJ opined there was no question that Respondents knew of Complainant's cooperation at the time of his termination and found this provided strong circumstantial evidence of retaliation.[35] The ALJ also found that Respondents' explanation "rings particularly hollow" in light of Respondents' disparate treatment of a similarly situated employee.[36] The ALJ further found that Respondents' rationales for terminating Complainant lacked credibility.[37]

Substantial evidence supports the ALJ's finding of circumstantial evidence of retaliation based on temporal proximity. Mr. Brozena testified on December 15, 2015, that he suspected Complainant told investigators he directed Complainant to

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[32] JX 4, JX 5, CX 4 – CX 6.

[33] 29 C.F.R. § 24.109(b)(2); *Morriss v. LG&E Power Servs., LLC*, ARB No. 2005-0047, slip op. at 31.

[34] *Onysko v. State of Utah, Dep't of Interior, Bureau of Land Mgmt.*, ARB Nos. 2006-0147, -0160; ALJ No. 2005-SDW-00008, slip op. at 8 (ARB Aug. 28, 2008).

[35] Specifically, the ALJ referenced Mr. Brozena's testimony on December 15, 2015, in which he stated that he suspected that Complainant told investigators that he directed Complainant to discard the samples; he knew Complainant provided grand jury testimony against him; and that he obtained information about Complainant's grand jury testimony a week or two following his own initial appearance after his indictment. D. & O. at 13.

[36] D. & O. at 13-14.

[37] *Id.* at 15-17.

discard the sample and that he knew Complainant testified against him.[38] Within a couple weeks, Respondents obtained Complainant's grand jury testimony.[39] On February 3, 2016, Complainant entered his plea.[40] On February 5, 2016, he was fired.[41]

Substantial evidence also supports the ALJ's finding of disparate treatment. Stephen Fritz, another former employee of MAB and M&B, pled guilty to crimes on two separate occasions. In 2012, he pled guilty to a tampering with public records, a felony in the third degree. Mr. Brozena sent Mr. Fritz a letter instructing him to go to training and meet each week to discuss his performance, and stating that he looked forward to working with him in the days ahead.[42] Mr. Fritz testified he never received the training.[43] Mr. Fritz also testified that he neither signed a cooperation agreement nor testified against Respondents for this incident.[44] Mr. Brozena later hired Mr. Fritz to work for M&B despite the 2012 guilty plea, which resulted in the loss of a contract.[45] When Mr. Fritz was charged again in 2015, he testified before a grand jury that either Mr. Brozena or his site's operator instructed him to commit a wrongdoing. A few days after he entered his guilty plea, Respondents fired him.[46] This treatment demonstrates that employees who testified against Respondents were treated more severely for misconduct than employees who did not.

Substantial evidence also supports the ALJ's finding that Respondents' explanations lacked credibility as they were either meritless or conflicted with other conduct and shifted from one reason to another.[47] Complainant's termination letter states that he was fired because of his illegal action for which he pled guilty.[48]

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[38] CX 22 at 35, 37; JX 2; Tr. at 103-04.

[39] JX 2, Tr. at 104.

[40] JX 5, Tr. at 44-45.

[41] JX 1, Tr. at 44-45.

[42] CX-7.

[43] Tr. at 77:13-17, 81-82, 87-88.

[44] *Id.* Specifically, when the PA DEP asked Mr. Fritz if he acted at the direction of his employer, he responded "no."

[45] CX 13, TR at 75.

[46] Tr. at 84-86, 88-89.

[47] D. & O. at 13-17.

[48] CX 23.

However, Mr. Brozena testified that he "had no choice" but to fire Complainant because Complainant damaged his business and no longer had the necessary certifications.[49]

Specifically, Respondents contend they had to terminate Complainant's employment because Complainant was no longer certified and was debarred from working on federal government contracts. However, Complainant previously worked for M&B without a certification.[50] Additionally, Respondents state that Complainant was no longer eligible to obtain a license due to his guilty plea. However, Pennsylvania law states that it "*may* suspend, revoke, or modify" an operator's certificate for "negligence in the operation of the water or wastewater system" not that it *must*.[51] Further, Complainant was not debarred from working on federal contracts until April 2018, over two years after Complainant was fired.[52] Respondents do not explain why Complainant could not have worked on non-government contracts, constituting seventy-to-eighty percent of total business.

Respondents also argue they had to fire Complainant because his actions damaged their business to the sum of a million dollars' worth of work. However, Respondents have not submitted evidence of this. Further, as noted above, substantial evidence supports the ALJ's finding that Mr. Brozena directed Complainant to dump the sample. Thus, Mr. Brozena's direction to Complainant is the basis of the action that he alleges damaged his business.

For these reasons, substantial evidence supports the ALJ's finding that Complainant's protected activity was a motivating factor in his termination.

4. Respondents' Affirmative Defense

An employer may avoid liability by demonstrating by a preponderance of the evidence that it would have discharged the Complainant even if he had not engaged in protected activity.[53] However, as discussed *supra*, substantial evidence supports

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[49] Tr. at 92, 96, and 112.

[50] *Id.* at 112-13.

[51] D. & O. at 14, quoting 25 Pa. Code § 302.308(b)(1) (emphasis added).

[52] *Id.* at 3, 5; Tr. at 54-55.

[53] 29 C.F.R. § 24.109(b)(2); *Tomlinson v. EG&G Defense Materials*, ARB Nos. 2011-0024, 2011-0027, ALJ No. 2009-CAA-00008, slip op. at 8 (ARB Jan.

the ALJ's finding that Respondents' rationales for terminating Complainant lacked credibility. Thus, the ALJ properly found that Respondents' affirmative defense is inapplicable.

Respondents argue that the government "cannot have it both ways" by punishing them for failing to supervise their employees and then punishing them for terminating Complainant's employment. However, the ALJ correctly opined that Respondents' conduct resulted in criminal as well as civil liability because Respondents violated environmental laws and because Complainant established that engaging in a protected activity was a motivating factor in his termination in violation of WPC's employee protection.

CONCLUSION

For the reasons stated above, the ALJ's D. & O. is **AFFIRMED**.

SO ORDERED.

31, 2013).