

No. 10-4476

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 27, 2011
LEONARD GREEN, Clerk

DANIEL M. SALATA,)
)
 Petitioner,)
)
 v.)
)
 CITY CONCRETE, LLC; UNITED STATES)
 DEPARTMENT OF LABOR,)
)
 Respondents.)

O R D E R

Before: SILER and GIBBONS, Circuit Judges; BERTELSMAN, District Judge.*

Acting on his own behalf, Daniel M. Salata seeks review of a decision of the Administrative Review Board (ARB) dismissing his complaints made under the employee-protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105. The Secretary of Labor now moves for remand to allow the ARB to consider in the first instance whether 2007 statutory amendments to the burden of proof apply and, if so, whether those amendments compel a different result. Both Salata and his former employer, City Concrete, LLC, have filed responses that oppose the motion. The Secretary replies.

Salata filed two complaints against City Concrete. In the first, he alleged that his employment was unlawfully terminated in retaliation for his complaints about the safety of a truck that he was assigned to drive. (“*Salata I*”) In a second complaint, brought during the administrative

*The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

No. 10-4476

- 2 -

proceedings in *Salata I*, Salata charged that City Concrete had forged entries on vehicle inspection forms that Salata had turned in about the truck. (“*Salata II*”)

In *Salata I*, an administrative law judge (ALJ) determined that City Concrete had terminated Salata for legitimate, nondiscriminatory reasons and recommended dismissal. In *Salata II*, the ALJ recommended dismissal because the allegations did not constitute an adverse employment action. The ARB adopted both recommendations and dismissed Salata’s complaints.

The ARB concluded that although Salata had presented a *prima facie* case of discrimination based on his complaint, City Concrete had shown by a preponderance of the evidence that it would have terminated Salata for legitimate, non-discriminatory reasons. The ARB noted that the STAA was amended on August 3, 2007, but that “[t]he ALJ applied the pre-amendment law to his analysis.” Because “[n]either of the parties argued that the post-amendment law should apply in this case,” the ARB also applied the pre-amendment law.

The Secretary of Labor now concedes that Salata did ask the ARB to apply the 2007 amendments. Further, Salata has renewed that argument in his brief to this court. Based on those amendments, a complaint filed under the STAA “is governed by the legal burdens of proof set for in [49 U.S.C. §] 42121(b).” 49 U.S.C. § 31105(b)(1). Under that provision, an employer may obtain dismissal of a complaint if it “demonstrates, *by clear and convincing evidence*, that the employer would have taken the same unfavorable personnel action in the absence of [the protected] behavior.” 49 U.S.C. § 42121(b)(2)(B)(ii) (emphasis supplied). But in this case, both the ALJ and the ARB determined by a preponderance of evidence that City Concrete had terminated Salata for a legitimate reason. The Secretary argues that the difference between the pre- and post-amendment standards warrants a remand for further proceedings.

No. 10-4476

- 3 -

“[W]hen an agency seeks a remand to take further action consistent with correct legal standards, courts should permit such a remand in the absence of apparent or clearly articulated countervailing reasons.” *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004). Upon review and consideration, we find no countervailing reasons on which to deny a remand. “It is well settled that when an agency makes an error of law in its administrative proceedings, a reviewing court should remand the case to the agency so that the agency may take further action consistent with the correct legal standards.” *Cissell Mfg. Co. v. U.S. Dep’t of Labor*, 101 F.3d 1132, 1136 (6th Cir. 1996).

Additionally, Salata has moved for leave to proceed *in forma pauperis*. In view of his stated income and expenses, payment of the filing fee would pose an undue hardship to Salata. *See Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948) (it is unnecessary “that one must be absolutely destitute to enjoy the benefit of the [pauper] statute.”)

The motion to remand and the motion to proceed *in forma pauperis* are **GRANTED**.

ENTERED BY ORDER OF THE COURT



Clerk