UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 12 November 2020

ALJ NO.: 2020-SDW-00002

In the Matter of:

BETHANY TRUDEAU,
Complainant,

v.

CRAIG BARNUM d/b/a
TULLAR'S TAVERN LLC,
Respondents.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

This matter arises from a complaint under the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-9, and 29 C.F.R. Part 24. On November 10, 2019, Complainant, Bethany Trudeau ("Trudeau"), filed this Complaint against Respondent, Craig Barnum d/b/a Tullar's Tavern LLC[1] ("Respondent"). On January 3, 2020, the Regional Administrator for the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA"), acting as agent for the Secretary of Labor ("Secretary"), dismissed Trudeau's claim because the Complaint was untimely filed and Trudeau was not employed within the meaning of the SDWA. On February 18, 2020, Trudeau objected to the Secretary's preliminary order and requested a hearing pursuant to 29 C.F.R. § 24.106. On April 22, 2020, Trudeau filed an amended complaint.

On May 18, 2020, Respondent filed a Motion to Dismiss, arguing the United States Department of Labor lacks jurisdiction in this matter. R. Mot to Dismiss 1. Specifically, Respondent contends that (1) Trudeau failed to file her Complaint within the mandated thirty

[1] Respondent, in its Motion to Dismiss, clarified that Tullar's Tavern LLC is not a d/b/a of Craig Barnum, but rather is a real-estate holding company, which Mr. Barnum is the sole member and manager. R. Mot to Dismiss 1 n.1.

(30) days of the alleged adverse action; (2) the Complaint fails to state a claim upon which relief can be granted; and (3) no employer-employee relationship ever existed between Respondent and Trudeau. R. Mot to Dismiss 1. On June 29, 2020, Trudeau, acting as a self-represented litigant, filed a response to Respondent's Motion to Dismiss, and a Motion for Summary Judgment.

Considering the arguments presented by the parties, and for the reasons addressed below, I find dismissal is appropriate, as Trudeau has failed to establish an employer-employee relationship between herself and Respondent.

I. Standard of Review

Pursuant to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. § 18.70(c), "[a] party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness."[2]

II. Background

In her amended Complaint, Trudeau alleged she entered into a lease with Respondent in May 2017, and spent more than a year developing the property located at 227 Egremont Plain Road, for the purpose of eventually purchasing the property to live and work. Amend. Comp. 2. She expressed she held the position of agent/director of a Community Development Center. Amend. Comp. 2. Trudeau stated that in May 2018, Respondent refused to renew the lease with her; however, her partner, Peter Case ("Case"), continued to lease the commercial kitchen located on the first floor of the building. Amend. Comp. 2.

Trudeau contends that Respondent made untrue statements about the qualities and conditions of her living and work space, and covertly and illegally delegated the duty of compliance to tenants. Amend. Comp. 3. Specifically, Trudeau alleges the building was not compliant with safety and health codes, including safe drinking water, lead paint, mold and fire. Amend. Comp. 3. As it pertains to SDWA, in October 2017, Trudeau complained to Craig

[2] A motion to dismiss under 29 C.F.R. 18.70(c) is the equivalent of a Section 12(b)(6) Motion under the Federal Rules of Civil Procedure, which focuses solely on "the allegations in the complaint, its amendments, and the legal arguments the parties raised – not whether evidence exists to support such allegations." *Evans v. U.S.E.P.A.*, ARB No. 08-059, ALJ No. 2008-CAA-003, PDF at 10 (ARB July 31, 2012). Accordingly, while both parties attached exhibits to their filings, I will not consider evidence outside of the pleadings on Respondent's motion to dismiss.

Barnum ("Barnum") and the Egremont Board of Health about high levels of lead revealed in water samples, and in June 2018, she again reported high lead levels to the Massachusetts Department of Environmental Protection. Amend. Comp. 2. Trudeau referenced water tests taken by the Water Operator, in 2017 and 2018, respectively, which both revealed actionable levels of lead, indicating exposure for over a year. Amend. Comp. 3.

Consequentially, Trudeau maintains Respondent took adverse employment action against her in violation of the SDWA for reporting lead in the water. Compl. Resp. 4. Trudeau contends Respondent retaliated against her by issuing her a no trespass notice at 227 Egremont Plain Road, the location of Peter Case's organization, Be the Change Community Development Corporation ("BTCCDC"). Amend. Comp. 2, 4.

III. Discussion

A. *Employer-Employee Relationship*[3]

To prevail on a complaint of unlawful retaliation or discrimination under the whistleblower protection provisions, a complainant must first establish that he or she is an employee and the respondent is an employer. *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ No. 2000-CAA-00020, 2001-CAA-00009, 2001-CAA-00011, slip op. at 6 (ARB Jun. 30, 2004); *Demski v. Indiana Michigan Power Co.*, ARB No. 02-084, ALJ No. 2001-ERA-00036, slip op. at 4 (ARB Apr. 9, 2004); *see also Anderson v. Metro Wastewater Reclamation Dist.*, ARB No. 01-103, ALJ No. 1997-SDW-00007, slip op. at 8 (ARB May 29, 2003) (noting that SWDA, SDWA, CERCLA, FWPCA, TSCA, and ERA require complaining employee to have an employment relationship with respondent employer). The issue of whether the complainant is an employee within the meaning of the SDWA is jurisdictional. *Reid v. Methodist Medical Center of Oak Ridge*, 1993-CAA-00004 (Sec'y Apr. 3, 1995).

The SDWA and its implementing regulations do not define "employee." Accordingly, to ascertain whether or not an employer-employee relationship exists, courts follow the common-law, right-to-control test. *See Lewis v. Synagro Technologies, Inc.*, ARB No. 02-72, ALJ No.

[3] While I acknowledge Respondent also contends Trudeau failed to file her Complaint within the mandated thirty (30) days of the alleged adverse action, and the Complaint fails to state a claim upon which relief can be granted, discussion of such matters is unnecessary as dismissal is warranted based on a lack of an employer-employee relationship.

2002-CAA-00012, 2002-CAA-00014, slip op. 4 (ARB Feb. 27, 2004). The common-law test for determining who qualifies as an "employee" under the environmental whistleblower statute considers:

> The hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

See Lewis v. Synagro Technologies, Inc., ARB No. 02-72, ALJ No. 2002-CAA-00012, 2002-CAA-00014 (ARB Feb. 27, 2004); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-324 (1992) (*quoting Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989)); *Robinson v. Martin Marietta Serv. Inc.*, ARB No. 96-075, ALJ No. 1994-TSC-00007, slip op. at 5 (ARB Sept. 23, 1996); *Reid v. Methodist Med. Center*, 1993-CAA-00004, slip op. at 6 (Sec'y Apr. 3, 1995). "[A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

Trudeau alleges "Respondent used the tenant/landlord relationship to exploit/prevent Complainant from being considered an employee, however the work Complainant actually did result in capital gain for Respondent." Amend. Comp. at 3. Trudeau cited to her investments of "real property, commercial equipment …, hospitality upgrades, and other investments." Amend. Comp. at 4. To demonstrate she was an employee of Respondent, Trudeau states that Barnum critiqued her performance and services she provided. Amend. Comp. 4. Additionally, Barnum controlled the ways and the means both she and Case conducted their business. Amend. Comp. 4. Furthermore, Trudeau's work schedule was at the mercy of Barnum's schedule of renovations and approvals. Amend. Comp. 4. Moreover, she states she was constantly monitored and intruded on by Barnum. Amend. Comp. 4. Trudeau also claims (1) her services were an integral part of Barnum's business and produced financial gain; (2) Barnum had authority to control Trudeau's work schedule and prevent her from entering the property; (3) she invested

$40,000.00 in Barnum's business; (4) Barnum had complete control of her day-to-day decisions; (5) she had no opportunity to operate BTCCDC – an independent business organization; and (6) Barnum told her she was permitted to email him and did not require her to cease communications. Amend. Comp. 4.

In her response to Respondent's Motion to Dismiss, Trudeau further alleges she was an employee because Barnum had the right to enter at any time and show the property to prospective buyers, which she contends controlled her work schedule. Compl. Resp. 3. Additionally, Trudeau asserts she was an employee of Barnum because he sent her emails that requested her to unplug the freezer, turn down the heat, and turn off the lights. Compl. Resp. 3.

Based on the facts provided, under the common-law, right-to-control test, I find that Trudeau's allegations, taken as true and making all reasonable inferences in her favor, do not establish an employer-employee relationship. Of particular significance, Respondent did not pay Trudeau for her work or provide any employee benefits. While Trudeau alleges that she invested in the leased property and attempted to ensure compliance with safety and health codes, this was not done at the direction or control of Respondent, and does not support a finding of an employer-employee relationship.

To the contrary, Barnum's (1) right to enter at any time and show the property to prospective buyers, (2) use of email to request Trudeau to unplug the freezer, turn down the heat, and turn off the lights, and (3) constant scheduling of renovations and approvals demonstrate a landlord-tenant relationship. Trudeau herself admitted that she was a tenant of Respondent. *See* Request for Hearing (Feb. 18, 2020); Amend. Complaint at 3 (Apr. 22, 2017). The United States Department of Labor does not possess jurisdiction to adjudicate landlord-tenant disputes as such matters are not covered by the SDWA. 42 U.S.C. § 300j-9(i)(2)(A).

Given Trudeau's status as a self-represented litigant in this matter, I am mindful that her Complaint must be construed with "'liberty in deference to [her] lack of training in the law' and with a degree of adjudicative latitude." *Trachman v. Orkin Exterminating Co.*, ARB No. 01067, ALJ No. 2000-TSC-00003, PDF at 6 (ARB Apr. 25, 2003) (internal citations omitted), *quoted in Dewolfe*, 2012-ACA-00003 at 12; *see also Pik v. Credit Suisse AG*, ARB No. 11-034, ALJ No. 2011-SOX-2006, PDF at 4-5 (ARB May 31, 2012); *Peck v. Safe International, Inc.*, ARB No.

02-028, ALJ No. 2001-AIR-00003 (ARB Jan. 30, 2004). However, viewing all facts in favor of Trudeau and construing her arguments liberally, I find that her Complaint has failed to adequately allege that an employer-employee relationship ever existed between her and Respondent. Since Trudeau cannot establish that Respondent was her employer, she cannot prevail as a matter of law.

Accordingly, Respondent's Motion to Dismiss is **GRANTED,** Complainant's Motion for Summary Judgement is **DENIED** and Complainant's SDWA claim is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

JONATHAN C. CALIANOS
District Chief Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file

an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.