U.S. Department of Labor

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

In the Matter of:

MICHAEL B. GARCIA, **ARB CASE NO. 99-109**

COMPLAINANT, **ALJ CASE NO. 99-CAA-11**

v. **DATE: October 31, 2000**

WANTZ EQUIPMENT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Michael B. Garcia, *pro se*, *Sacramento, California*

For the Respondent:
Russell W. Carlson, Esq., *Law Offices, Sacramento, California*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Clean Air Act ("CAA'), 42 U.S.C. §7622 (1994). The facts of this case are as follows. On September 2, 1998, Wantz Equipment ("Respondent") terminated Michael Garcia from his position as a mechanic/welder on the grounds that, despite repeated warnings, he continued to work on personal projects during his regular duty hours. Garcia subsequently filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that the real reason Respondent terminated him was because he contacted the Air Resources Board concerning Respondent's practice of purging toxic vapors from gasoline or diesel tankers that came into Wantz Equipment for repair directly into the atmosphere. In view of the allegedly retaliatory nature of his termination, Garcia argued that Respondent violated the employee protection provisions of the CAA, which, among other things, states:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .

> 1) commenced, caused to be commenced, or is about to commence a proceeding under this chapter . . .
> 3) assisted or participated or is about to assist or participate in any manner in such proceeding or in any other action to carry out the purpose of this chapter.

42 U.S.C. §7622 (1994).

After reviewing the complaint, the Regional Administrator of OSHA ("Administrator") found that Respondent terminated Garcia for working on personal projects and not in retaliation for contacting the Air Resources Board. As a result, the Administrator concluded that Respondent did not violate the employee protection provisions of the CAA. Garcia objected to the Administrator's determination and the matter was referred to an Administrative Law Judge ("ALJ").

Following an evidentiary hearing in this case, the ALJ found that Respondent terminated Garcia because he ignored repeated warnings to refrain from working on his personal projects during his regular duty hours and not because he contacted the Air Resources Board. In light of that finding, the ALJ concluded that Garcia's termination did not violate the employee protection provisions of the CAA. Therefore, by Recommended Decision and Order (RD&O") dated May 17, 1999, the ALJ recommended that Garcia's complaint be dismissed with prejudice. Garcia then filed a petition for review before the Administrative Review Board ("Board") pursuant to 29 C.F.R. §24.8 (1999).

As part of his case before the ALJ, Garcia asserted that other employees worked on personal projects during duty hours, but were not disciplined. Garcia then argued that, because he was the only one disciplined for such misconduct, Respondent's reason for terminating him was pretextual. However, Respondent presented testimony from two witnesses who stated that, although other employees used company equipment and materials to work on personal projects, they were not similarly situated to Garcia because they did not engage in that activity on company time. On appeal, Garcia essentially urges us to re-evaluate and discredit the testimony on which the ALJ relied.

In this case, two witnesses (who were also owners of the company) testified that other employees did not work on personal projects on company time. Garcia attempted to rebut this testimony as part of his closing statement.[1/] In response, the ALJ reopened the record on this issue, accepted Garcia's statement during closing argument on this point as testimonial evidence, and allowed additional testimony from Respondent. The ALJ reviewed the testimony and found Respondent's witnesses more credible than Garcia. Consequently, Garcia's claim of disparate treatment evaporated. We have reviewed the record and find no compelling reason to reach a

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[1/] Tr. 31-32.

contrary conclusion. In the absence of evidence of disparate treatment, and considering the record as a whole, we find that Garcia has not met his burden of proving that his termination violated the employee protection provisions of the CAA. Accordingly, we concur with the ALJ's recommendation that the complaint should be dismissed with prejudice.

SO ORDERED.

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member