U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

GABRIEL BOSTAN,	**ARB CASE NO. 01-034**
COMPLAINANT,	**ALJ CASE NO. 2000-WPC-0004**
v.	**DATE: March 31, 2003**
CITY OF CORONA,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Thomas M. Johnson, Esq., Karen E. Helland, Esq., ***Law Office of Thomas Johnson, Diamond Bar, California***

For the Respondent:
Jack B. Clarke, Jr., Esq., Trang Tran, Esq., ***Law Offices of Best, Best & Krieger LLP, Riverside, California***

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Federal Water Pollution Control Act of 1972, as amended ("Act" or "FWPCA"), 33 U.S.C.A. § 1367 (West 2001). Complainant Gabriel Bostan filed a written complaint alleging that Respondent City of Corona violated the Act when, because of his protected activity, it failed to continue his employment beyond the probationary period. After a formal hearing, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) finding that Corona had established, by a preponderance of the evidence, that it had terminated Bostan's employment for non-discriminatory reasons. Bostan appealed this R. D. & O., and we now **AFFIRM** the denial of Bostan's

claim.[1]

JURISDICTION AND STANDARD OF REVIEW

By regulation the Secretary of Labor has provided for a formal hearing before an Administrative Law Judge, 29 C.F.R. Part 24 (2002), and has delegated to this Board the authority to render the Secretary's final decision. Secretary's Order 1-2002, 67 Fed. Reg. 64272 (October 17, 2002).

In reviewing the ALJ's recommended decision, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). Accordingly, the Board is not bound by either the ALJ's findings or his conclusions of law, but reviews both *de novo*. *See Berkman v. United States Coast Guard Academy,* ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000) and the authorities cited therein.

BACKGROUND

The ALJ's R. D. & O. contains complete findings of fact that we summarize for purposes of this decision.[2]

On March 4, 1999, Corona hired Bostan as a Wastewater Treatment Plant Operations Supervisor. The employment was on an at-will basis with a one-year probationary period. Bostan's immediate supervisor was Mike Perales, the Superintendent of Wastewater Systems. Dave Commons, Water Utility Manager, supervised Perales and Glenn Prentice, Director of Water Utilities, supervised Commons. Bostan, Perales, and Prentice all had wastewater treatment operator licenses. Commons did not.

During his probationary period, Bostan had various job-related difficulties and received several reprimands. In May 1999, Corona reprimanded Bostan because he used a city vehicle to transport his family. The City of Corona did not permit using city vehicles for personal reasons. But in July 1999, Bostan again used a city vehicle for personal reasons despite the instruction to the contrary. In September, Bostan's performance evaluation noted difficulties in interpersonal relationships. In October,

---

[1] Citations to the record are as follows: Recommended Decision and Order (R. D. & O. ___); Hearing Transcript (TR ___); Joint Exhibit (JEX ___); Complainant Exhibit (CEX ___); Respondent Exhibit (REX ___); ALJ Exhibit (AEX ___).

[2] An electronic copy of the ALJ's R. D. & O. can be found at: http://www.oalj.dol.gov/public/wblower/decsn/00wpc04a.htm.

Corona reprimanded Bostan for failing to follow federal safety regulations for lockout/tagout of machinery. Bostan's failure resulted in an injury to a staff member. Bostan also opted not to attend a safety training class on lockout/tagout regulations that was given shortly after the reprimand.

On November 8, 1999, Commons prepared a Notice of Intent to Suspend Bostan based upon the two prior reprimands. The Notice of Intent to Suspend stated that Bostan had initiated four major operational decisions without discussing them with Commons. This violated instructions Commons had given to all superintendents at an October 19th meeting. However, Prentice did not suspend Bostan because the human resources director informed Prentice that suspension was not appropriate for probationary employees. Thereafter, Bostan sought out a meeting with Prentice and complained that Commons was not licensed to make operational decisions and that he could not work for two supervisors (Commons and Perales). Also, during November, Perales and Prentice met and discussed not passing Bostan through his probation. They decided not to terminate Bostan's employment because of the upcoming holidays and because they wanted to give him every chance to succeed. TR 284-86.

On December 10, 1999, Commons verbally reprimanded Bostan for not "wasting" enough material from the plant.[3] Bostan complained to Perales that Commons was not licensed to make operational decisions such as giving orders on "wasting."

On January 4, 2000, Bostan complained to the State of California's Office of Operator Certification that Perales allowed Commons to make operational decisions regarding the treatment plant. On that same day, Bostan told Perales about this complaint. Then, also on January 5, Commons directed Perales to demote Bostan. However, Prentice did not agree with the demotion, and he reinstated Bostan on January 7, 2000, with no loss of pay.

In late January, Prentice learned that Bostan failed to order bioxide after Perales had earlier told him to do so. The treatment plant needed bioxide to control noxious odors emanating from the plant, a large public relations problem. Prentice considered Bostan's failure to order the bioxide the "straw that broke the camel's back."

On February 4, 2000, the City of Corona notified Bostan that he was released from his position because of his failure to satisfactorily complete his probationary period. REX A, CEX 24; Complainant's Brief at 14, n.1.

---

[3] "Wasting" is the process which permits solids to pass through the treatment plant without building up in the oxidation ditch. TR 131.

On February 7, 2000, Bostan filed a written complaint with the Department of Labor's Occupational Safety and Health Administration "under the provision of Section 507(a) of the Federal Water Pollution Control Act (33 USC 1367)" regarding his "whistleblower" activities while employed with Corona. REX A.

DISCUSSION

1. The Timeliness of Bostan's Complaint

The ALJ found that Bostan did not timely file his complaint. R. D. & O. at 5-6. We disagree.

The Act provides in pertinent part:

> Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, *within thirty days after such alleged violation occurs*, apply to the Secretary of Labor for a review of such firing or alleged discrimination.

33 U.S.C.A. § 1367(b) (emphasis supplied).

In other words, a FWPCA complainant like Bostan has 30 days from the date of an adverse action to file a complaint alleging a violation of the Act. *See* 29 C.F.R. § 24.3(b)(1) (2002); *McKinney v. Tennessee Valley Authority*, 1992-ERA-22, slip op. at 2 (Sec'y Nov. 16, 1993) (date Energy Reorganization Act complainant was discharged is the "triggering violation" commencing the thirty day filing period under 29 C.F.R. § 24.3(b)).

The date of the adverse action affecting Bostan was February 4, 2000, the day Corona notified him that it had terminated his probationary period. Bostan filed his discrimination complaint with OSHA on February 7. Therefore, we hold that Bostan timely filed the complaint. The ALJ's ruling that Bostan's allegations of discrimination should be dismissed because they were untimely filed is error, albeit harmless, because it does not alter the ALJ's ultimate finding.

2. The Merits of Bostan's Complaint

Bostan complains that Corona violated the Act when it terminated his employment

because he engaged in protected activity.[4] The ALJ found that Bostan's whistle-blowing activities did not influence Corona's decision not to keep Bostan past his probationary period. "Rather, Corona presented sufficient evidence to show . . . that Bostan did not pass his probationary period for non-discriminatory reasons and that the adverse action was motivated by a legitimate, non-discriminatory reason." R. D. & O. at 8. The record supports this finding, and we agree with it.

We analyze this case using the now familiar *McDonnell Douglas* framework.[5] *See Odom v. Anchor Lithkemko/Int'l Paper*, ARB No. 96-189, ALJ No. 1996-WPC-0001 (ARB Oct. 10, 1997) (in case involving FWPCA, among other environmental statutes, the burdens of production and persuasion in whistleblower cases are based on the framework applied under Title VII of The Civil Rights Act of 1964). Under this framework a complainant must establish the elements of a *prima facie* claim to create an inference of discrimination. The burden of production then shifts to the respondent who must articulate a legitimate nondiscriminatory reason for its action. *McDonnell Douglas*, 411 U.S. at 802. *See also Abu-Hjeli v. Potomac Elec. Power Co.*, No. 1989-WPC-1, slip op. at 13 (Sec'y Sept. 24, 1993). Once the respondent proffers a legitimate, nondiscriminatory reason, the complainant's *prima facie* case of discrimination is rebutted. *Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 257 (1981). Ultimately, the complainant, Bostan, must establish by a preponderance of the evidence that the respondent, Corona, intentionally discriminated against him because of his protected conduct. *Id.* at 253; *Abu-Hjeli*, slip op. at 13.

In order for Bostan to make a *prima facie* case of discrimination under the FWPCA he must show: 1) that he engaged in protected conduct; 2) that the City of Corona was aware of that conduct and took adverse action against him; and 3) that an inference is raised that the protected activity was the likely reason for the adverse action. *See Guttman v. Passaic Valley Sewerage Comm'rs*, 1985-WPC-2, slip op. 9 (Sec'y Mar. 13, 1992), *aff'd sub nom. Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474 (3d Cir. 1993).

The ALJ found, and we agree, that Bostan made two internal complaints. R. D. &

---

[4] 33 U.S.C.A. § 1367(a) reads as follows: "No 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 resulting from the administration or enforcement of the provisions of this chapter."

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

O. at 5. As previously noted, on November 8, 1999, Bostan received a copy of the Notice of Intent to Suspend. He complained to Prentice that Commons, the non-licensed manager, was interfering with the operations of the wastewater treatment plant. TR 35-36, 224. As also mentioned above, on December 10, 1999, Bostan and Perales met with Commons regarding a "wasting" violation that had occurred. Commons gave Bostan a verbal reprimand for not "wasting" enough. After the meeting Bostan spoke with Perales, who was also licensed, and complained that it was improper for Commons to give operational orders. TR 41-42; CEX 22. These two internal complaints are protected activity under the FWPCA. *Immanuel v. Wyoming Concrete Indus., Inc.*, ARB No. 96-022, ALJ No. 1995-WPC-3, slip op. at 6 (ARB May 28, 1997), *rev'd on other grounds sub nom. Immanuel v. United States Dep't of Labor*, 139 F.3d 889 (4th Cir. 1998)(Table). We also find, as did the ALJ, that Bostan's January 4, 2000 complaint to the Office of Operator Certification is protected activity. R. D. & O. at 6.

Furthermore, the record clearly indicates that Corona was aware of Bostan's protected activities. Moreover, Corona took adverse action against him by not extending his at-will employment beyond the probationary period.[6] Therefore, Bostan established a *prima facie* case under the Act.

We agree with the ALJ that Corona rebutted Bostan's inferential proof of discrimination with legitimate reasons for the adverse action. Corona produced evidence that it terminated Bostan because he misused city property (REX B), violated a supervisor's orders (REX D), had problems in scheduling staff, had poor working relations with them, had poor supervisory skills (TR 250-251), failed to follow the lockout/tagout procedures (REX C), and failed to order the bioxide in late January (TR 257-261, 270).

Corona having satisfied its burden of production, Bostan was required to establish, by a preponderance of the evidence, that Corona's reasons for the termination were false and that retaliation for his protected activity was the real reason. *Masek v. The Cadle Co.*, ARB No. 97-069, ALJ No. 1995-WPC-1, slip op. at 13 (ARB Apr. 28, 2000), *citing St. Mary's Honor Center. v. Hicks*, 509 U.S. 502, 515 (1993). The ALJ found that Bostan did not prove retaliation because a preponderance of the evidence showed that Corona terminated Bostan's employment for legitimate reasons. R. D. & O. at 8.

---

[6] With respect to the January 6, 1999 demotion, we concur with the ALJ's finding that the demotion did not constitute an adverse action because Prentice immediately rescinded it, and Bostan suffered no identifiable harm. R. D. & O. at 7. *Accord Griffith v. Wakenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10-11 (ARB Feb. 29, 2000).

We agree.[7] The reprimands Bostan received, his difficulties in dealing with subordinates and supervisors, his failure to follow safety procedures and attend safety training, and his failure to order bioxide to control odors emanating from the treatment plant all constitute a preponderance of persuasive evidence that legitimate business concerns motivated Corona's decision. Bostan therefore failed to prove by a preponderance of the evidence that Corona violated the Act.

CONCLUSION

We hereby **DENY** the complaint of Gabriel Bostan under the Federal Water Pollution Control Act of 1972.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

[7] We disagree, however, with the ALJ's finding that Prentice had decided as early as November 1999 to terminate Bostan. R. D. & O. at 8. *See* TR 284-86.