U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

MICHAEL TYLER, **ARB CASE NO. 2021-0016**

COMPLAINANT, **ALJ CASE NO. 2018-SWD-00002**

v. **DATE: April 17, 2023**

USA DEBUSK, LLC,

RESPONDENT.

Appearances:

For the Complainant:
Michael J. Tyler; *pro se*; Houston, Texas

For the Respondent:
Ken Hughes, Esq.; *Ken Hughes, PLLC*; Houston, Texas

Before BURRELL, WARREN, and MILTENBERG, Administrative Appeals Judges

DECISION AND ORDER

MILTENBERG, Administrative Appeals Judge:

This case arises under the Solid Waste Disposal Act (SWDA) and its implementing regulations, as amended.[1] Michael Tyler (Complainant or Tyler) filed a whistleblower complaint against USA DeBusk, LLC (Respondent or USAD) for alleged retaliation. A U.S. Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) denying the claim based on the ALJ's finding

[1] 42 U.S.C. § 6971; 29 C.F.R. Part 24 (2022).

that Tyler failed to establish that his protected activity was a motivating factor to the adverse personnel action he suffered.[2] Tyler timely appealed the ALJ's decision to the Administrative Review Board (ARB or Board). We affirm.

BACKGROUND

USAD is an industrial service provider with ten service lines, including hydro-blasting, hydro-cutting, chemical cleaning, and inter-catalyst handling and is subject to the requirements of the SWDA.[3] In February of 2015, USAD hired Tyler to work as a maintenance manager in its Highland Park, Texas facility.[4] In March of 2015, Tyler developed concerns over how USAD managed catalyst waste.[5]

Beginning in January 2016, Collin Leslie (Leslie), USAD's President and Tyler's supervisor, developed concerns about the quality of Tyler's job performance and began giving him informal coaching sessions on the need to improve his performance and how to do so.[6] Over the next four months, *i.e.,* between February and May of 2016, nine employees filed formal complaints against Tyler with USAD based on their personal interactions with him; the complaints ranged from allegations that Tyler was generally difficult to work with to accusations that Tyler had made statements to his fellow workers that they or other listeners had perceived as threatening.[7]

On May 26, 2016, three employees filed written complaints detailing an incident in which Tyler told one of those employees, Eric Smith (Mr. Smith), that he was "pushing it" and would "get it."[8] That same day, Leslie discussed Tyler's conduct and employment performance with Brian Black (Black), USAD's vice president of human resources.[9] Leslie informed Black that he had tentatively

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2 D. & O. at 20.

3 *Id.* at 7.

4 *Id.* at 7-8.

5 *Id.* at 8.

6 *Id.* at 7-8.

7 *Id.* at 8-9.

8 *Id.* at 9.

9 *Id.* at 10.

decided to terminate Tyler's employment, but that he also planned to "sleep on it."[10] Later that day, Black emailed Leslie USAD's standard forms for terminating employees.[11] On May 27, 2016, Leslie informed Black that he had decided to terminate Tyler's employment based on Tyler's inability to work cooperatively with other employees, his failure to reduce costs, and because he was perceived as threatening to other USAD employees.[12] On June 10, 2016, Leslie terminated Tyler's employment.[13]

On June 27, 2016, Tyler filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that he suffered an adverse action for engaging in protected whistleblower activity.[14] On October 26, 2017, OSHA dismissed the complaint, finding there was no reasonable cause to believe a violation of the SWDA had occurred.[15]

Tyler filed a timely appeal with the Office of Administrative Law Judges and requested a formal hearing before an ALJ.[16] The hearing was held on June 13, 2019 and January 7-8, 2020.[17] The parties were afforded a full opportunity to offer testimony and documentary evidence.[18]

On January 7, 2021, the ALJ issued a Decision and Order denying Tyler's claim based on the ALJ's finding that Tyler had failed to establish that his purportedly protected activity was a motivating factor in the adverse personnel action he suffered.[19] In the alternative, the ALJ found that even if Tyler's protected activity under the SWDA was a motivating factor in his employment termination,

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10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.* Leslie chose this date because he wanted to terminate Tyler's employment on a Friday and Leslie had been traveling extensively to other USAD offices prior to this. *Id.* at 10-11.

14 OSHA Findings at 1.

15 *Id.*

16 D. & O. at 1.

17 *Id.*

18 *Id.* at 1-2.

19 *Id.* at 20.

USAD had demonstrated by a preponderance of the evidence that it would have taken the same personnel action against Tyler in the absence of his protected activity.[20]

Tyler filed a timely appeal to the Board.[21] Both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions under six federal statutes known, collectively, as the Environmental Acts, one of which is the SWDA.[22] The ARB reviews questions of law presented on appeal *de novo*, but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence.[23] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[24] The Board reviews an ALJ's procedural rulings under an abuse of discretion standard.[25]

DISCUSSION

The purpose of the SWDA is to promote the reduction of hazardous waste and to encourage the treatment, storage, or disposal of such waste so as to minimize threats to human health and the environment.[26] The whistleblower protection provision of the SWDA prohibits employees from being fired or otherwise discriminated against for engaging in protected activity.[27] The SWDA affords an

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20 *Id.*

21 Petition for Review at 1.

22 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

23 29 C.F.R. § 24.110(b); *Evans v. U.S. Env't Prot. Agency*, ARB No. 2017-0008, ALJ No. 2008-CAA-00003, slip op. at 8 (ARB Mar. 17, 2020) (citing *Kaufman v. U.S. Env't Prot. Agency*, ARB No. 2010-0018, ALJ No. 2002-CAA-00022, slip op. at 2 (ARB Nov. 30, 2011)).

24 *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938) (citations omitted).

25 *Vander Boegh v. EnergySolutions, Inc.*, ARB No. 2015-0062, ALJ No. 2006-ERA-00026, slip op. at 7 (ARB Feb. 24, 2017) (citation omitted).

26 42 U.S.C. § 6902(b).

27 *Id.* § 6971(a).

employee who believes that he or she has been discriminated against for engaging in protected activity the right to file a whistleblower complaint with the Secretary of Labor.[28]

To prevail on an SWDA claim, as in all "cases arising under the six environmental statutes listed in [29 C.F.R.] § 24.100(a), a determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint.[29] "A complainant need only show that the protected activity was *a* motivating factor, not *the* motivating factor."[30] "A complainant must prove more when showing that protected activity was a 'motivating' factor than when showing that such activity was a 'contributing' factor."[31] If the complainant meets this burden of proof, the respondent may nevertheless avoid liability if it proves by a preponderance of the evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.[32]

1. The ALJ Did Not Abuse His Discretion in Evidentiary Rulings

Tyler contends the ALJ abused his discretion in several evidentiary rulings. In particular, Tyler asserts the ALJ erroneously relied on evidence that was based on

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[28] *Id.* § 6971(b).

[29] 29 C.F.R. § 24.109(b)(2); *see Furlong-Newberry v. Exotic Metals Forming Co., LLC*, ARB No. 2022-0017, ALJ No. 2019-TSC-00001, slip op. at 17 (ARB Nov. 9, 2022) ("In whistleblower cases under the Environmental Acts, including the TSCA, a complainant must prove by a preponderance of the evidence that she (1) engaged in protected activity, (2) suffered an adverse action, and (3) can show that the protected activity was a motivating factor in the adverse action." (citing 29 C.F.R. § 24.109(b)(2))); *Wetzel v. M & B Environmental, Inc.*, ARB No. 2019-0050, ALJ No. 2018-WPC-00001, 2020 WL 7319290, at *4 (ARB Nov. 18, 2020) (*per curiam*) (same).

[30] *Furlong-Newberry,* ARB No. 2022-0017, slip op. at 17 (citing 29 C.F.R. § 24.109(b)(2)) (emphasis in original).

[31] *Id.* (quoting *Lopez v. Serbaco, Inc.*, ARB No. 2004-0158, ALJ No. 2004-CAA-00005, slip op. at 4-5 n.6 (ARB Nov. 29, 2006)).

[32] 29 C.F.R. § 24.109(b)(2).

hearsay, which includes USAD's Exhibits 1-9, as well as on problematic testimony from several of USAD's witnesses.[33]

The ARB reviews an ALJ's determinations on evidentiary rulings under an abuse of discretion standard.[34] "To reverse an evidentiary ruling, we must conclude that the ALJ abused his discretion and that the error was prejudicial."[35] In the present matter, the ALJ applied the formal rules of evidence found in Subpart B to the Office of Administrative Law Judges Rules of Practice and Procedure.[36]

The ALJ issued a thorough and well-reasoned D. & O. in which he made and relied upon specific credibility determinations for each witness as well as the parties' exhibits. We find these determinations to be consistent with the record and well within the ALJ's discretion to make. As such, Tyler has failed to establish any abuse of discretion.

2. The ALJ was Unbiased and Appropriately Assisted Tyler as a *Pro Se* Litigant

Tyler contends the ALJ was biased against him.[37] Tyler asserts that the ALJ "applied advanced restrictions on [Tyler']s use of cross examination requiring list [sic] of limited questions produced prior to hearing."[38] Tyler also asserts that the ALJ controlled his questioning on the cross-examination of witnesses in a manner that favored USAD.[39] Tyler further asserts that the ALJ did not require USAD to produce an advance list of cross-examination questions and allowed USAD to freely

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33 Brief of Appellant Michael Tyler (Tyler's Br.) at 17-19, 24-29; Complainant's Amended Reply to Respondent's Brief (Tyler's Reply Br.) at 5-8. In addition, Tyler contends that the ALJ relied on evidence that the ALJ previously told him would not carry any weight in the final decision. Tyler's Br. at 26; Tyler's Reply Br. at 8. Tyler does not cite to anywhere in the record to support this assertion. After a review of the record, we find that the ALJ made no such agreement.

34 *James v. Suburban Disposal, Inc.*, ARB No. 2010-0037, ALJ No. 2009-STA-00071, slip op. at 4 (ARB Mar. 12, 2010).

35 *Zinn v. Am. Com. Lines Inc.*, ARB No. 2010-0029, ALJ No. 2009-SOX-00025, slip op. at 14 (ARB Mar. 28, 2012) (citations omitted).

36 Tr. at 13.

37 Tyler Reply Br. at 7-8.

38 *Id.* at 7.

39 *Id.*

engage with witnesses.[40] Lastly on this issue, Tyler contends that the ALJ denied his request for an extension of time in order to obtain legal counsel while granting USAD's request for an extension, which Tyler contends demonstrates the ALJ's bias.[41]

Administrative law judges are presumed to act impartially.[42] To overcome the presumption of fairness, the party alleging partiality must show that the decision-maker has "demonstrated prejudgment of the facts and law involved in the case . . . or has a conflicting interest that is likely to influence their decision."[43] Generally, such bias "cannot be shown without proof of an extra-judicial source of bias."[44]

In the present matter, the ALJ appropriately accommodated Tyler in his role as a *pro se* litigant and was circumspect about informing Tyler about his rights and how to question and cross-examine witnesses.[45] In fact, the ALJ, rather than unduly limiting Tyler's questioning of witnesses, informed Tyler that he was being given "a pretty broad latitude" in regard to his line of questioning and the relevance and materiality of his questioning.[46] Further, the ALJ carefully explained to Tyler that he could take his time cross-examining witnesses.[47] Finally, the ALJ advised Tyler that he would take measures to assist Tyler in clarifying his line of questioning throughout the hearing.[48] The record reflects the ALJ fulfilled his promises to Tyler and, overall, acted commendably towards him as a *pro se* litigant. For these reasons the Board finds that Tyler failed to establish that the ALJ was biased against him.

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40 *Id.* at 7-8.

41 *Id.* at 8.

42 *In re Slavin*, ARB No. 2004-0172, slip op. at 4 (ARB Oct. 20, 2004) (citation omitted).

43 *Id.* (citations omitted).

44 *Matthews v. Ametek, Inc.*, ARB No. 2011-0036, ALJ No. 2009-SOX-00026, slip op. at 5 (ARB May 31, 2012) (internal quotations and citations omitted).

45 *See* Tr. at 230-31, 241-43, 251-53, 310-20, 343, 358-63, 462-63, 466, 469-70, 476, 503-05, 511-12.

46 *Id.* at 404.

47 *Id.* at 362.

48 *Id.* at 462-63.

3. Tyler Engaged in Protected Activity

To prevail on a complaint of unlawful discrimination under the whistleblower protection provisions of the Environmental Statutes, a complainant must first establish that he or she engaged in protected activity.[49] The ALJ found that Tyler had engaged in multiple instances of protected activity based on Tyler's subjective and objective beliefs that USAD was violating the SWDA.[50] Neither party challenges the ALJ's finding that Tyler engaged in protected activity.[51] We find that the record substantially supports the ALJ's finding. Thus, we affirm the ALJ's finding that Tyler engaged in protected activity.

4. Tyler Suffered an Adverse Employment Action

A whistleblower complainant must establish that he or she suffered an adverse employment action.[52] The ALJ found that USAD's termination of Tyler's employment caused him to suffer the loss of full-time employment, at an annual salary of $78,000, and thus constituted an adverse employment action.[53] Neither party challenges the ALJ's finding that Tyler suffered an adverse action.[54] We find the record substantially supports the ALJ's opinion. Thus, we affirm the ALJ's finding that Tyler suffered an adverse employment action.

5. Tyler Failed to Establish his Protected Activity was a Motivating Factor in the Termination of his Employment

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[49] 29 C.F.R. § 24.109(b)(2); *Beaumont v. Sam's E., Inc.*, ARB No. 2015-0025, ALJ No. 2014-SWD-00001, slip op. at 4 (ARB Jan. 12, 2017).

[50] D. & O. at 13-14. The protected activity includes Tyler reporting concerns over waste catalyst spills, USAD's tank wash system, and USAD's need to establish a waste profile to dispose of hoses at a landfill. *Id.* at 13.

[51] *See* Tyler Br., *passim*; Respondent USA Debusk, LLC's Principal Brief in Response to the Brief of Mike Tyler (USAD Br.), *passim*; Tyler Reply Br., *passim*.

[52] 29 C.F.R. § 24.109(b)(2); *Beaumont*, ARB No. 2015-0025, slip op. at 4.

[53] D. & O. at 15.

[54] *See* Tyler Br., *passim*; USAD Br., *passim*; Tyler Reply Br., *passim*.

A whistleblower complainant must establish that his or her protected activity was a motivating factor in the adverse action taken against them.[55] A complainant only has to prove that his or her protected activity was a motivating factor in the adverse action, even if other legitimate factors also motivated the adverse action.[56] A motivating factor is not established merely by evidence that the employee engaged in a protected activity and that the employee suffered an adverse action. Establishing that protected activity was a "motivating factor" requires proof, by a preponderance of the evidence, that some causal nexus existed between the protected activity and the adverse action.[57] That nexus is missing if the protected activity takes place after or is otherwise causally unconnected to the adverse action.[58]

The ALJ found that Tyler's protected activity was not a motivating factor in the adverse personnel action he suffered.[59] The ALJ based this finding on the fact that Leslie's concerns about Tyler's performance began in January of 2016 and that nine of Tyler's co-workers filed formal complaints against him for unprofessional behavior between January 2016 and June 10, 2016.[60]

The ALJ found that Tyler engaged in protected activity from March 2015 through February 2016, and also found USAD had knowledge of Tyler's protected activity based on the fact that Tyler directly conveyed his concerns that dumping without a waste profile would be improper.[61] Neither party challenges the ALJ's finding; we find the record substantially supports it, and therefore we affirm it.

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55 29 C.F.R. § 24.109(b)(2); *Beaumont*, ARB No. 2015-0025, slip op. at 4.

56 *See Lopez*, ARB No. 2004-0158, slip op. at 6-8.

57 *Beaumont*, ARB No. 2015-0025, slip op. at 4 (citing 29 C.F.R. § 24.109(b)(2) and *Jenkins v. U.S. Env't. Prot. Agency*, ARB No. 1998-0146, ALJ No. 1988-SWD-00002, slip op. at 17-18 (ARB Feb. 28, 2003).

58 *See Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 1996-0173, ALJ No. 1995-CAA-00012, slip op. at 5 (ARB Apr. 8, 1997).

59 D. & O. at 16.

60 *Id.*

61 *Id.* at 14. We note that although the ALJ separately identified the employer's knowledge of a complainant's protected activity as an independent element of Tyler's initial burden, the Board has cited the elements of a complainant's burden on the merits as they are set forth in the regulations (protected activity, motivating factor, adverse action) at 29 C.F.R. § 24.109(b)(2). *See id.* at 11.

The ALJ also recognized that while USAD's decision to terminate Tyler's employment came eight days after Tyler conveyed his concerns to Leslie regarding the need to obtain a waste profile, the decision to terminate Tyler's employment came just one day after an incident involving Tyler led three of his co-workers to file separate complaints with USAD against him.[62] Thus, the ALJ concluded that the events most temporal to Tyler's employment termination were the complaints filed against him by three of his fellow employees.[63]

Next, the ALJ found no merit in Tyler's argument that the complaints against him by his fellow employees were a mere pretext for USAD's decision to terminate his employment because he engaged in protected activity.[64] The ALJ found the complaints that Tyler's fellow employees filed against him "resulted solely from their personal concerns about his actions and comments," concerns that were based on their first-hand knowledge of such matters.[65]

The ALJ further found that Tyler's argument that USAD deviated from protocol by terminating his employment also lacked merit.[66] The ALJ found that the events that caused Leslie to decide to terminate Tyler's employment occurred quickly over a short period of time, and that it was reasonable for Black to conclude that discussing the complaints with Tyler would be unproductive and unnecessary because the authority on how to resolve the matter rested with Leslie.[67]

The ALJ found that the preponderance of the evidence established "significant and repeated incidents of employee misconduct [by Tyler] that nullify the temporal relationship between Tyler's reports of concern about hose disposal at the landfill and his employment termination."[68] The ALJ further found that these incidents demonstrated that Tyler's unprofessional conduct and unsatisfactory performance were the motivating factors behind Leslie's decision to terminate

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62 *Id.* at 18.

63 *Id.* at 16.

64 *Id.* at 17.

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 18-19.

Tyler's employment.[69] The ALJ concluded that "the totality of the evidence demonstrates that [Tyler]'s alleged protected activity played no factor in [USAD]'s decision to terminate [Tyler]'s employment."[70]

Tyler contends that "[u]nder the contributing factor standard, the only question to be answered is whether the decisionmaker placed *any* weight whatsoever on the protected activity."[71] The standard in SWDA cases is that Tyler's protected activity be a *motivating* factor in the adverse action, not a contributing factor.[72] In the present matter, the ALJ applied the correct, motivating factor standard.[73] Thus, we affirm the ALJ's application of the motivating factor standard.

Next, Tyler contends that the ALJ misapplied the "temporal proximity" test. Tyler asserts that temporal proximity should be measured from when Leslie, the key decision maker, obtained knowledge of his protected disclosures and should end when that decision maker acted on those disclosures.[74] Tyler asserts that the record demonstrates a temporal proximity between when Tyler reported safety concerns about the need for a waste profile with Leslie on May 19, 2016, and when his employment was terminated on June 10, 2016.[75] Tyler contends that Leslie's knowledge of his complaints establishes temporal proximity.[76]

An inference of discrimination may arise when an adverse action closely follows a protected activity.[77] Significantly, however, temporal proximity alone is not necessarily sufficient to satisfy the motivating factor element.[78] Further, an intervening event may diminish the inference of discrimination.[79]

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69 *Id.* at 19.

70 *Id.*

71 Tyler's Reply Br. at 11 (emphasis in the original).

72 29 C.F.R. § 24.109(b)(2). *See Furlong-Newberry,* ARB No. 2022-0017, slip op. at 17.

73 D. & O. at 15.

74 Tyler Br. at 6.

75 *Id.* at 4-8.

76 Tyler's Reply Br. at 12.

77 *Furlong-Newberry*, ARB No. 2022-0017, slip op. at 19 (finding that temporal proximity did not support the motivating factor event due to intervening events).

78 *Id.*

79 *Id.*

In the present matter, Tyler conveyed his concerns regarding USAD's need to obtain a waste profile on May 19, 2016, and Leslie decided to terminate Tyler's employment eight days later on May 27, 2016.[80] However, on May 26, 2016, one day before Leslie decided to terminate Tyler's employment, three employees filed written complaints against Tyler over an incident in which they considered Tyler's comments to Mr. Smith that he was "pushing it" and that he would "get it" to be threatening.[81] On the same day, another employee, Corrie Brown (Brown), filed a second complaint against Tyler regarding ongoing problems with Tyler's conduct that Brown deemed unprofessional and that Brown said made Tyler a difficult co-employee.[82] USAD asserts that it terminated Tyler's employment due to these complaints.[83] We agree with the ALJ that these complaints collectively constitute an intervening event. Thus, we affirm the ALJ's finding that the temporal proximity between the instances in which Tyler engaged in protected activity and USAD's termination of his employment fails to establish that his protected activities were a motivating factor in his employment termination.

Next, Tyler contends that USAD deviated from company policy in terminating his employment.[84] Tyler asserts that USAD failed to document progressive discipline and deviated from USAD's standardized employment practices.[85] The record substantially supports the ALJ's findings that it was reasonable for Black to decide not to discuss the complaints with Tyler because he thought it would be unproductive and unnecessary given that the authority on how to address the complaints rested with Leslie, who had addressed previous performance problems with Tyler.[86] Further, as the ALJ found, the events that

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80 D. & O. at 9-10.

81 *Id.*

82 *Id.*

83 USAD Br. at 22-23.

84 Tyler Reply Br. at 8-10, 12.

85 *Id.* at 12.

86 D. & O. at 17. Notably, Letia Smith (Ms. Smith), USAD's Human Resources representative at its Highland Park facility, testified that, while there was a written policy for some violations, there was no official company policy on how to process complaints against employees and that it was within Leslie's discretion on how to address them. Tr. at 267-68. The ALJ found her testimony "generally persuasive." D. & O. at 5.

ultimately led to Leslie's decision to terminate Tyler's employment occurred quickly.[87] Thus, we find that Tyler's argument lacks merit.

Lastly, Tyler contends that there was no evidence on record to establish that he threatened fellow employees, interfered with other employees' work, refused to perform his work in a satisfactory manner, or directly increased USAD's costs.[88] After a thorough review of the record, we agree with the ALJ that there were "significant and repeated incidents" that demonstrated Tyler's "unprofessional conduct and unsatisfactory performance" as well as his inability to cooperate with other employees and his penchant for making comments to other employees that they reasonably perceived as threats.[89] These incidents are well-documented in the record.[90] Thus, we conclude that the ALJ's findings that the complaints from other employees and Tyler's poor job performance were the motivating factors behind Leslie's decision to terminate his employment are supported by substantial evidence in the record.

Therefore, we affirm the ALJ's finding that Tyler failed to establish that his protected activity was a motivating factor in the adverse personnel action he suffered.

6. USAD Established it Would Have Taken the Same Action in the Absence of Tyler's Protected Activity

Even if a complainant can satisfy the burden of proving that a protected activity was a motivating factor in an adverse action, the respondent can ultimately prevail if it can demonstrate by a preponderance of the evidence that it would have taken the same action in the absence of the complainant's protected activity.[91]

Although the ALJ determined that Tyler failed to establish that his protected activity was a motivating factor in the adverse action taken against him and, therefore, the ALJ was not required to analyze the respondent's same action defense, the ALJ undertook that analysis and found that USAD would have taken

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87 *Id.* at 9-10, 17.

88 Tyler Br. at 10.

89 D. & O. at 18-19.

90 USAD Exhibits 1-9.

91 29 C.F.R. § 24.109(b)(2).

the same adverse action against Tyler, *i.e.*, terminating his employment, even if he had not engaged in protected activity.[92] The ALJ grounded this conclusion on the finding that USAD terminated Tyler's employment based on a "culmination of repeated complaints by coworkers about [Tyler]'s conduct, [Tyler]'s failure to satisfactorily accomplish job objectives, and actions by [Tyler] perceived as threats against other employees."[93] The ALJ further found that Tyler's employment ultimately ended after Leslie received a ninth complaint against Tyler for five separate incidents.[94] The ALJ concluded that, for those reasons alone, USAD terminated Tyler's employment.[95]

Tyler contends that if he had not reported his concerns to Leslie, he would still be employed by USAD.[96] Tyler asserts that, prior to his discharge, he was given high remarks for his job performance and was told that USAD wanted to promote him.[97]

As the ALJ found, Tyler engaged in protected activity from March 2015 through February 2016 and suffered no adverse action because of his protected activity.[98] This undercuts Tyler's argument that he would still be employed by USAD if he had not engaged in protected activity. Further, as discussed in the preceding section, the record substantially supports the ALJ's finding that USAD terminated Tyler's employment based on his failure to satisfactorily accomplish job objectives, repeated complaints from his fellow workers about his overall conduct, and actions that Tyler took that several of his fellow employees perceived as threatening.[99] Thus, we affirm the ALJ's finding that USAD would have taken the same action in the absence of Tyler's protected activity.

Therefore, we affirm the ALJ's conclusion that even if Tyler's protected activity under the SWDA were a motivating factor to his employment termination,

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92 D. & O. at 19-20.

93 *Id.* at 19.

94 *Id.* at 20.

95 *Id.*

96 Tyler Br. at 5.

97 *Id.*

98 D. & O. at 16.

99 *Id.* at 19.

USAD demonstrated by a preponderance of the evidence that it would have taken the same personnel action against Tyler in the absence of his protected activity.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Decision and Order.[100]

SO ORDERED.

NED I. MILTENBERG
Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge

IVEY S. WARREN
Administrative Appeals Judge

[100] In any appeal of this Decision and Order, the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.