U.S. Department of Labor

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

In the Matter of:

DWAYNE OLSOVSKY, **ARB CASE NO. 96-183**

COMPLAINANT, **(ALJ CASE NO. 96-CAA-1)**

v. **DATE: April 10, 1997**

SHELL WESTERN E&P, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

The Administrative Law Judge (ALJ) submitted a Recommended Decision and Order (R. D. & O.) in this case arising under the employee protection provisions of the Clean Air Act, 42 U.S.C. § 7622 (1988) and several other environmental whistleblower laws. R. D. & O. at 1. The ALJ found that Complainant Dwayne Olsovsky did not carry his burden of proving that Respondent Shell Western E & P, Inc. (Shell) discriminated against him for engaging in protected activities when it discharged him on August 9, 1995. The record in this case has been reviewed and we find that it fully supports the ALJ's factual findings and conclusions and we adopt them.

The facts in this case are fully set forth in the R. D. & O. at 4-10. Briefly, Olsovsky was hired by Shell in December 1989 to work at its Houston Central gas processing facility and was promoted twice, reaching the level of Maintenance Assistant A. R. D. & O. at 4. Olsovsky began to exhibit "performance problems" in 1991 which continued and increased in 1992, 1993 and 1995, including the need to put more thought and planning into his work to anticipate problems and recognize safety hazards. *Id.* at 4-5. Olsovsky also displayed "disruptive behavior" several times and Shell suspended him for two days after one such incident in 1995. *Id.* at 5. Shell then warned Olsovsky that continued unacceptable behavior or performance would lead to further disciplinary action "up to and including termination." *Id.*

In July 1995, Complainant was responsible for replacing a valve inside a compressor with the assistance of two contract employees. Because he failed to follow proper procedures for this task, the cap of the compressor blew off and injured one of the contract employees. Shell thoroughly

investigated this incident and concluded that, in light of Olsovky's past performance problems, he should be discharged. R. D. & O. at 6-7.

The ALJ found that Olsovsky did make some complaints about environmental hazards that were protected under the environmental whistleblower laws, but he also found that these complaints were not motivating factors in Shell's decision to fire Olsovsky.[1/] Rather, the ALJ found that Shell articulated legitimate reasons for firing Olsovsky which were fully supported by the record evidence and that Olsovsky did not show that those reasons were pretextual. R. D. & O. at 12-13.[2/]

In his exceptions to the R. D. & O., Olsovsky concedes that Shell "may legitimately have singled out Complainant for disciplinary action because of his misconduct (e.g., unsafe work practices, inappropriate conduct toward supervisors, etc.)." His principal argument is that discharge was an "unreasonably harsh punishment" in light of the nature of Olsovsky's conduct and in comparison with discipline imposed on other employees at the same plant, raising the inference that the action was taken out of discriminatory motives.

We agree with the ALJ that Complainant has not supported this allegation with probative evidence. He has not identified any evidence in the record which shows that other employees similarly situated, that is with substantially similar disciplinary records but who had not engaged in protected activity, received more lenient treatment for their conduct. *Davin v. Delta Airlines, Inc.,* 678 F.2d 567, 570 (5th Cir. Unit B 1982). Although some employees separately had performance

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[1/] The ALJ rejected Shell's assertion that internal complaints to supervisors and management, which was the nature of all of Olsovsky's environmental complaints, are not protected in the Fifth Circuit under *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1036 (1984). We note that other courts of appeals have held that internal complaints are protected under the environmental whistleblower provisions, *Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 494, 480 (3d Cir. 1993); *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991), and that the Secretary has held several times that internal complaints are protected under those statutes. *See, e.g., Rivers v. Midas Muffler Center*, Case No. 94-CAA-5, Sec'y. Dec. Aug. 4, 1995, slip op. at 3-4; *Flor v. United States Dep't of Energy*, 93-TSC-9, Sec'y. Dec. Dec. 9, 1994, slip op. at 10-11; *Poulos v. Ambassador Fuel Oil Co.*, Case No. 86-CAA-1, Sec'y. Dec. Apr. 27, 1987, slip op. at 6.

[2/] The ALJ analyzed the facts in this case step by step, first determining whether Olsovsky made out a *prima facie* case, then considering whether Shell articulated legitimate, non-discriminatory reasons for its action, and lastly evaluating whether Olsovsky proved those reasons pretextual. But,

> once the employer meets [its] burden of production, 'the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.' *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981) (applying McDonnell Douglas test) (footnote omitted); see also *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, (1993) (applying McDonnell Douglas test). The Couty/McDonnell Douglas framework and its attendant burdens and presumptions cease to be relevant at that point, Hicks, 113 S. Ct. at 2749, and the onus is once again on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reason for the challenged employment action. *Burdine*, 450 U.S. at 256.

Carroll v. Bechtel Power Corp., 78 F.3d 352, 356 (8th Cir. 1996).

and attitude problems, such as loss of temper, poor performance or tardiness, Olsovsky has not shown that any of them had an employment history combining all of these problems which, when taken together, brought Shell to the conclusion that Olsovsky should be fired. *See, e.g.,* T (Transcript of hearing) 691-92 (the reasons for Olsovsky's discharge were "the continued unacceptable behavior . . . the interaction with supervisors [and] peers, and . . . concerns [about] safety and performance and work behavior."); *see also* T. 712 (Olsovsky was fired based on the accident and his "overall performance.") Shell acknowledges that the July 1995 accident by itself would not have been grounds for termination, T. 730, but argues that a pattern of behavior over several years after counseling and progressive discipline resulted in the decision to terminate Olsovsky's employment. T. 732-37. We also agree with the ALJ that many of the witnesses called by Olsovsky to corroborate his claim that he was a safe worker who got along well with his colleagues, in fact gave testimony supporting Shell's position that Olsovsky was difficult to get along with and sometimes worked in an unsafe manner. *See* R. D. & O. at 13.

Olsovsky testified that he did not make any environmental complaints until 1993. T.217. His claim that the warnings and suspension in the years prior to his discharge were motivated by discrimination and are evidence of discrimination in his discharge is undermined by the fact that his performance evaluations began to note problems with his work before he made any environmental complaints. *See* R- (Shell's exhibit) 18 (1991 performance review); R-19 (1992 performance review). We adopt the ALJ's conclusion that Olsovsky has not shown that Shell's reason for firing him was pretextual.

Shell requested an award of its costs, other than attorney's fees. As the Secretary has held in other whistleblower cases, the statutes invoked here only grant authority to the Department of Labor to assess attorney's fees and costs against the person against whom a finding has been made that a violation of the statute has occurred, but does not grant authority to award costs when a complaint is denied. *See, e.g.,* 42 U.S.C. § 7622(b)(2)(B); *Crosby v. Hughes Aircraft Co.,* Case No. 85-TSC-2, Sec'y. Dec. Aug. 17, 1993, slip op. at 15; *Rogers v. Multi-Amp Corp.*, Case No. 85-ERA-16, Sec'y. Dec. Dec. 18, 1992, slip op. at 2-3. Respondent's motion for costs is denied.

For the reasons discussed above, the complaint in this case is DENIED.

SO ORDERED.

DAVID A O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate