U.S. Department of Labor

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

In the Matter of:

MICHAEL MADONIA, **ARB CASE NO. 99-001**

COMPLAINANT, **ALJ CASE NO. 98-STA-2**

v. **DATE: January 29, 1999**

DOMINICK'S FINER FOOD, INC.,

and

MAVO LEASING, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Brian F. DeCook, Esq., *Olympia Fields, Illinois*

For Respondent Dominick's Finer Food, Inc.:
Paul F. Gleeson, Esq., James E. Bayles, Jr.,
Vedder, Price, Kaufman & Kammholz, Chicago, Illinois

ORDER REMANDING FOR CONSIDERATION OF NEW EVIDENCE, AND VACATING ORDER OF REINSTATEMENT

This case arises under Section 405 of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. §31105 (1994), as amended. On October 5, 1998, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) finding that Dominick's Finer Foods, Inc., and Mavo Leasing, Inc. (Respondents), violated the employee protection provisions of STAA by terminating Michael Madonia (Madonia or Complainant) in part because of his protected activity. As a remedy for the violation, the ALJ ordered, *inter alia*, that Respondents reinstate Complainant to his position as a truck driver.

On October 21, 1998, Respondents moved this Board to remand the case to the ALJ for (1) reopening the record to admit new evidence, (2) reconsideration of the R. D. & O. based on the new

evidence, and (3) a stay of the reinstatement order pending reconsideration.[1/] In his response filed on November 9, 1998, Complainant agreed to the admission of evidence but opposed remanding the matter to the ALJ.[2/] Complainant's response did not address the reinstatement issue.

For the reasons discussed below, Respondents' motion is granted, and this matter is hereby remanded to the ALJ with instructions to reopen the record to admit the newly-discovered evidence and to reconsider the Recommended Decision in light of this new evidence. Inasmuch as the Recommended Decision and Order is vacated pending reconsideration of the case in light of the new evidence, the reinstatement order is null and void.

BACKGROUND

An abbreviated recitation of facts is necessary to understand the relevance and materiality of the new evidence.

Michael Madonia was employed by Mavo Leasing and leased to Dominick's Finer Foods as a truck driver from 1986 until August 1997. R. D. & O. at 2. In November 1996, Madonia was fired because he was involved in an altercation with an employee of Dominick's store. *Id*. at 4. In an effort to regain his job, Madonia entered into a written agreement with Respondents which provided for Complainant's continued employment as long as, *inter alia*, he completed a psychotherapy program recommended by his physicians. *Id*. at 5. Because he signed the agreement, Madonia was rehired by Respondents as of December 3, 1996. *Id*.

On August 25, 1997, Madonia was again terminated because, according to Respondents, he had failed to complete his psychotherapy treatments as required in the 1996 agreement. *Id*. at 8. In contrast, Complainant maintains that the true motivation for his firing was that he filed a safety-related complaint with his employers on August 7, 1997. *Id*. at 11.

[1/] Dominick's motion also requested an extension of time for filing briefs with this Board. By order dated October 29, 1998, we stayed until further notice our earlier-issued briefing schedule. Additionally, on November 10, 1998, the Board received a motion withdrawing Robert Mann and substituting Brian F. DeCook as counsel for Complainant. The motion for the substitution is granted.

[2/] The Board rejects Complainant's argument that the new evidence can be admitted without remanding the matter to the ALJ. Comp. Response at 2. The Board's review of a case must be based on the record made *before the ALJ* and on *the ALJ's* recommended decision and order. 29 C.F.R. §1978.109(c)(1) (1997). Reliance by the Board on exhibits not in the record before the ALJ is, therefore, not permitted. *Boyd* v. *Belcher Oil Co.*, Case No. 87-STA-9, Dep. Sec. Decision and Order, December 2, 1987, at 3.

ANALYSIS

Section 405 of the Surface Transportation Assistance Act of 1982 forbids the discharge of employees in the commercial motor transportation industry in retaliation for filing complaints alleging that the employer is not complying with applicable safety standards. The elements of a violation of the STAA employee protection provision are "that the employee engaged in protected activity, that the employee was subjected to adverse employment action, and that there was a causal connection between the protected activity and the adverse action." *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F. 3d 12, 21 (1st Cir. 1998). *See also Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir. 1987).

The ALJ determined that Respondents' August 1997 termination of Madonia violated STAA, using a "dual motive" analysis. R. D. & O. at 15. A dual motive analysis is appropriate when an adverse action is motivated in part by lawful reasons, and also in part by unlawful reasons. *Mt. Healthy City School District Bd. of Education* v. *Doyle, 429 U.S. 274 (1977).* In his Recommended Decision and Order, the ALJ specifically ruled that Madonia's termination was motivated in part by Respondents' discovery that Complainant had failed to complete the course of psychotherapy, and in part by Madonia's safety-related complaint. The ALJ ultimately concluded that Respondents were liable because they had failed to establish that Madonia would have been fired "in the absence of the protected activity." *Id*. at 15-16.

Critical to the ALJ's finding was his determination that it was only *after* Madonia filed a safety complaint on August 7, 1997, that Respondents checked whether he was complying with the psychotherapy requirement of the 1996 settlement agreement. *Id*. at 15. This finding by the ALJ stands in opposition to the testimony of Respondents' officials, who said that they had asked the doctor about Madonia in June or July, and that the reply was contained in Dr. Cochran's letter to Respondents reporting that Madonia had failed to complete the required treatment. R. D. & O. at 14; Exh. MX 6. Dr. Cochran's letter was dated July 7, 1997, a full month *before* Madonia filed the safety complaint. *Id*. at 14.

The ALJ did not find the testimony of Respondents' officials credible and rejected the assertion that the letter was sent around the time it was dated. *Id.* The ALJ was particularly troubled by the fact that the July 7, 1997, letter from the physician was not received by Respondent until August 8, 1997, as documented by a date stamp. *Id*. Because of this discrepancy between the typewritten date on the letter and the stamped date of receipt, the ALJ deduced that the "July date in Dr. Cochran's letter is a typographical error and the letter should read August 7 . . . . " *Id*. at 14. Accordingly, the ALJ found that Respondents "did not check with the Complainant's physicians . . . until the same day he made safety complaints on August 7." *Id*.

The new evidence proffered by Respondents raises questions about this key ALJ finding. Respondents seek to introduce a second letter from Dr. Cochran, also dated July 7, 1997. This second letter was sent by Dr. Cochran to Madonia, who produced the letter and envelope in response

to discovery requests made by Respondents in separate litigation involving the same parties.[3/] Attach. B to Resps. Motion. Respondents argue that this letter is significant as it is further proof that Respondents' inquiries about Madonia's compliance with his psychotherapy program *predated* the safety complaint of August 7, 1997.

In the July 7, 1997, letter from Dr. Cochran to Respondents, already in evidence, Dr. Cochran states that, because Madonia would not accept psychiatric treatment, Dr. Cochran "will be sending [Madonia] a letter advising him of his termination as a patient in this clinic in the near future . . . ." Exh. MX6. The newly proffered July 7, 1997, letter from Dr. Cochran to Madonia, according to Respondents, is the fulfillment of Dr. Cochran's declared intention, because it informs Madonia that Dr. Cochran is "terminating [him] as a patient" based on his lack of compliance with the doctor's treatment recommendations. Attach. B to Resps. Motion. Significantly, the envelope indicates that the newly proffered July 7, 1997, letter was postmarked on July 24, 1997. *Id.*

In STAA cases, the Board often looks to the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges for guidance on procedural matters. 29 C.F.R. §1978.100(b); 29 C.F. R. Part 18. The Rules permit the acceptance of additional evidence under certain circumstances:

> Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.

29 C.F.R. §18.54(c) (1998).

We find that the evidence proffered by Respondents is relevant and material, and that it was not available prior to the closing of the record. Thus, on remand, the ALJ shall admit the new evidence as well as any additional arguments, briefs or rebuttal evidence he deems appropriate, and shall reconsider his findings in light thereof.[4/]

The ALJ ordered reinstatement of Complainant as a remedy for Respondents' violation of STAA. R. D. & O. at 16. The reinstatement order, however, is no longer valid because the liability finding is vacated pending review of the new evidence.

[3/] The discovery response was made by Complainant in his case brought against Respondents under the Americans with Disabilities Act, 42 U.S.C. §1201 *et seq.* and was received by Respondent on October 16, 1998. Resps. Motion at 4. The ALJ's R. D. & O. was issued October 5, 1998.

[4/] By order dated January 22, 1999, the ALJ recommended an award of back pay to Complainant. Inasmuch as the Board today remands for reconsideration the ALJ's finding of liability, the back pay order also shall be reviewed by the ALJ.

ORDER

Accordingly, this matter is **REMANDED** to the ALJ for further proceedings consistent with this decision, including:

1. The admission of the letter from Dr. Cochran to Complainant dated July 7, 1997, as well as the envelope in which the letter was sent, and such rebuttal evidence as appropriate;

2. The submission of any additional briefs and arguments as necessary;

3. Reconsideration of the findings in light of the foregoing; and

4. Issuance of a new or supplemental recommended decision.

FURTHER the ALJ's order reinstating Complainant is hereby declared null and void.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Acting Member