Winch v. Dir., OWCP

United States Court of Appeals for the Eleventh Circuit

February 13, 2018, Decided

No. 16-15999

Reporter
2018 U.S. App. LEXIS 3584 *

BEN WINCH, Petitioner, versus DIRECTOR, OWCP, U.S. DEPARTMENT OF LABOR, SECRETARY, U.S. DEPARTMENT OF LABOR, Respondents, CSX TRANSPORTATION, INC., Intervenor.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] Petition for Review of a Decision of the Department of Labor. Agency No. 15-020.

Disposition: PETITION DENIED.

Counsel: For BEN WINCH, Petitioner: Frank Tucker Burge, Sr, Courtney B. Brown, Burge & Burge, BIRMINGHAM, AL.

For DIRECTOR, OWCP, Respondent: Stanley Keen, Office of the Solicitor, US DOL, ATLANTA, GA.

For U.S. DEPARTMENT OF LABOR, Respondent: Stanley Keen, Office of the Solicitor, US DOL, ATLANTA, GA; Claire Elizabeth Kenny, Andrew Ryan Tardiff, U.S. Department of Labor, Office of the Solicitor, WASHINGTON, DC.

For SECRETARY, U.S. DEPARTMENT OF LABOR, Respondent: Elaine Chao, U.S. Department of Labor, Office of the Solicitor, WASHINGTON, DC; Stanley Keen, Office of the Solicitor, US DOL, ATLANTA, GA.

For CSX TRANSPORTATION, INC., Intervenor: Jacqueline M. Holmes, Ronald Maurice Johnson, Jones Day, WASHINGTON, DC; James S. Urban, Jones Day, PITTSBURGH, PA.

Judges: Before ROSENBAUM, JILL PRYOR, and RIPPLE,* Circuit Judges.

Opinion

PER CURIAM:

Petitioner Ben Winch appeals a decision of the Administrative Review Board ("ARB") of the Department of Labor. That decision affirmed his dismissal from his employer, CSX Transportation, Inc. ("CSX"), after he called in sick and did not attend work. Winch asserts that he engaged in the [*2] protected activities of reporting and refusing to work in an unsafe condition under the *Federal Railroad Safety Act* ("FRSA"), *49 U.S.C. § 20109(b)*, so the ARB's decision should be reversed and his petition granted. After reviewing the record on appeal and having had the benefit of oral argument, we now deny Winch's petition.

I.

The *FRSA* was enacted "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." *49 U.S.C. § 20101*. The *FRSA's* anti-retaliation provisions prohibit, in relevant part, an employer from disciplining an employee under the following circumstances:

> (b) Hazardous safety or security conditions.—
>
> (1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for—
>
> (A) reporting, in good faith, a hazardous safety or security condition;
>
> (B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in *paragraph (2)* exist; or
>
> (C) refusing to authorize the use of any safety-related equipment, track, or structures, if the employee [*3] is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the

* Honorable Kenneth F. Ripple, United States Circuit Judge for the Seventh Circuit, sitting by designation.

> equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in *paragraph (2)* exist.
>
> (2) A refusal is protected under *paragraph (1)(B)* and *(C)* if—
>
> (A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;
>
> (B) a reasonable individual in the circumstances then confronting the employee would conclude that—
>
> (i) the hazardous condition presents an imminent danger of death or serious injury; and
>
> (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and
>
> (C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

49 U.S.C. § 20109. This case involves *§ 20109(b)(1)(A)*, *(b)(1)(B)*, and *(b)(2)*.

II.

Winch worked as a conductor and remote control operator at CSX, a railroad carrier, where his job entailed riding and [*4] running along the sides of moving trains and cars, looking for debris. At about 8:15 p.m. on January 19, 2012, Winch called the crew operator at CSX to inform the company he was ill and to request that he be marked off as "sick" for the next day, January 20. He told the operator only his name, his identification number, and his need to be marked off sick. Winch did not describe his symptoms. Nor did he state that his presence at work would be a safety concern that would endanger himself and others or otherwise be a hazard.

The next day, January 20, Winch visited his family doctor, who examined him, did blood work, and diagnosed him with acute gastroenteritis. She prescribed him an anti-nausea medicine, told him to stay hydrated, and told him not to go to work for two days. That same day, Winch had his doctor fax a note to CSX regarding his illness in an attempt to have his absence excused.

CSX's work-availability policy subjects employees to discipline if they have two or more "non-compensated" absences in a twenty-eight-day cycle, which could include an absence based on an illness that does not require treatment at an emergency room or urgent-care center. The policy delineates a progression [*5] of discipline based on the number of violations over a certain period of time. Following several violations and disciplinary suspensions, CSX conducts a review of the employee's complete attendance and work history, along with any extraordinary issues related to a specific period of uncompensated unavailability, to determine whether to dismiss the employee.

Winch had a history of receiving discipline for failure to comply with CSX's safety and work-availability policies, including a dismissal in 2006, after which he was rehired six months later, and multiple suspensions in 2009. Before the absence at issue, Winch's absences placed him on the final phase of review, and he was warned that any future violations could result in dismissal. After he missed work on January 20, Winch marked off sick another day in February. So a full review of his attendance record took place, and he was dismissed on May 3, 2012.

III.

Winch filed a complaint with the Department of Labor's Occupational Safety and Health Administration ("OSHA") in June 2012 alleging that his absence on January 20 was in compliance with his doctor's orders not to go to work and that in firing him, CSX violated *49 U.S.C. § 20109(c)(2)*.[1] OSHA denied the [*6] complaint based on Winch's history of attendance and safety violations.

Winch objected to OSHA's findings and requested a hearing with an Administrative Law Judge ("ALJ"). Before the ALJ, in addition to asserting that his termination violated *49 U.S.C. § 20109(c)(2)*, Winch argued for the first time that CSX violated the reporting and refusal provisions of *49 U.S.C. § 20109(b)(1)(A)* and *(B)*. The ALJ rejected Winch's claim under *§ 20109(c)(2)*. But he determined on the basis of *§ 20109(b)* that CSX's dismissal of Winch was nonetheless wrongful because "it was reasonable for Complainant to conclude that it would have been unsafe to go to work."

CSX appealed, and the ARB reversed. The ARB assumed, without deciding, that reporting one's own illness can

[1] *49 U.S.C. § 20109(c)(2)* precludes railroad carriers from disciplining " an employee . . . for following orders or a treatment plan of a treating physician."

constitute "reporting" a hazardous condition, as set forth in § 20109(b)(1)(A). Nevertheless, as relevant here, it concluded that Winch failed to satisfy the conditions for "reporting" under that provision. The ARB explained, "Even the most liberal reading of section 20109(b)(1)(A) requires that some information be reported pointing to the 'hazardous condition' at the railroad. As a matter of law, the extremely limited information Winch reported falls short of 'reporting . . . a hazardous . . . condition.'" The ARB further noted that "'reporting a hazardous [*7] condition' is [also] essential to a claim of protected 'refusal' under section 20109(b)(2)." Finally, as relevant here, the ARB held that the statute requires the employee to "notif[y]" the employer of the hazardous condition if possible, and Winch did not.

Winch appeals the ARB's decision.

IV.

The *Administrative Procedure Act, 5 U.S.C. § 706* ("APA"), governs judicial review of the ARB's final decision. DeKalb Cty. v. U.S. Dep't of Labor, 812 F.3d 1015, 1020 (11th Cir. 2016). Under the APA, the Court affirms the ARB's decision unless it is "unsupported by substantial evidence" or is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *5 U.S.C. § 706(2)(A), (E)*; Stone & Webster Constr., Inc. v. U.S. Dep't of Labor, 684 F.3d 1127, 1132 (11th Cir. 2012). So long as substantial evidence in the record as a whole supports factual findings, we must affirm them. *See* DeKalb Cty., 812 F.3d at 1020 (citing *5 U.S.C. § 706(2)(E)* (APA standard for formal adjudications)).

As for the ARB's legal conclusions, we review them de novo but apply due deference to the Secretary of Labor's interpretation of the statutes which he administers, in accordance with Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *See* Fields v. U.S. Dep't of Labor Admin. Review Bd., 173 F.3d 811, 813 (11th Cir. 1999) ("Appropriate deference must be given to statutory interpretation by the ARB.").

V.

After careful review, we find that the ARB's fact-specific decision was supported by substantial evidence. Like the ARB, we do not opine on whether calling in to report one's own illness can [*8] qualify as "reporting . . . a hazardous . . . condition" under § 20109(b). Assuming for purposes of this opinion that it can, the ARB relied on substantial evidence in concluding that Winch did not actually "report[] . . . a hazardous . . . condition" under § 20109(b)(1)(A). As the ARB noted, when Winch called in sick, he told the crew operator only his name, his identification number, and his desire to be marked off sick; he failed to list or describe any of his symptoms and how they would impact the performance of his duties. Nor did Winch otherwise put CSX on notice that he was "reporting . . . a hazardous . . . condition." Indeed, nothing in his call indicated that he was attempting to trigger this hazardous-condition provision as opposed to simply requesting a sick day.

And because Winch did not, as § 20109(b)(2)(C) requires, "notif[y]" CSX that a "hazardous condition" existed, despite his ability to do so, the ARB concluded that Winch's claim fared no better under § 20109(b)(1)(B). This finding is supported by substantial evidence for the same reasons as the ARB's conclusion that Winch failed to "report[] . . . a hazardous . . . condition" under § 20109(b)(1)(A).

VI.

For the foregoing reasons, we deny Winch's petition.

PETITION DENIED.

End of Document