



In the Matter of:

SEBEDO V. LOPEZ,

ARB CASE NO. 04-158

COMPLAINANT,

ALJ CASE NO. 04-CAA-5

v.

DATE: November 29, 2006

SERBACO, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Kirk P. Brown, Esq., *The Law Firm of Kirk Patterson Brown*, Pueblo, Colorado

For the Respondent:

Janice L. Hirsch, Esq., *Jordan Schrader PC*, Portland, Oregon

FINAL DECISION AND ORDER

Sebedo V. Lopez filed a whistleblower complaint against his employer, Serbaco, Inc., claiming that it violated the employee protection provisions of the Clean Air Act (CAA).¹ Following an evidentiary hearing, a United States Department of Labor Administrative Law Judge (ALJ) concluded that Serbaco did not violate the CAA and recommended that we dismiss the complaint. We accept the ALJ's recommendation and dismiss Lopez's complaint.

BACKGROUND

Rocky Mountain Steel Mills makes steel. RMSM's Pueblo, Colorado mill has two steel furnaces. Each furnace has a filter system called a "bag house." The bag

¹ 42 U.S.C.A. § 7622 (West 1995). The implementing regulations are found at 29 C.F.R. Part 24 (2006).

houses contain bags that collect the steel dust that results from the manufacturing process. This dust is a hazardous waste. "Transfer pumps" vacuum this dust into storage silos. The dust is then loaded onto railcars and disposed. Hearing Transcript (T.) at 34-36, 100-101.

Serbaco, a Portland, Oregon company, contracts with RMSM to operate the bag houses. Serbaco employed Lopez as an Air Pollution Control Technician at the Pueblo mill beginning on July 30, 2003. Lopez worked the night shift. His job was to monitor the bag houses to make sure that the steel dust was not escaping into, and polluting, the atmosphere. T. at 32-39.

Lopez filed his whistleblower complaint on November 30, 2003. After investigating Lopez's complaint, the Department of Labor's Occupational Safety and Health Administration (OSHA) dismissed it on December 15, 2003. Lopez then requested a hearing before an ALJ.

At the hearing, Lopez testified that he had been instructed to turn the transfer pumps on at night and turn them off at 5:00 A.M. But, said Lopez, the bag house for silo #3 contained torn bags. Thus, when the transfer pump for that bag house was activated, steel dust was emitted into the atmosphere. Lopez testified that at about 9:00 P.M. on October 23, 2003, he informed his supervisor, Kim Jaynes, about this problem and that, therefore, he did not want to turn on the transfer pump. T. at 40, 44. According to Lopez, Jaynes responded that "we had to turn that pump on because if we didn't, . . . we would have to shut half of the mill down." Lopez testified that Jaynes "wasn't too happy that I was kind of like refusing to turn the pump on, because I also told him that I was concerned about my job either way I looked at it, because if I had that transfer pump on emitting that kind of emission up through the air, . . . what if OSHA . . . was to approach me during that night, what am I supposed to be telling them." At that point, Lopez testified, Jaynes turned on the pump and then went home for the night at 11:00 P.M. T. at 46-49. Serbaco admits that the filter bags for silo #3 contained holes. Respondent's Exhibit (RX) 13 at 62. The company also admits that Lopez told Jaynes about this problem on October 23. Respondent's Brief at 5.

Tim Cordova, a RMSM employee, says that he tried to contact Lopez via two-way radio at about 2:00 A.M. the next morning, October 24th. When Lopez did not answer, Cordova searched for him in the bag house area but did not find him. Cordova then called his supervisor, Sean Ortiz, and together they again tried to reach Lopez by radio. Fearing Lopez might be injured, Ortiz and Cordova went to the bag house area. Eventually, they said, they found Lopez sitting on two chairs, asleep, with a coat pulled over him like a blanket. Ortiz called Jaynes, who had been at home sleeping, to report that Lopez was asleep. Jaynes came back to the mill, and at about 3:20 A.M. Ortiz and Cordova took Jaynes to where they had found Lopez sleeping. According to Jaynes, Ortiz, and Cordova, Lopez woke up only after Jaynes shined a flashlight in his face,

called his name several times, and Cordova pounded on a nearby metal table with a piece of steel.²

Jaynes immediately discharged Lopez because he was asleep on the job. Shortly thereafter, according to Jaynes, Lopez admitted that he had been asleep. RX 13 at 65. Lopez also signed Serbaco's "Employee Status Change" form dated October 24, 2006, which indicates that he had been discharged because he had "made a 'bed' and "was sleeping on 2 chairs." RX 13 at 60. Serbaco's "Employee Handbook" makes sleeping while on duty an "unacceptable activity," a "serious violation" of its conduct guidelines, and grounds for termination. RX 3 at 16-19. Moreover, Jaynes stated that Dave Ellis, a manager for RMSM, informed him that Serbaco employees caught sleeping on the job would not be allowed to continue to work at the RMSM jobsite. RX 13 at 62.

Although Lopez admits that he was sitting on two chairs when Jaynes, Ortiz and Cordova found him, he denies that he was asleep and denies that Ortiz and Cordova had previously attempted to contact him by two-way radio. T. at 50-52. Lopez also testified that although he signed the "Employee Status Change" form, the form was blank at the time that he signed it. T. at 57-58. In essence, Lopez testified that within hours of his complaining to Jaynes about turning on the transfer pump, Jaynes trumped up a reason to fire him. T. at 63.

As previously noted, the ALJ recommended that Lopez's complaint be dismissed. Recommended Decision and Order (R. D. & O.) at 7. Lopez appealed. We have jurisdiction to decide this matter.³ In CAA cases, the Administrative Review Board (ARB) reviews the ALJ's findings and conclusions de novo.⁴

² Jaynes, Ortiz, and Cordova did not testify at the hearing. The ALJ admitted unsworn written statements about these events from Ortiz and Cordova and a sworn affidavit with an attached statement from Jaynes. See RX 11, 12, 13. Hearsay evidence is admissible in whistleblower hearings concerning the environmental statutes like the CAA. 29 C.F.R. § 24.6(e)(1); 63 Fed. Reg. 6614, 6619 (Feb. 9, 1998).

³ 29 C.F.R. § 24.8; *see also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under the CAA).

⁴ *See* 5 U.S.C.A. § 557(b) (West 1996); *Kemp v. Volunteers of America of Pa., Inc.*, ARB No. 00-069, ALJ No. 2000-CAA-6, slip op. at 3 (ARB Dec. 18, 2000).

DISCUSSION

The Legal Standard

The CAA prohibits employers from retaliating when their employees engage in certain protected activities:

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 (or any person acting pursuant to a request of the employee) –

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan . . . [or]

* * *

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C.A. § 7622(a)(1), (3).

To prevail on his CAA complaint, Lopez must establish by a preponderance of the evidence that he engaged in protected activity, that Serbaco was aware of the protected activity, that he suffered adverse employment action, and that Serbaco took the adverse action because of his protected activity.⁵ To show that adverse action was taken “because of” protected activity, Lopez must show that his protected activity was a “motivating” factor in Serbaco’s decision to dismiss him.⁶

⁵ See *Saporito v. Central Locating Servs.*, ARB No. 05-004, ALJ No. 2001-CAA-13, slip op. at 5 (ARB Feb. 28, 2006). We note that the ALJ discussed and applied the prima facie case analysis. R. D. & O. at 4-5. Since this case was fully tried, such analysis was unnecessary. See *Williams v. Baltimore City Pub. Schools Sys.*, ARB No. 01-021, ALJ No. 2000-CAA-15, slip op. at 3 n.7 (ARB May 30, 2003).

⁶ In *Saporito*, we inadvertently said that a CAA complainant must prove by a preponderance of the evidence that “his protected activity contributed to the employer’s decision to take adverse action.” Slip op. at 5. We should have said “motivated” instead of

Protected Activity, Employer Knowledge, Adverse Action

Under the CAA, an employee engages in protected activity when he or she expresses a concern, and reasonably believes, that the employer has either violated Environmental Protection Agency (EPA) regulations implementing the CAA or has

“contributed to.” *See Dierkes v. West Linn-Wilsonville Sch. Dist.*, ARB No. 02-001, ALJ No. 2000-TSC-002, slip op. at 6-7 (ARB June 30, 2003) (distinguishing between complainant’s burden under Toxic Substance Control Act (TSCA) (“motivating” factor) and complainant’s lower burden under revised Energy Reorganization Act (ERA)(“contributing” factor)); *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 1995-CAA-12, slip op. at 5 & n.5 (ARB Apr. 8, 1997) (distinguishing between “motivated” standard used in environmental cases under acts including TSCA and CAA, and new “contributing factor” standard used in ERA cases). Prior to the enactment of the 1992 amendments to the ERA, the ERA burdens of proof were applied in environmental cases; thus cases decided under the pre-1992 ERA are also instructive. *See, e.g., Goldstein v. Ebasco Constructors, Inc.*, 1986-ERA-36, slip op. at 15 n.3 (Sec’y Apr. 7, 1992) (“I do not accept a requirement, as asserted by Respondent, that Complainant must prove that ‘but for’ his protected activity, the adverse action would not have been taken. If the employee carries his burden of proving by a preponderance of the evidence that retaliation was a *motivating* factor in the adverse action, the employer has the burden of proving” that it would have taken the same action anyway) (emphasis added); *Wagoner v. Technical Prods., Inc.*, 1987-TSC-4, slip op. at 2-3 (Sec’y Nov. 20, 1990) (“[T]he ERA burdens of proof are applicable to claims arising under the TSCA whistleblower section. . . . [T]he ERA burdens of proof have not been limited solely to ERA cases; they have been applied to cases arising under other environmental whistleblower statutes, including all of the other statutes implementing 20 C.F.R. Part 24 [including the CAA]. . . . *See also, Lopez v. West Texas Utilities*, [1986-ERA-25,] slip op. at 1-2 (Sec’y July 26, 1988)], applying ERA burdens to all statutes mentioned in 29 C.F.R. 24.1 [including the CAA]. . . . The applicable burdens and order of presentation of proof are set forth fully in *Dartey v. Zack*”); *Dartey v. Zack Co.*, 1982-ERA-2, slip op. at 4-6 (Sec’y Apr. 25, 1983) (whistleblower complainants must show that retaliation was a “motivating” factor) (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-65) (1981)); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-44 (1989) (“To construe the words ‘because of’ as colloquial shorthand for ‘but-for’ causation . . . is to misunderstand them. . . . [T]he words ‘because of’ do not mean ‘solely because of’ [A] Title VII plaintiff must show only that an impermissible reason] played a *motivating* part in [the] employment decision.”) (emphasis added); *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977) (employment discrimination plaintiff has “the burden . . . to show that his conduct was . . . a ‘substantial factor’ or to put it in other words, that it was a ‘*motivating factor*’ in the [adverse action]”) (citation omitted) (emphasis added).

A complainant must prove more when showing that protected activity was a “motivating” factor than when showing that such activity was a “contributing” factor. *See, e.g., Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 5-7 (ARB Sept. 30, 2003); *Van der Meer v. Western Ky. Univ.*, ARB No. 97-078, ALJ No. 1995-ERA-38, slip op. at 3 (ARB Apr. 20, 1998).

emitted or might emit, at a risk to the general public, potentially hazardous materials into the ambient air.⁷

The ALJ concluded that Lopez engaged in protected activity, of which Serbaco was aware, when he told Jaynes that turning on the transfer pump in silo #3 would cause steel dust to enter the atmosphere. R. D. & O. at 6. As noted, Serbaco admits that the bags in the silo #3 baghouse contained holes and that Lopez told Jaynes about this problem. And Serbaco does not contest the ALJ's conclusion that Lopez engaged in protected activity. Therefore, we will assume that Lopez engaged in activity that the CAA protects and that Serbaco was aware of this activity. In addition, the ALJ properly concluded that Lopez suffered an adverse employment action when Jaynes fired him on the morning of October 24, 2003. *Id.*

Protected Activity Motivating Adverse Action

Lopez's whistleblower complaint fails because he did not prove by a preponderance of the evidence, as he must, that reporting the steel dust emission problem motivated Jaynes's decision to fire him.

Lopez argues that the ALJ ignored evidence that demonstrates that Serbaco was motivated to fire him because of what he reported to Jaynes. Complainant's Brief at 3-6. He points to the fact that Jaynes admitted that problems existed in the silo #3 baghouse. And he points to his testimony that other Serbaco employees had ordered him to turn on the silo #3 transfer pump, and that Jaynes told him that half the mill would shut down if the pump was not activated and "people weren't going to be very happy about that." Also, according to Lopez, after he told Jaynes about his concerns, Jaynes "made a face and got like a little attitude" before he, Jaynes, turned the pump on. T. at 44-46. In addition, Lopez argues that we should credit a written statement from former Serbaco employee Jason Quick, who, like Ortiz, Cordova, and Jaynes, did not testify at the hearing. Quick's statement (CX 5) confirms the silo #3 baghouse problem and indicates that Lopez had been told to turn the transfer pump on only after dark so that inspectors would not be able to see the steel dust emissions.⁸

These facts, along with the fact that Jaynes fired Lopez very shortly after their conversation about turning on the transfer pump, constitute relevant circumstantial evidence that Jaynes fired Lopez because he reported the emission problem.⁹

⁷ *Knox v. United States. Dep't of the Interior*, ARB No. 06-089, ALJ No. 2001-CAA-3, slip op. at 5 (ARB Apr. 28, 2006).

⁸ Serbaco employee Joe Lopez, no relation, made a similar statement. *See* CX 6.

⁹ Contrary to Lopez's argument, the ALJ did not ignore this evidence. *See* R. D. & O. at 6.

Serbaco, of course, contends that the record supports a finding that it legitimately fired Lopez because he was sleeping on the job. Respondent's Brief at 4-5. Lopez asserts that he was not sleeping, and that firing him for sleeping is a pretext for the real reason he was fired – reporting the silo #3 emission problem. If Lopez could prove that Serbaco's reason for firing him is not believable, he might prevail here.¹⁰ But we find that Lopez did not prove that firing him for sleeping on the job was a pretext for discrimination.

Lopez admits that he was sitting down with his feet propped up on another chair when Jaynes, Ortiz, and Cordova found him. Therefore, he confirms Cordova's and Ortiz's statements that he was using two chairs. Even so, Lopez argues that we should give more weight to his version of the events surrounding his firing because he testified at the hearing whereas Serbaco did not call Cordova, Ortiz, and Jaynes as witnesses but only submitted their written statements about those events. Therefore, he could not question them. Complainant's Brief at 8. But the statements, though hearsay, are not therefore necessarily less probative.

Lopez also argues that the Cordova and Ortiz statements evidence "collusion" because Cordova and Ortiz are RMSM employees, but Carol Doty, Serbaco's operations manager, prepared the statements, and the statements are practically identical. Complainant's Brief at 7-8. Carol Doty did prepare the statements, and they do contain identical descriptions of finding Lopez asleep. Nevertheless, the statements are admissible, and the fact that they are identical does not, in and of itself, mean that Lopez's testimony is entitled to more weight.

Lopez's second argument concerning pretext is that RMSM and Serbaco conspired to concoct the story about his sleeping on the job. In essence, Lopez argues that because he refused to turn on the transfer pump, he jeopardized the entire mill operation. A mill shutdown would not only hurt RMSM but would also end Serbaco's contract with RMSM. Therefore, according to Lopez, Serbaco and RMSM had a "powerful motivation" to be rid of him. Complainant's Brief at 9-10.

But Lopez's conspiracy argument fails because the record contains no evidence that either Cordova or Ortiz had any knowledge that Lopez had refused to turn on the silo #3 transfer pump or that he had complained to Jaynes about the steel dust emissions. Therefore, Cordova and Ortiz could not have been concerned that Lopez might cause the RMSM plant to shut down and thus have been motivated to scheme with Jaynes to fire Lopez.

¹⁰ See *Burdine*, 450 U.S. at 256; *Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, slip op. at 19 (ARB Jan. 30, 2004); *Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 16-17 (ARB Feb. 28, 2003).

Thus, Lopez presented some evidence, but not a preponderance, that Jaynes discharged him because he complained about the steel dust emissions in silo #3 and did not want to turn the transfer pump on. The record demonstrates that Jaynes fired Lopez because Jaynes believed Lopez was asleep on the job, a serious violation of company rules.

Lopez might also have prevailed by showing that Serbaco's reason "[wa]s only one of the reasons for its conduct, and another motivating factor [wa]s [his] protected" activity.¹¹ But "when the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation becomes less likely because the intervening event also could have caused the adverse action."¹² Here, while arguing that he was not asleep, Lopez admits that employees of both Serbaco and RMSM found him sitting on two chairs in a posture that Serbaco interpreted as that of sleep, and in a room dark enough that the other men needed to use a flashlight in order to see. Moreover, this incident occurred after Lopez engaged in the protected activity, and before he was fired. Therefore, this intervening incident eliminated the causal link that otherwise might have been suggested by the temporal proximity between the protected activity and the adverse action.¹³

¹¹ *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004); see also *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 517-18 (1993) (plaintiff can prevail by showing that "whatever the stated reasons for [the adverse action], the decision was . . . premised [upon an impermissible reason]"); *id.* at 517 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973) (plaintiff may meet ultimate burden to prove discrimination by showing *either* that the employer's explanation is not true, *or* that "a discriminatory reason more likely motivated the employer")); *Price Waterhouse*, 490 U.S. at 247 n.12 (plaintiff does not need to prove employer's decision "pretextual" to prevail, if plaintiff *instead* is able to "satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision").

¹² *Keener v. Duke Energy Corp.*, ARB No. 04-091, ALJ No. 2003-ERA-12, slip op. at 11 (ARB July 31, 2006) (citing *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19, slip op. at 6-7 (ARB Apr. 28, 2006) and *Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 1997-WPC-1, slip op. at 8 (ARB July 31, 2001)).

¹³ Lopez presented no evidence to suggest that other employees whom Serbaco concluded were sleeping on the job were treated more leniently, and Serbaco presented evidence that RMSM had said it would not again permit on its premises any Serbaco employees who were found asleep.

CONCLUSION

Accordingly, because Lopez has not demonstrated by a preponderance of the evidence that Serbaco retaliated against him in violation of the CAA, we **DISMISS** his complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

A. LOUISE OLIVER
Administrative Appeals Judge