U.S. Department of Labor

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

In the Matter of:

BRIAN EVANS,

COMPLAINANT,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

RESPONDENT.

ARB CASE NO. 96-065

ALJ CASE NO. 95-ERA-52

DATE: July 30, 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1]

FINAL DECISION AND ORDER

Before us for review is the Recommended Decision and Order (R. D. and O.) issued on January 17, 1996, by the Administrative Law Judge (ALJ) in this case arising under section 211 (employee protection provision) of the Energy Reorganization Act, as amended (ERA), 42 U.S.C. § 5851 (1988 & Supp. V 1993). The ALJ recommended dismissal of this case because Complainant Brian Evans (Evans), failed to prove that he was terminated by Respondent Washington Public Power Supply System (WPPSS), for engaging in protected activity pursuant to the ERA. After a thorough examination of the record in this case we agree with the ALJ and dismiss the complaint.

[1/] On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996)(copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization is also attached.

BACKGROUND

Evans was hired on January 29, 1990 to provide technical guidance for the testing and maintenance of motor operated valves (MOVs) at WPPSS' Plant #2. On February 19, 1993, he attended a briefing for an emergency exercise that was to commence on February 23, 1993. Although Evans had been designated by management to serve as a controller during the emergency exercise, he did not attend the exercise and instead flew to Phoenix, Arizona in order to participate in a Motor Operated Valve Users Group (MUG) conference. Evans believed that his attendance at the conference was more important than his participation in the emergency drill. T. 9. Upon returning to work after the conference he was reprimanded and warned that a subsequent similar abrogation of his duties could result in termination.

In May of 1994, Evans filed a Performance Evaluation Request (PER) related to the taking of grease samples and the application of lubrication during testing activities on MOVs. Four weeks later, Evans raised concerns with another worker regarding a separate matter that generated a second PER. PERs are reports filed by employees who wish to identify areas of concern. Management at WPPSS encourages employees to identify problems, and about 1,200 PERs are filed on an annual basis. Evans testified that the concerns raised in the PERs were addressed by WPPSS. T. 14-18

In December of 1994, Evans obtained approval to attend a MUG conference in Charlotte, North Carolina. In January of 1995, WPPSS made the decision to limit the number of employees attending that conference. John Sampson (Sampson), Maintenance Manager, instructed Daniel Farley (Farley), MOV Functional Coordinator, to communicate this decision to the affected individuals. Farley called Evans and left a voice mail message which Evans reproduced in his complaint to the Wage and Hour Division:

> Hey Brian this is Dan, I know you are in training today, but I want to let you know just in case you're trying to make some travel plans ... I met with Morris and Sampson, basically they have committed to send me to Charlotte and for us to switch off for the summer one, or if there is something else you would rather attend other than the MUG, a MOV Region IV, training or something like that. Basically they are going back to committing is to 1 trip a year, they want us to try to figure out early in the year - budget on where they may be and they will try to honor that, is the way they put it....so call me back and give me comments, uh sorry it didn't work out for both of us to go but it looks like we at least convinced them to not completely delete us from all of our MOV conferences, they have committed to at least one of us, so give me a call. Thanks, Dan

R. D. And O. at 3. Evans acknowledged that Farley subsequently met with him in person to convey the message that Evans was not to attend the conference. Evans says that he "just didn't believe him." Deposition of Brian Evans, November 10, 1995, p. 54. Evans had already made vacation plans that coincided with his trip to the MUG conference. WPPSS policy allotted

workers three extra travel days at the end of a business-related trip, and allowed for the payment of hotel, rental car, and meals. Evans planned to use this extra time to travel from Charlotte to Orlando, where he would meet his wife. T. 31-32.

Evans attended the conference, went on the planned vacation to Orlando, and returned to work on February 13, 1995. When questioned about his absence, Evans initially denied that he been told by Farley not to attend the conference. On or about April 11, 1995, Evans met with Matteo Monopoli (Monopoli), WPPSS' maintenance manager and Sampson's supervisor, who had just returned from a thirteen week management training course. Monopoli terminated Evans on that day. Monopoli testified that his decision to terminate Evans was based on the fact that "Evans had taken it upon himself to undertake that travel at the expense of the Supply System and ultimately the rate payers." T. 107. Evans alleges that it was the content of the PERs he filed in 1994 that initiated a pattern of hostility that ultimately led to his termination.

DISCUSSION

The ALJ weighed all the evidence and concluded that Evans did not present a *prima facie* case of a violation of the employee protection provisions of the ERA. R. D. and O. at 6. However, since "this case was fully tried on the merits," it is not necessary to engage in an analysis of the elements of a *prima facie* case. *USPS Board of Governors v. Aikens,* 460 U.S. 711, 713 (1983). Once WPPSS produced evidence that Evans was subjected to an adverse action for a legitimate, nondiscriminatory reason, the answer to the question whether a *prima facie* case was presented is no longer particularly useful. If Evans has not prevailed by a preponderance of the evidence on the ultimate question of liability, it matters not at all whether he presented a *prima facie* case.[2]

WPPSS concedes that the filing of a PER can constitute protected activity. Proposed Findings of Fact and Conclusions of Law submitted by the WPPSS at 8. Although the filing of a PER is encouraged by management, it is possible that management could retaliate against an employee for the content of a PER.

[2/] The ALJ also noted that a "recent decision raised the employer's burden from a preponderance of the evidence to clear and convincing evidence. *Yule v. Burns International Security Service*, 93-ERA-12 (Sec'y May 24, 1995)." R. D. and O. at 6. Section 2902 of the Comprehensive National Energy Policy Act of 1992, enacted on October 24, 1992, amended the ERA to, among other things, raise the employer's burden of proof under a dual motive analysis to "clear and convincing." The fact finder only gets to a dual motive analysis if the employee has proven by a preponderance of the evidence that discriminatory motives, at least in part, caused the adverse action. The employer's burden of proof then increases to show by clear and convincing evidence that, although improper motives played a part in its action, it would have taken the same action regarding the complainant even if no improper motive existed. 42 U.S.C.A. § 5851(b)(3)(D). Since Evans failed to prove by a preponderance of the evidence that discriminatory motives played any part in his termination, the question of dual motive was not reached in this case.

The ALJ found that Monopoli's investigation of Evans unauthorized trip to Charlotte was not affected by the PERs generated by Evans because Monopoli was unaware of them. R. D. And O. at 5. The record supports this conclusion. Even if Monopoli was aware of the PERs, it is unlikely that his decision was inspired by observations made by Evans a year earlier. When a complainant shows that his termination closely followed protected activity, such temporal proximity may indicate that the activity was the cause of the termination. *See Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (as a matter of law 30 day temporal proximity establishes final element of *prima facie* case); *Goldstein v. Ebasco Constructors, Inc.,* Case No. 86-ERA-36, Sec. Dec., Dec. 7, 1992, slip op. at 11-12, *rev'd on other grounds sub nom. Ebasco Constructors Inc. v. Martin*, No. 92-4567 (5th Cir. Feb. 19, 1993). However, in this case nearly a year elapsed between Evans' filing of the PERs and Monopoli's decision to terminate him.

More importantly, Monopoli had an intervening legitimate reason for terminating Evans. *See, e.g., Williams v. Southern Coaches, Inc.,* 94-STA-44, Sec. Final Dec. And Order, September 11, 1995, slip op. at 6-7 (under the Surface Transportation Assistance Act, a legitimate reason for termination that occurs after protected activity may negate any temporal inference of causation). Evans was terminated for attending -- at company expense -- the Charlotte MUG conference, contrary to express instruction. Evans himself all but admits that he was instructed not to attend the Charlotte MUG conference.[3] This was the second similar violation of company policy by Evans and he was warned after the first incident that a subsequent violation could be cause for termination. The record fully supports the ALJ's findings that WPPSS proffered legitimate, nondiscriminatory reasons for Complainant's termination. Evans did not prove by a preponderance of the evidence that those reasons were pretextual or that WPPSS's true motivation in terminating him was, even in part, discriminatory. Accordingly, this case IS DISMISSED.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[3/] The ALJ made a specific credibility finding against Evans on this issue that is well supported by the record. R. D. And O. at 4.