U.S. Department of Labor

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

In the Matter of:

RICHARD DEAN BOURLAND, **ARB CASE NO. 99-124**

COMPLAINANT, **ALJ CASE NO. 98-ERA-32**

v. **DATE: April 30, 2002**

BURNS INTERNATIONAL SECURITY SERVICES,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Mark Heinen, Esq., *Gregory, Moore, Jeakle, Heinen, Ellison, Brookes & Lane P.C. Detroit, Michigan*

For the Respondent:
Roger Guerin, Esq., *Chicago, Illinois*

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act (ERA) of 1974, as amended, 42 U.S.C.A. §5851 (West 1995), and its implementing regulations at 29 C.F.R. Part 24. Respondent Burns International Security Services (Burns) suspended Complainant Richard Dean Bourland (Bourland) following allegations that he sexually harassed a fellow employee. Bourland claims that he was suspended for engaging in activity protected by the ERA and that Burns's rationale for the adverse action was pretextual.

After reviewing the record we have concluded that Bourland was not suspended for engaging in protected activity. We therefore **AFFIRM** the Administrative Law Judge's (ALJ) ruling but provide clarification of the ultimate burden of persuasion for an ERA complainant.

BACKGROUND

The facts set forth by the ALJ are fully supported by the record. To summarize, Bourland was hired by Burns in 1988 as an armed security guard. Burns provides security services to Commonwealth Edison's Quad Cities Nuclear Power Station. In December 1997 Burns received a complaint from employee Kim Mix (Mix) that Bourland had been making unwanted advances toward her. Although she said she felt like she was being "stalked," she did not file a formal

complaint at the time. Burns's management documented her complaint and told Bourland to cease harassing Mix. Recommended Decision and Order (RD&O) at 2-3.

On March 17, 1998, Bourland filed a written safety notice with Burns alleging that shotguns used by its security personnel had been modified and rendered defective. On March 31, 1998, Bourland wrote a letter to Burns's security force manager, Kent Hungerford (Hungerford), reporting that security officers tasked with searching personnel were not physically positioned to react to certain emergency situations. Hungerford investigated both of Bourland's safety concerns. RD&O at 3. There is no dispute that these two acts are protected under the ERA. RD&O at 7.

In early April 1998 Mix again informed her supervisors that Bourland was continuing his harassment of her. Soon thereafter, on April 8, 1998, Bourland was placed on administrative leave pending an investigation into this second harassment complaint. Mix was unaware of Bourland's protected activities. RD&O at 3-4, Respondent's Exhibit 8.

On April 10, 1998, Bourland submitted a letter to an inspector at the Nuclear Regulatory Commission (NRC) reiterating his concerns about the shotguns and the positioning of security personnel. The NRC investigated Bourland's concerns and found that Bourland's allegations concerning defective shotguns were unsubstantiated, and Burns's placement of its guards was not in violation of any rule or standard. RD&O at 4.

Between April 10 and April 16, 1998, Dianne Wood (Wood), Human Resources Manager for Borg-Warner Protective Services (of which Burns is a subdivision), interviewed various employees who described Bourland's behavior. Wood reported her findings to Mike Embree (Embree), Burns's General Manager, who concluded that Bourland should be referred to Burns's Employee Assistance Program (EAP). Wood was not aware of Bourland's protected activities. RD&O at 4.

On April 17, 1998, Bourland was informed of the results of the investigation into Mix's allegations. Three days later he participated in an EAP examination and interview. On May 20, 1998, Dr. Gloria Mouzon, Commonwealth Edison's medical review officer, wrote to Embree and outlined conditions under which Bourland would be permitted to return to work. These conditions included evaluation, counseling sessions, and a recommendation by a therapist that Bourland could return. RD&O at 5. Bourland was told that he would be allowed to return to work after he attended the first session. Bourland disagreed that his return to work should be conditioned upon his participation in counseling. RD&O at 5.

Bourland filed a complaint with the Occupational Safety and Health Administration (OSHA) on April 30, 1998. OSHA conducted an investigation and concluded that Burns did not violate the ERA. Bourland appealed the OSHA determination to an ALJ, who conducted a hearing and recommended that Bourland's complaint be dismissed. The case is now before this Board pursuant to Bourland's Petition for Review.

JURISDICTION AND SCOPE OF REVIEW

We have jurisdiction to decide this appeal pursuant to 29 C.F.R. § 24.8 (2000). *See also* Secretary's Order No. 2-96, Fed. Reg. 19,978 (May 3, 1996) (delegating Secretary of Labor's

authority to review cases arising under, *inter alia*, the statutes listed at 29 C.F.R. § 24.1(a)). This Board is not bound in this Part 24 case by either the ALJ's findings of fact or conclusions of law, but may review both *de novo*. *See* 5 U.S.C.A. § 557(b) (West 1996); *Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-001, slip op. at 6-7 (Apr. 28, 2000), and authorities cited therein.

DISCUSSION

The judge below found that the record herein is "devoid of any evidence to suggest the adverse action taken against Mr. Bourland was in any way related to the protected activity." RD&O at 11. We have reviewed this record and concur. However, since the ALJ did not explicitly so indicate, we find it necessary to explain the standard of proof involved when we review ERA cases arising after the effective date of the 1992 employee protection amendments to the statute.[1]

The ERA requires a complainant to "demonstrate" that his protected behavior was a contributing factor in the unfavorable personnel action that followed. 42 U.S.C.A. § 5851 (b)(3)(C). "Demonstrate," in this context, means to prove by a preponderance of the evidence. *Dysert v. Florida Power Corp*., 93-ERA-21, slip op. at 3 (Sec'y Aug.7, 1995), *aff'd sub nom. Dysert v. U. S. Secretary of Labor*, 105 F. 3d 607, 609-10 (11th Cir. 1997); *Trimmer v. U. S. Dep't of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999); *Stone & Webster Engineering Corp. v. Herman,* 115 F. 3d 1568, 1572 (11th Cir. 1997). Bourland did not meet this statutory requirement and therefore cannot prevail.

In his Brief In Support Of Petition For Review, pages 20-26, Bourland argues that because various "attendant circumstances" tend to support "inferences" of retaliatory intent by Burns, these inferences therefore become the necessary preponderance of evidence in his favor. But, he continues, when the ALJ erroneously applied a *McDonnell Douglas*[2] analysis and allowed Burns to articulate a legitimate reason for the suspension, the inferences were "wipe[d] out" and thus could not become a preponderance evidencing retaliation. As a result of the ALJ's error, concludes Bourland, Burns was not required to shoulder its clear and convincing burden, 42 U.S.C.A. § 5851(b)(3)(D), and prove it would have made the same decision. We find no authority supporting this argument, and we reject it.

For the reasons stated above we **AFFIRM** the ALJ's order and **DISMISS** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[1] Energy Policy Act of 1992, P.L. 102-486, § 2902, 106 Stat. 3123, 3124.

[2] *McDonnell Douglas v. Green,* 411 U.S. 792 (1973).