

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 January 2015

CASE NO: 2014-SWD-00001

In the Matter of:

RONALD J. BEAUMONT,
Complainant,

v.

SAM'S EAST, INC.,
Respondent.

Appearances: Ronald J. Beaumont
Complainant, in pro per

Michael A. Chichester, Jr., Esq.
Littler Mendelson, PLC
For Respondent

Before: Paul C. Johnson, Jr.
District Chief Administrative Law Judge

DECISION AND ORDER DENYING COMPLAINT

The matter arises under Section 7001(A) of the Solid Waste Disposal Act (SWDA), 42 USC §6971 and the implementing regulations at 29 C.F.R. Part 24. On October 24, 2013 the Occupational Safety and Health Administration (OSHA) dismissed Complainant's case. Complainant filed an objection and requested a hearing before an Administrative Law Judge (ALJ). The case was referred to the Office of Administrative Law Judges on October 29, 2013. A formal hearing was held on March 24, 2014 in Flint, Michigan. Respondent was represented by counsel while Complainant was *pro se*. At the formal hearing, Respondent's exhibits (RX) 1-30 were admitted. Complainant's exhibits (CX) G-W, AB, and AD-AG were admitted, while CX X-AA, AC, AH, and AI were rejected. Post-hearing briefs were submitted by the Parties and were considered during deliberations.¹

¹ "RB" denotes respondent's brief, and "CB" denotes complainant's brief. "TR," used *infra*, denotes the hearing transcript.

I. ISSUES PRESENTED FOR ADJUDICATION

The unresolved issues presented by the parties are:

- A. Whether a preponderance of the evidence shows that Complainant's protected activity caused or was a motivating factor in Respondent's termination of Complainant's employment.
- B. If so, whether a preponderance of the evidence shows Respondent would have terminated Complainant's employment in the absence of the protected activity.

II. SUMMARY OF EVIDENCE

The Testimonial Evidence

Complainant

Direct Examination

Mr. Beaumont has a bachelor's degree in social work from Temple University. He worked in Philadelphia and New York for 20 years with difficult, violent, inner city kids who had been court adjudicated. He left the field to work as a graphic artist for about ten years: first in Philadelphia then in Flint. He pursued a master's degree in Management Science and Human Resources Management at Central Michigan University, but did not finish the program for financial reasons. (TR 41-42)

Mr. Beaumont began working for Respondent in October of 2000. He started as a part-time worker in the electronics and furniture departments. After two years, he took a full-time position, which included health benefits, working in the seasonal department. Complainant started working in the gas station in 2005, where he remained until his termination in July 2013. (TR 43-44)

Mr. Beaumont never had any negative feedback or disciplinary actions against him. He wanted to make sure he was obeying whatever laws applied to the gas station. The Environmental Protection Agency started a program that required training for gas station attendants. Ms. Cash, his manager, had taken the test to be a Class A operator, but Complainant was not sure how many Class A and B operators the EPA required at each gas station. (TR 44-45)

Mr. Beaumont asked Ms. Cash about the 16 signs posted at the gas station that said, "The person dispensing fuel should remain outside of their vehicle while dispensing fuel." (TR 46) Complainant had conversations with Jason Corbett, a general manager, and also expressed his concerns to Matthew Waters, the Region 5 Human Resources Manager. (TR 46-47) Mr. Beaumont wanted clarification as to what he should do when people disregarded the sign and sat inside their vehicles while fuelling. (TR 48) Ms. Cash tried to get clarification on what he was supposed to do, but there was still no definitive answer. Complainant and Ms. Cash had some conflict, but they did not have a negative relationship. "I never wanted to see her in trouble or

fired or anything. I think there was some conflict definitely over the course of the time she was my manager...” (TR 49)

Mr. Beaumont kept asking for an answer about the signs because he wanted to satisfy the conditions of his job. There are 16 pumps and at least 7 cannot be seen from the kiosk. Once he identified someone sitting in a vehicle while dispensing fuel, he wanted to know what he was supposed to say to the customer. (TR 50-51) Complainant was concerned with having to approach vehicles because of Flint’s high crime rate. It’s uncomfortable to approach someone’s vehicle. It could become a violent situation. There were altercations where customers made threats. (TR 51-52)

When Mr. Beaumont started working at the gas station there were cameras using VCR tapes. There was a camera in the gas station booth that had a wide angle lens capturing the whole room. (TR 53) The store updated its cameras from VCRs to a digital system. Mr. Beaumont actually took down the old camera and handed it in to management. The new cameras were directly in line with all of the pumps, and each pump had an intercom system. If something was occurring at the pump Complainant could use the intercom to talk to the customer. (TR 54) Ms. Cash decided the solution to addressing customers who remained in their cars while fuelling was to read the sign over the intercom. This practice was successful. (TR 55)

Mr. Beaumont’s understanding of Respondent’s position is that he was terminated because Respondent believes he tampered with a camera. (TR 57) He has never seen a policy on cameras. There is no CBL [Computer Based Lesson] training. “Tampering with the camera, I disrupted the signal.” (TR 57) When Complainant disrupted the signal he pulled a phone jack and put it back in. He thought there would be an auditory alarm. Mr. Beaumont meant it as a joke, to make a disruptive signal, but he didn’t know it would turn the camera off. He said he shouldn’t have done it. (TR 58)

Mr. Beaumont disabled the camera as a way of saying, “Please stop the excessive surveillance.” The surveillance was in reference to his doing some beading, using a saw, and sparking a wire. (TR 58) He didn’t damage the camera, and he didn’t cut a wire. (TR 59)

Mr. Beaumont expressed concerns, while Ms. Cash was on bereavement leave, about taking direction from someone who did not understand the requirements of operating a gas station, specifically someone who was not a Class A or B operator. (TR 59) Complainant was instructed to do things he believed to be wrong. A third-party vendor was spilling fuel Mr. Beaumont was required to clean. He was required to sop-up gasoline with towels and squeeze the towels into a container. The gloves Respondent provided him were latex and gasoline melts latex. Complainant spoke to Ms. Cash about his concerns, and she purchased industry standard absorbent towels and gloves which were recommended by a fuel delivery man. (TR 60)

A third party vendor provided a 55-gallon drum for disposing flammable waste. The container has an EPA sticker that identifies the waste is flammable. (TR 61) The drum was used to dispose of rags and towels that were used for cleaning up spilled gas. (TR 62) The drum had been placed in front of the kiosk where it was observable in case of a fire. (TR 63-64) The drum was moved from view to a location behind the kiosk. Mr. Beaumont made reference that it posed

a hazard because “customers would get out of their vehicles and come over to the side area and walk their dogs, maybe have a cigarette break. We couldn’t see them.” (TR 64). The barrel was not allowed to be moved. It was where Ms. Krease (Asset Protection Manager) and Ms. Nordin (Market Asset Protection Manager) wanted it. (TR 64)

Mr. Beaumont spoke to Ms. Nordin and Ms. Krease regarding a sign indicating the location of emergency shutoffs for the gas pumps. The legibility of the sign was always a question to him. (TR 65) Complainant said when he expressed concerns about the signs, but he was not given a response. (TR 66)

Mr. Beaumont expressed his concerns based on his understanding of EPA regulations for underground tanks. He simply wanted to do what he was told to do and not break the law. “One of [Respondent’s] statements is to obey the law, and that’s what I wanted to do.” (TR 67)

Mr. Beaumont only used the butane torch for two minutes of soldering while trying to fix the fire extinguisher cabinet. (TR 71) He was told this was cited as one of his gross misconduct actions. (TR 71) He was accused of using a coping saw without permission, but he had permission from Jason Corbett, the general manager, and Karla Cash, his immediate supervisor, to install laminate flooring. The coping saw was to allow him to cut out certain shapes in the flooring. (TR 73)

Mr. Beaumont suggested to Ms. Cash that gas station attendants be allowed a key to access the gas station in case of a problem. (TR 74) He created a keychain with wood and his coping saw to make carrying the keychain uncomfortable so attendants wouldn’t take it home. (TR 75) Complainant was told by Respondent using a coping saw is gross misconduct. (TR 75)

Mr. Beaumont thought disconnecting the telephone jack on the camera would set off a temporary little alarm. (TR 77) It was obvious that he was doing it because he put his face up to the camera so he could be seen. “I didn’t hide. I didn’t sneak in there.” (TR 77) The reason he disabled the camera “was to say I’m getting tired of this excessive surveillance of me...” (TR 77) Complainant didn’t find out until later that the camera was disabled for longer than he intended. (TR 78) He wished he would have known when Respondent discovered it, but no one came to him to tell him what he did was wrong. “I should have been given a disciplinary action, a coaching. They kept it quiet. Nothing was said to me at all until the 27th because they had to launch an investigation.” (TR 78)

Mr. Beaumont was beading a necklace for his daughter at work. (TR 79) He did not stop doing his job at this time. He found out in a formal meeting that Ms. Krease had watched 43 minutes of his beading. Complainant didn’t realize he had spent that much time beading and wondered why he wasn’t given a coaching. The beading was another thing identified as gross misconduct. Mr. Beaumont was told he needed to have more surveillance. (TR 80)

Mr. Beaumont thought he was being treated unfairly when he was inside the store and asked to show a receipt for chicken before he returned to the gas station kiosk. (TR 87) The policy was applied to him in a retaliatory manner. (TR 87)

Mr. Beaumont previously identified problems with the gas station to Michigan's Department of Licensing and Regulatory Affairs ("LARA") which resulted in significant reconstruction and replacement of underground storage tanks, resulting in a costly endeavor. (TR 88)

Mr. Beaumont first addressed the issue of customers returning to their vehicles while fuelling with Matthew Waters. Complainant hoped the matter would be resolved internally. (TR 89) He was ignored by Mr. Waters, so he brought the issue to Mr. Corbett's attention and nothing happened. (TR 89) Then Mr. Beaumont contacted the EPA to discuss the problem. (TR 89) He believes his concerns about how the gas station was being run led to his termination because he made reference to what he would be willing to do, "[A]nd what I had done in the past would escalate the situation and report it to other agencies..." (TR 91)

Mr. Beaumont was being paid \$16.35 an hour at the time he was terminated. He had been working 37.5 hours per week when he was terminated on July 27, 2013. (TR 91) Complainant has not been employed since his termination. (TR 93) He applied for two jobs per week for 20 weeks, as was required to receive unemployment benefits. He has not had any interviews; it is difficult to find work at 60 years old and having to explain why he left a job after 13 years. (TR 94) Mr. Beaumont would not want his position reinstated with Respondent because he couldn't trust Respondent wouldn't fire him for another reason. (TR 95)

Cross Examination

Mr. Beaumont agreed he was subject to Respondent's policies throughout his employment. (TR 101) He acknowledged the *Workplace Safety Standards* include the following: "Do not tamper with electric controls or switches. Do not operate machines or equipment until you've been properly instructed or authorized to do so by your supervisor. Do not engage in practices that may be considered inconsistent with ordinary and reasonable commonsense safety rules." (TR 102)

Mr. Beaumont acknowledged Respondent's camera policy states that cameras may only be operated, added, removed or moved by authorized associates and failure to follow the policy may result in disciplinary action including termination. (TR 103) Complainant acknowledged his signature on his exit interview which stated the reason for termination was gross misconduct, destruction of company property. (TR 104) His job description did not include use of the cameras. (TR 105) He told the OSHA investigator when he disconnected the camera he was joking with his manager. (TR 105)

Mr. Beaumont wrote an email to an OSHA inspector stating he did not damage anything and did not leave the coaxial cable disconnected for very long. (TR 109) He admitted he tampered with the camera because he didn't want someone else to get blamed. (TR 110) He has not denied anything he has done. Mr. Beaumont explained and admitted on each reported event that he was doing the things as observed. (TR 111) Complainant wrote an email to an OSHA investigator that said he subscribes to a political philosophy called Anarcho-Syndicalism. (TR 112)

Ms. Cash ordered the industry standard gloves Mr. Beaumont requested for clean-ups. (TR 116) He said he spoke to management (Dave Mullen) about a fuel delivery company that failed to clean-up its spills. He said, subsequently, that company began cleaning up its spill. (TR 116) Complainant spoke with Ms. Cash about the problem of customers returning to their vehicles while pumping gas. (TR 117) He collaborated with Ms. Cash on protocol for addressing those customers. (TR 117)

Mr. Beaumont has a hard time remembering who he spoke to about placement of the 55-gallon drum. (TR 117) The reason he suggested the drum be placed in front of the kiosk was based on the vendor who provided the drum requesting it be somewhere grounded and safe. (TR 118) It was just common sense to him that the drum be placed on camera in the event of an accident as opposed to keeping it by the bathroom where it could get knocked over. (TR 118)

Mr. Beaumont was not disciplined when he reported a gas station violation (between 2005 and 2007) which resulted in expensive repairs. (TR 121) He agreed that other than his own speculation as to the reasons for his termination, he does not have any evidence of retaliation by Respondent. (TR 122)

Mr. Beaumont has never seen Respondent's camera policy. His only contact with Respondent's cameras was to remove the one that was replaced and occasionally reconnect a coaxial cable that became disconnected. (TR 123) "I am curious as to why after so many years of employment without any disciplinary actions I wasn't afforded a different level of disciplinary action, than my termination." (TR 232)

Jenna Krease - Asset Protection Manager

Ms. Krease has been the asset protection manager for Respondent for approximately 3 years. (TR 133). Her job is to ensure the associates are following company policies and following state and federal laws and regulations. (TR 133) She is responsible for overall compliance for the gas station. (TR 133). Ms. Krease noticed an issue with the camera in the gas station kiosk on July 19, 2013. (TR 134) There was a third party vendor on site that day to fix cameras. Ms. Krease examined all of her camera monitors to make sure everything was working before the repairman left. (TR 134)

Ms. Krease was reviewing the camera shots with her boss, Alexcia Nordin, who had come to the store for a compliance tour. (TR 134) Ms. Krease noticed a red and blue screen on a monitor she determined someone disabled the camera. (TR 135) She reviewed the camera video prior to its disabling and saw Complainant standing underneath the camera. (TR 136) She joined Ms. Nordin on the compliance tour. When they arrived at the gas station kiosk they visually inspected the camera, and nothing looked out of place. (TR 137)

Ms. Krease told the camera repairman there was one additional camera that needed fixing. (TR 137) She took pictures of the kiosk camera wires that were inspected by the third-party repairman. (TR 138) She took repair "before and after" pictures of the camera's wires. (TR 139) The repairman immediately knew what was wrong with the camera; the black wire was not exposed enough to be fused to the red wire. (TR 140)

Ms. Krease pulled still images on July 19, 2013 from the video recorded by the kiosk camera of the seconds leading up to the camera going out. (TR 142) She sent those stills to Ms. Nordin. (TR 142) She never watched Complainant on surveillance. (TR 142)

Once a month a third party reviews Respondent's video to assess Respondent's compliance. (TR 143) The third party informed Ms. Krease that Complainant was making a piece of jewelry when the gas station daily checklist had yet to be completed. (TR 143) She reviewed the video and determined Complainant spent 43 minutes working on the jewelry. (TR 143) She and Jason Corbett had a conversation with Complainant in the coach's office to make sure Complainant was doing his job and not making jewelry while on the clock. (TR 144) Ms. Krease observed Complainant on video sawing something, sparking an electrical outlet, using a torch. (TR 144)

Respondent's policies are all available on the company's intranet site. (TR 145) Workplace safety standards include prohibiting the tampering with electronic controls or switches and operating machines or equipment until properly instructed or authorized. (TR 146) The closed circuit camera policy applies to all associates and is available on the intranet. (TR 147) Associates certainly cannot tamper, nor do anything, with the cameras. (TR 147) The cameras do not have audible alarms that buzz when they are turned off. (TR 148)

Many times Complainant had argued with Ms. Krease about having a camera in his area. "He did not like it. He thought he was always under surveillance. He thought I just sat in my office and watched him." (TR 148) She did not sit in her office and watch him. There were roughly 200 cameras in the store, and nearly every associate is visible on some surveillance camera at all times. (TR 148-149)

Ms. Krease received the report from LARA on June 7, 2013 from the inspection that was conducted on April 29, 2013. (TR 150) She had a few questions pertaining to the report and conferred with Complainant before contacting the inspector. (TR 151) Ms. Krease wanted an explanation "for the special attention on Number 7." (TR 151) The report indicated there were multiple incidents of people sitting in their cars while fuelling and there was no gas attendant there to monitor the pumps. (TR 151) This report was inaccurate because the investigator did not know there was a monitor inside the kiosk. (TR 152) "I had told [the Inspector] that I was told there was a variance where [customers] could sit in their vehicles." (*Id.*) The investigator apologized and acknowledged there was a variance allowing Respondent to monitor the pumps inside the kiosk. (TR 152) Complainant was not involved in communicating with the inspector about this issue. (TR 152)

Mr. Beaumont and Ms. Cash worked together on creating a procedure for dealing with patrons who remain in their vehicles while fuelling. (TR 155) There are regulations on where the 55-gallon drum needs to be placed. (TR 156) It needs to be located between concrete poles and on concrete. (TR 156)

On July 27th, 2013, Ms. Krease was not aware of Complainant having complained about any safety or EPA issues. She did not make the decision to terminate Complainant. (TR 157)

Ms. Krease heard there was a confrontation with Complainant not wanting to show his receipt for merchandise. (TR 158) She reviewed the incident on video. There was no audio, but she saw Complainant throw something white and crumpled out the door, and then he walked out the door. (TR 158)

The person who delivered the 55-gallon drum took a picture to make sure he had a photo of the concrete poles. (TR 159) Ms. Krease pointed at two areas outside of the scope of the Complainant's picture of the drum to indicate the location of the concrete poles. (TR 160)

Ms. Krease was not aware that a third party compliance inspector brought his underage son to a work site. (TR 166) She did not know the compliance inspector was instructing Complainant to fill out the "day" fuel delivery checklist, though Complainant was a morning associate. (TR 166)

Ms. Krease is not a class B operator. As a risk manager she makes sure the gas station associates wear their personal protection equipment (PPE) when they are using gas or cleaning up gas. (TR 168) She was aware Ms. Cash was getting the gloves requested by Complainant. (TR 168) The PPE provided by the company would never be unsafe. The provided gloves were not up to Complainant's standards which is why Ms. Cash was getting him different gloves. She has never seen the gloves melt, and no one has ever complained about gloves melting. (TR 169) Ms. Krease nodded when asked if Ms. Cash purchased gloves because the gloves were melting. (TR 169 -170)

The camera was inoperative the whole period between when it went out on July 17 until it was repaired on July 19. (TR 173)

Karla Cash - Member Service Manager

Ms. Cash was in charge of seven departments at the store including the gas station. (TR 175) She was Complainant's supervisor. She never disciplined Complainant, and she never authorized him to make repairs. (TR 176) She asked Complainant to look at the fire extinguisher cabinet and tell her what was needed to fix it. (TR 177) She did not tell him to make the repair, nor did she authorize him to use a torch inside the kiosk. "[A]n open flame in the gas station seems like a bad idea to me." (TR 177)

Ms. Cash was a Class A Certified Operator and certification required an understanding of proper installation and maintenance of underground storage tanks to ensure the store was environmentally compliant. (TR 178)

Ms. Cash knew that Complainant was going to contact the LARA inspector about the cited violation for which the store actually had a variance. (TR 179) She was not at all upset that Complainant was communicating with the LARA inspector. She told Complainant to do whatever he felt was necessary to do his job correctly. (TR 179)

There was a period when the kiosk monitor was not working and gas station attendants were asked to sit outside to monitor the pumps. (TR 181) Complainant expressed some safety concerns due to crime in the area. She sat down with Complainant to develop a process that

would ensure everyone's safety and comfort. (TR 181) Ms. Cash and Complainant developed a procedure using the P.A. system to address customers who remained in their vehicles while fuelling. (TR 181) The policy was created and put into effect when she returned to work from bereavement leave in July. She believed Complainant was satisfied with the solution. (TR 182)

Ms. Cash was unaware of any complaints Complainant made concerning EPA issues or DEQ. (TR 182) Complainant mentioned he was concerned about being on camera constantly. (TR 183) He expressed his concern around the end of June, beginning of July. She told him that 90 percent of the building was under camera at all times. (TR 183) Ms. Krease informed her in mid-July that the gas station kiosk camera had been disabled. (TR 183) She was made aware on July 27th that Complainant was interviewed in connection with disabling the camera. (TR 184) Complainant was interviewed in the gas station coach's office, and that's when she became aware. (TR 184) Ms. Cash came in at the end of the interview to do the termination based on Ms. Nordin's recommendation. The recommendation was due to destruction of company property, for disabling the camera. (TR 185) Ms. Cash agreed with the decision to terminate Complainant, and there were no other reasons for his termination. (TR 185)

The company safety policy applies to all associates and is available on the intranet. (TR 186) Tampering with a camera violates the policy and can result in termination. (TR 187) She delivered a copy of the exit interview to Complainant which stated he was terminated for "gross misconduct, destruction of property." (TR 190) It was her decision to terminate Complainant based only on disabling the camera. (TR 195)

Alexcia Nordin - Market Asset Protection Manager

Ms. Nordin's primary responsibilities include supervising the asset protection managers in each store. (TR 199) She is responsible for shrink, safety, accidents, compliance, and government regulatory contacts. (TR 199) She first met Complainant in July of 2013 when she was touring the store. (TR 200) She went to see Ms. Krease and saw the camera in the gas station kiosk was not operating. (TR 201) Ms. Nordin looked for any visible signs of damage to the camera in the kiosk. (TR 202) She did not notice anything unusual. (TR 203)

Ms. Nordin was no longer at the store when the repair people inspected the camera. (TR 203) Ms. Krease told her the power wires to the camera had been cut. (TR 203) Ms. Krease sent her still photos from the video leading up to the moment it went out. (TR 204) She recognized the Complainant as the person in view of the camera leading up to it being disabled. (TR 204) Ms. Nordin decided she needed to speak with Complainant to find out what happened to the camera. (TR 204)

Between July 19th and July 27th Ms. Nordin learned about the use of a torch, the 43 minutes spent on a beaded necklace, and a spark from the electrical box. (TR 205) These incidents did not play a role in the consideration for employment or non-employment. These incidents did come up in the conversation with Complainant on July 27th. (TR 205) Trent Peebles from Global Investigations was present with her while interviewing Complainant. (TR 206) The interview took a couple of hours, and Complainant admitted to disabling the camera. (TR 206) Complainant said it was a joke he was playing on Ms. Krease. (TR 206)

Through the investigation Ms. Nordin determined the consequence for tampering with the camera was termination. (TR 207) The investigation report states the findings are that Complainant admitted to disabling the camera in the gas station kiosk, and no other findings were made. (TR 207) The Respondent's workplace policies apply to all associates and prohibit tampering with electric controls or operating machines or equipment without training and authorization. (TR 208) Respondent's closed circuit camera policy only allows the third party vendor to touch the equipment. (TR 209) The policy states unacceptable conduct, including damage to property, may result in immediate termination. (TR 211)

Ms. Nordin has been in asset protection for 8 years and is the highest level asset protection person in the market, responsible for 14 locations. (TR 212) She is not aware of any employee intentionally disabling a video camera. (TR 212) If there were any other associates who intentionally disabled a camera she would recommend termination. (TR 212)

Respondent's *Open Door Policy* allows associates to bring up issues or concerns with supervisors without fear of retaliation. (TR 213) Retaliation against an associate for initiating or cooperating in an open door review will lead to disciplinary action up to an including termination. (TR 214) Ms. Nordin takes the policy seriously and would not violate it. (TR 215) She was not aware Complainant had reported any safety or environmental concerns. (TR 215) She was aware Complainant had communication with a LARA inspector in order to get clarification on an inspection report. (TR 215) She appreciated that Complainant took the initiative to get clarification, and she was not aware of anyone who had an issue with Complainant contacting LARA. (TR 215) No one told her to terminate Complainant prior to the investigation. Complainant was terminated because he disabled the camera in the gas station kiosk. (TR 216)

Disabling a camera warrants termination because, "You have to wonder why they wanted it disabled...I don't know. But it warrants termination based on the policy." (TR 218) The purpose of having a camera in the gas station kiosk is for the associate's safety. (TR 228) The cameras can absolutely be used for personnel reasons. (TR 229)

Exhibits

Complainant's Exhibits

CX C – 11/24/13 Website screen capture of LARA regulation requiring patrons to remain outside of vehicle while dispensing fuel

CX G – 7/6/13 email from Complainant to LARA Inspector, Mr. Harris, regarding customers remaining in vehicles while dispensing fuel.

CX H - 7/8/13 email from Mr. Harris to Complainant ensuring complaints will remain confidential

CX I - 9/23/13 Letter from LARA indicating Respondent is in compliance

CX J – Procedure for addressing customers who remain in vehicle while fuelling

CX K – 7/09/13 email to Mr. Harris, LARA Inspector, regarding customers remaining in cars while dispensing fuel.

CX L – 7/13/13 email from Complainant to LARA, Mr. Harris, regarding filing a DEQ complaint

CX M – 7/13/13 email from Complainant to Daryl White, a manager for Respondent, regarding customer fuel dispensing protocol and not receiving a response to his concerns from Mr. Corbett, the general manager.

CX N – 7/18/13 email to Mr. Corbett about the chicken receipt and stated policy

CX O – 7/20/13 email to Mr. Waters from Complainant thanking Mr. Waters for responding to Complainant’s concerns.

CX P – Fire extinguisher cabinet inside the kiosk

CX Q – Photo of 55-gallon drum and plastic bag contents.

CX S – Photo of butane torch

CX T – Photo of coping Saw

CX U – Picture of wood keychain

CX V – picture of the kiosk security camera

CX AG – beading a necklace

Respondent’s Exhibits

RX 1, 2, 3 - Video

RX 4 – Pictures of the camera wires before repair and after

RX 5 – stills from the kiosk camera leading up to the camera going out

RX 6 – Respondent’s Safety and Health in the Workplace Policy

RX 8 – Respondent’s Open Door Policy

RX 10 – Respondent’s Camera policies

RX 12 – Complainant’s exit interview

RX 13 – Form stating, “What to do when a member is sitting in their (sic) vehicle while dispensing fuel.”

RX 14 – 4/29/13 LARA Facility Inspection Report

RX 15 – Job description for gas station attendant

RX 19, RX 21 – Handwritten notes from OSHA investigator’s file

RX 22 – 9/23/13 letter to Complainant from Michigan Dept. of Licensing and Regulatory Affairs, Bureau of Fire Service, State Fire Marshal’s Office showing Complainant contacted Inspector Harris on 7/23/13

RX 24 – 9/19/13 email from OSHA inspector to Complainant with statement from Complainant “I am to conclude that this does not look good on me because I made fun of a surveillance policy.”

RX 26 – 9/20/13 email from Complainant to OSHA stating “If I said I heard a quote ‘buzzing’ end quote noise coming from the camera, turned it off, and called it in as damaged, there’s be no gross misconduct.”

RX 27 – 9/20/13 email from Complainant to OSHA stating, “If I were to sabotage or engage in gross misconduct, I would have cut a wire in a manner undetected by a video camera.”

RX 30 – 9/29/13 email from Complainant to OSHA stating anyone with a rudimentary understanding of electricity looking at the camera wiring would not be able to immediately tell if someone simply disconnected the wires and put the caps back on.

PARTY CONTENTIONS

Complainant's Position

Mr. Beaumont contends he was subjected to retaliation and fired from his position at Sam's East because he reported regulatory violations to his superiors and regulatory agencies. (CB at 3) Complainant stated Sam's East had violations regarding operator training, customer fuel dispensing protocol, waste clean-up, and waste disposal. (TR 45-48, 60-64)

Additionally, Complainant states he did not "cut" or "disable" the security camera in the gas station attendant kiosk, but rather, he did "the equivalent of turning off a light in a room for a few seconds..." (*Id.* at 4) Complainant states there were no training modules, meetings, or review of a camera policy. (*Id.*)

Mr. Beaumont states he was not soldering a key chain in the kiosk; he was repairing a piece of metal for a cabinet. (*Id.* at 5) He stated he had permission to use a coping saw in order to install laminate flooring. (TR 72-73)

Mr. Beaumont requests an award of \$249,856. He states this figure represents six years of payments based on his annual gross income and healthcare costs, plus reimbursement for \$10,000 from a retirement account he withdrew following his termination. (CB at 6)

Respondent's Position

Respondent contends it had a legitimate, non-retaliatory reason for terminating Complainant's employment, *i.e.* Complainant admitted to disabling the camera in the gas station kiosk. (RB at 2-3) Respondent states the offense is a violation of its policy, constitutes gross misconduct, and is immediately terminable. (*Id.*) Further, Respondent states those who investigated and recommended Complainant's termination were unaware of his alleged protected activity. Lastly, Respondent states it would have terminated employment in the absence of any purported protected activity. (*Id.*)

Respondent requests the complaint be dismissed in its entirety, with prejudice. (*Id.*)

III. STATUTORY AND REGULATORY FRAMEWORK

The SWDA "is a comprehensive environmental statute that governs generation, treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). The Act's purpose is to promote the reduction of hazardous waste and the treatment, storage, or disposal of such waste so as to minimize threats to human health and the environment. 42 U.S.C.A. § 6902. The SWDA affords any employee who believes that he has been fired or otherwise discriminated against for engaging in protected activity the right to file a complaint with the Secretary of Labor. 42 U.S.C. § 6971(b).

The regulations implementing the SWDA provide:

- (a) No employer subject to the provisions of [SWDA] may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in this section...(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 such statute.

29 C.F.R. §24.102

The regulations provide that Administrative Law Judges' decisions and orders contain appropriate findings.

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. 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, relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.

29 C.F.R. §24.109

Further, “[A]fter a whistleblower case has been fully tried on the merits, the ALJ does not determine whether a *prima facie* showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity.” *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Apr. 30, 2004).

In the present case, Respondent moved for summary decision at the conclusion of Complainant's case. The motion was denied. (TR 129) To determine whether protected activity was a motivating or substantial factor in Complainant's employment termination requires examining the record as a whole. *See Id.*

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Complainant has not demonstrated by a preponderance of the evidence that his protected activity caused or was a motivating factor in his termination.

Perhaps because it is apparent that he did, the parties never addressed whether or not Complainant engaged in protected activity. For the sake of thoroughness, I will briefly explain why some of his actions qualify for protection. Congress' stated purpose for SWDA is to reduced or eliminate hazardous waste as expeditiously as possible while minimizing the threat to human health and the environment. The SWDA regulates the storage of underground tanks, the training

requirements of personnel involved with underground tanks, as well as cleaning up spills. Complainant's contact with the LARA Inspector regarding customer fuel dispensing requirements, his work with Ms. Cash in developing protocol to address customers, his inquiry about Class A and B operator training, his request to Ms. Cash for gloves, and his complaint about the location of the 55-gallon drum all qualify as protected activity.

While the aforementioned actions are protected, Complainant did not demonstrate the protected activity was a motivating factor in an adverse employment action, *i.e.* his termination. The record shows Respondent supported, was indifferent to, or was unaware of Complainant's protected activity. The Complainant's argument relies on linking multiple, discrete events and individuals to a single chain resulting in whistleblower discrimination, but the evidence does not support this connection. There is substantial evidence showing Respondent's termination decision was based on reasons unrelated to his having engaged in protected activities. Complainant's evidence shows a rising level of frustration with other employees and outside vendors, as well as a belief that he was being retaliated against by management with surveillance and selective enforcement of company policies. The record does not support this belief. The events and circumstances of Complainant's workplace conflicts are not activities covered by the SWDA whistleblower protections.

In order for Complainant to prevail under the SWDA, he must establish that his protected activity was a motivating factor (substantial factor) in his employment termination. *Kuehu v. United Airlines*, ARB No. 12-074, ALJ No. 2010-CAA-007 at 4 (ARB February 10, 2014). "A 'motivating factor' is conduct [that is]...a 'substantial factor' in causing an adverse action." *Wolslagel v. City of Kingman, Arizona*, ARB No. 11-079, ALJ No. 2009-SDW-007, slip op. at 3, n. 6 (ARB Apr. 10, 2013), citing *Onysko v. State of Utah, Dept. of Env'tl. Quality*, ARB No. 11-023, ALJ No. 2009-SDW-004 slip op. at 10 (ARB Jan 23, 2013). This is a higher burden for the Complainant than the contributing factor standard. "There may be other factors of substance but, in the final analysis, [the protected activity] must be the factor that motivates the conduct — 'the substantial factor'". *United States v. Jenkins*, 2013 U.S. Dist. LEXIS 92945, 2013 WL 3338650 (E.D. Ky. July 2, 2013).

No Temporal Proximity

Complainant attempts to prove his termination was due to his protected activity based on temporal proximity and procedural irregularities. Complainant was terminated on July 27, 2013. The record shows the last activity that could be considered protected activity was an email from Complainant to the Region 5 Human Resources manager, Mr. Waters, on July 20, 2013. (CX O) At first glance, seven days between the protected activity and adverse employment action supports Complainant's case, but closer examination undermines his claim. The July 20, 2013 email is a "Thank you" correspondence to Mr. Waters. Complainant stated, "I have appreciated your efforts and time to respond to issues I thought important..." The issues to which Complainant referred are how to ensure customers remain outside of their vehicles while fuelling and cleaning up spills. (*See Id.*) The record indicates Respondent addressed Complainant's concerns to Complainant's satisfaction. Further, the investigation which determined Complainant engaged in policy violations, *i.e.* tampering with the camera, was not completed until July 27, 2013. Respondent's conclusion that Complainant tampered with the camera is an intervening activity severing any relationship between the protected activity and adverse action. *Ortiz v. Grand Trunk Western Railroad Co.*, No. 13-cv-13192 (E.D. Mich. Sept. 17, 2014).

Complainant's other protected activity similarly lacks a connection to his termination. Complainant testified he asked Ms. Cash about the 16 signs posted at the gas station that said, "The person dispensing fuel should remain outside of their vehicle while dispensing fuel." (TR 46) Complainant testified he kept asking for an answer about the signs because he wanted to satisfy the conditions of his job. He wanted to know what he was supposed to say to customers who did not comply with the regulation. (TR 50-51) He was concerned with having to approach vehicles because of Flint's high crime rate. He said Ms. Cash was trying to get clarification on what he was supposed to do, but there was still no definitive answer when Ms. Cash went on bereavement leave at some point in late June 2013. While she was away, Complainant said he addressed his concern with Mr. Waters. He stated he hoped the matter would be resolved internally. (TR 89) Complainant said he was ignored by Mr. Waters, so he brought the issue to his general manager's attention, but still nothing happened. (TR 89) Complainant said he then contacted the EPA to discuss the problem. (TR 89)

In addition to Complainant's testimony, the record shows Complainant addressed his concern in an email to Mr. Harris at LARA on July 6, 2013 (CX G). On July 8, 2013, Complainant received an email from Mr. Harris stating his complaint would be investigated, and his identity would remain confidential. (CX H) On July 13, 2013, Complainant sent an email to Mr. White² calling his attention to Complainant's concern. Complainant wrote he did not receive a response from his general manager, Mr. Corbett, regarding Complainant's proposed solution. Complainant also wrote that he had proposed his solution to Mr. Waters, but had not yet received a response. (CX M) On the same date, July 13, 2013, Complainant sent another email to LARA indicating he intended to file a complaint with DEQ because his concern had not been addressed. He wrote "[I] am preparing for a feeding frenzy by managers retaliating..." (CX L)

When Ms. Cash returned from bereavement leave in July, she said she enacted a procedure for addressing customers who remained in their vehicles. The Complainant said the procedure was something he and Ms. Cash created together. (TR 117) Ms. Krease also testified the Complainant and Ms. Cash collaborated on creating the procedure. (TR 155) Ms. Cash said she believed Complainant was satisfied with the solution they enacted. (TR 182) The record does not indicate the exact date the protocol was put in place, however, the "thank you" email from Complainant to Mr. Waters from July 20, 2013 concluded, "I have no issues to discuss with you about any recent events." (CX O) A letter from LARA also stated Complainant contacted Mr. Harris on July 23, 2013 to inform him "the violations regarding customer re-fueling had been addressed by [Respondent]."

The record establishes, and I find, that Complainant expressed a regulatory concern, which qualifies as protected activity, in late June or early July, and that Respondent enacted a procedure resolving the concern by mid-July. The record does not demonstrate that Respondent retaliated in any way because of Complainant's protected activity, but rather, Respondent listened to the complaint, included Complainant in the solution process, and resolved his concerns to his satisfaction. The resolution did not happen as quickly as Complainant desired, but Respondent's actions show an employer that was supportive of Complainant, not retaliatory. The last email Complainant wrote before his concern was resolved was on July 13, 2013. (CX

² Mr. White's precise title is unclear from the record, but his email address and the contents of the message indicate he has a managerial role for Respondent.

O). It is undisputed Complainant disabled the kiosk camera on July 17, 2013. Respondent did not discover the camera was disabled until July 19, 2013, and Complainant's termination was not until July 27, 2013

Further, the record does not support a claim of temporal proximity between any of Complainants' other protected activity and any adverse actions. Complainant first engaged in protected activity sometime after 2005 but prior to 2007 when he reported a gas station violation to LARA which resulted in an expensive renovation. He said he did not suffer any repercussions from this protected activity. (TR 121)

A LARA inspection on April 29, 2013, cited Respondent, while Complainant was on duty, for allowing multiple vehicles to fuel without personnel leaving the kiosk (CX E). The regulation in question requires store personnel to have customers in view while customers are fuelling. Ms. Cash testified she knew that Complainant was going to contact the LARA inspector about the cited violation. She stated she was not at all upset that Complainant was communicating with the LARA inspector. She said she told Complainant to do whatever he felt was necessary to do his job correctly. (TR 179)

When Ms. Krease received the inspection report she believed the citation was an error. She said she conferred with Complainant before contacting the inspector. (TR 151) On June 15, 2013, Ms. Krease informed the inspector the Respondent had a variance because there was a monitor inside the kiosk. She said the investigator apologized and acknowledged there was a variance allowing Respondent to monitor the pumps inside the kiosk. (TR 152) The record shows Respondent did not retaliate against Complainant for the mistaken violation or for contacting LARA. Rather, the Respondent supported Complainant contacting LARA to get clarification on his job duties, and Respondent conferred with him before contacting LARA to have the citation dismissed.

The other protected activities in which Complainant engaged include the following:

1. Complainant testified he spoke to Ms. Nordin and Ms. Krease regarding a sign indicating the location of emergency shutoffs for the gas pumps. He said the legibility of the sign was always a question to him. (TR 65) He said when he expressed concerns about the signs, he was not given a response. (TR 66) The Complainant's hearing testimony is the only evidence in the record about this activity. The Respondent did not address it in its case. The record does not indicate when this conversation occurred. Complainant did not claim he suffered an adverse action from this conversation.
2. Complainant testified he was required to sop-up gasoline with towels and squeeze the towels into a container. He said the gloves Respondent provided him melted. He said he spoke to Ms. Cash about his concerns, and she purchased industry standard absorbent towels and gloves that were recommended by a fuel delivery man. (TR 60) Complainant also said he addressed management (Dave Mullen) about a company that delivered fuel and failed to clean-up its spills. He said, subsequently, that company began cleaning up its spill. (TR 116) Ms. Krease said she was aware Ms. Cash was getting the gloves requested by Complainant. (TR 168) The record does not

indicate when these conversations occurred. Complainant does not contend he suffered an adverse action from these conversations; in fact, he acknowledged Respondent provided him with the equipment he requested and addressed the third party delivery company about cleaning up after its spills.

3. Complainant testified a third party vendor provided a 55-gallon drum for disposing rags and towels that were used for cleaning up spilled gas. (TR 62) Initially the drum was located in front of the kiosk. It was moved to a location behind the kiosk. Complainant said he asked for the drum to be moved back in front of the kiosk, but he said he has a hard time remembering to whom he spoke. (TR 117) There is nothing in the record that indicates Complainant spoke to anyone about his concern with placement of the 55-gallon drum. The first mention of his concern does not appear until after he was terminated. (*See* RX 19 at RB0100 “Whistleblower worksheet” 07/29/13). Complainant gave evasive testimony when specifically asked about the date he complained of the drum’s location. The lack of contemporaneous documentation of his communications, although he had no hesitation about sending other concerns by email. I find, therefore, that Complainant did not express concerns about the location of the 55-gallon drum to anybody at Sam’s Club before he was terminated.

The record indicates the Respondent was generally supportive, at worst indifferent, and sometimes unaware of Complainant’s protected activities. Complainant did not establish a temporal link between his protected activity and employment termination. I find the Complainant did not demonstrate by a preponderance of the evidence that his protected activity caused or was a motivating factor in his termination.

No Procedural Irregularities

Complainant argued his termination did not follow company procedure, concluding this demonstrates retaliation for his protected activity. Complainant’s argument, that he should have received coaching rather than termination, is not supported by the evidence. Although Complainant was engaged in protected activity, the record also shows there were multiple concurrent incidents between Complainant and other employees, as well as outside parties, that are not subject to whistleblower protection. Complainant did not show there were any procedural irregularities. Accordingly, Complainant did not demonstrate that his protected activity caused or was a motivating factor in Respondent’s adverse treatment of him.

Complainant said, “I am curious as to why after so many years of employment without any disciplinary actions I wasn’t afforded a different level of disciplinary action, than my termination.” (TR 232) The record shows that Respondent did follow procedure. Respondent’s “Coaching for Improvement” policy (RX 9) indicates, depending on the severity of the violation, levels of coaching can be skipped. Further, when Respondent learns of reported misconduct it may conduct an investigation to determine what occurred, followed by appropriate action. The policy states, “If the investigation reveals that you have engaged in misconduct...The appropriate action...may include...immediate termination.” (RX 9 at RB0047)

Complainant failed to show that Respondent arbitrarily enforced its policy as retaliation to his protected activity. Complainant did receive coaching following Respondent's discovery of Complainant beading a necklace while at work. Complainant said he found out in a formal meeting that Ms. Krease had watched 43 minutes of his beading. He said the beading was identified as gross misconduct. Ms. Krease said she and Mr. Corbett had a conversation with Complainant in the coach's office to make sure Complainant was doing his job and not making jewelry while on the clock. (TR 144) Complainant's beading is unrelated to any protected activity; he received coaching and suffered no adverse action. I find Respondent did not act arbitrarily in enforcing its policy.

When Respondent learned on July 19, 2013 that the kiosk camera was not operating, it conducted an investigation per its coaching policy. Respondent reviewed video from the kiosk camera from the moments preceding its disabling and recognized Complainant directly in front of the camera as the feed went out. A visual inspection of the camera by Ms. Krease and Ms. Nordin did not show any irregularities. A third-party repairman determined the camera stopped working because two wires were no longer fused together. After the camera was repaired, while Respondent was still conducting its investigation, Complainant was recorded on July 20, 2013 using a "flame torch inside the booth" at 7:33 a.m. and "using a saw without permission" at 7:45 a.m. (RX 19 at RB0024). On July 27, 2013, Respondent concluded its investigation after interviewing Complainant. During the interview Complainant admitted to disabling the camera. Following this admission, Ms. Nordin recommended to Ms. Cash that Complainant's employment be terminated.

Complainant contends he was terminated because of his protected activity and argues that Respondent did not follow proper procedure before terminating him. The evidence does not support this contention. Complainant's prior misconduct, the undisputed beading for 43 minutes, concluded with coaching and Complainant returning to work. Ms. Nordin testified Complainant was terminated solely based on gross misconduct, specifically destruction of company property. The evidence shows Respondent's workplace policies apply to all associates. The policies prohibit operating machines or equipment without training and authorization. (RX 6 at RB0035) Further, Respondent's closed circuit camera policy states only those specifically authorized may operate the cameras and failure to comply "may result in disciplinary action up to and including termination." (RX 10 at RB0261). Ms. Nordin testified she has been in asset protection for 8 years and is not aware of any other employee intentionally disabling a video camera. She said if there were any other associates who intentionally disabled a camera she would recommend termination. (TR 212) Ms. Cash also said tampering with a camera violates policy and can result in termination. (TR 187) Ms. Cash said she based her decision to terminate Complainant solely on his gross misconduct in disabling the camera. (TR 195). Complainant's argument is not supported by the record. He did not show by a preponderance of the evidence that his protected activity was a motivating factor in any adverse action by Respondent. Accordingly, the complaint will be denied.

Complainant's Non-protected Activity

Several of Complainant's exhibits demonstrate disputes between Complainant and other employees, management, and outside vendors. These disputes occurred concurrently with

Complainant's protected activity. Complainant argues these exhibits demonstrate retaliation against him by the Respondent. After careful examination of the exhibits, I have determined the activities are not protected activities under the SWDA. This Administrative Law Judge has no authority to address Complainant's concerns beyond the scope of Complainant's "efforts to promote the reduction of hazardous waste and the treatment, storage, or disposal of such waste so as to minimize threats to human health and the environment" and any retaliation by Respondent because of those efforts.

Complainant testified he thought he was being treated unfairly when he was inside the store and asked to show a receipt for chicken before he returned to the gas station kiosk. He said the policy was applied to him in a retaliatory manner, since previously, he had frequently left the store without being asked to show a receipt. He wrote an email to Mr. Corbett about the incident on July 18, 2013, the day after he disabled the camera. The email indicated he was entering the store when he was asked by another employee, named Marie, to help her download music. He declined because he heard someone received coaching for having ear phones while on duty. (CX N) As he was exiting the store, Marie, whom he declined to help, asked him to present a receipt proving he purchased the chicken he was eating. (*Id.*) The record does not contain any evidence, nor does Complainant contend, Respondent terminated him based on this incident. The selective enforcement of the receipt policy does appear to be retaliatory by Marie, the employee Complainant declined to assist, but the retaliation was entirely unrelated to protected activity.

On June 27, 2013 Complainant wrote an email to Mr. Waters stating a supervisor named Mary told Complainant to make sure he stayed inside the kiosk and did not sit down outside where customers could see him. Complainant stated he was working outside in 90 degree heat and perspiring. He wanted to "sit down and allow my perspiration to dry" before going inside the kiosk. The Complainant wrote, "This is almost a weekly thing...I am getting angry about this repetitive conflict and hostility towards me." (CX B) The Complainant's concerns in this email are not protected activity under SWDA, and it's unclear what adverse action he suffered.

Another email to Mr. Waters from June 27, 2013 indicates Complainant was told by a third party vendor he was in violation of EPA rules for not remaining outside to monitor customers. Respondent already verified its variance with LARA on June 7, 2013. A third party criticism is not retaliation attributable to Respondent.

Finally, Complainant may sincerely believe there was a concerted effort to oust him based on his protected activity, but the evidence does not support his belief. Complainant's argument, that his termination did not follow procedure, relies on an assumption that is not supported by facts. Respondent's policies clearly indicate tampering with a camera may result in termination. Complainant's uncorroborated belief is not enough to meet his burden of demonstrating by a preponderance of the evidence that his protected activity caused his termination.

Complainant's "temporal proximity" and "procedural irregularity" arguments failed to prove his termination was caused by his protected activity. Accordingly, Complainant's complaint will be denied.

B. In the alternative, Respondent has demonstrated by a preponderance of the evidence that it would have taken the same adverse action in the absence of Complainant's protected activity.

Assuming arguendo Complainant demonstrated by a preponderance of the evidence that his protected activity caused or was a motivating factor in his termination, Respondent can avoid liability if a preponderance of the evidence shows that it would have terminated employment in the absence of the protected activity. If Complainant's temporal proximity and/or procedural irregularity arguments show he was terminated because of protected activity, I find Respondent demonstrated by a preponderance of the evidence that it would still have terminated his employment in the absence of his protected activity.

Respondent's witnesses and the physical evidence show Respondent would have fired Complainant based solely on his gross misconduct. I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. I have taken into account all relevant, probative and available evidence and attempted to analyze its cumulative impact on the parties' case. *See Frady v. Tennessee Valley Authority*, Case No. 1992-ERA-19 slip op. at 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51 (7th Cir. 1971). As the court further observed: Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe...Credible testimony is that which meets the test of plausibility. 442 F.2d at 52. Further, an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Altemose Construction Company v. NLRB*, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Respondent's witnesses were credible. They testified they either were unaware or supportive of Complainant's protected activity. The evidence supports their statements. While I find most of Complainant's testimony credible, there are some claims I find he is mistaken and others I find disingenuous. I find Complainant sincerely believes that he was punished by Respondent with harassment (*e.g.* the receipt incident, third party compliance complaint, etc.) and increased surveillance, but the record does not support his belief. I do not find plausible Complainant's assertion that because there were no training modules, meetings, or reviews of the camera policy he did not know tampering with the camera was a terminable offense. Additionally, I do not find credible Complainant's statement that when he tampered with the camera the only thing he did was unplug a phone jack. Finally, the evidence shows Complainant did not express his concern with placement of the 55-gallon drum until after his termination. As such, those concerns are not protected activity.

Complainant's belief that he was retaliated against by co-workers and third parties is unrelated to his protected activity and has been discussed *supra*. Complainant also believes he was targeted with increased surveillance. The record does not support his contention. Complainant testified there was a surveillance camera in the gas station kiosk prior to his

working there. Ms. Krease testified that many times Complainant had argued with her about having a camera in his area. She said, "He did not like it. He thought he was always under surveillance. He thought I just sat in my office and watched him." She said that was not true, and with roughly 200 cameras in the store, nearly every associate is visible on some surveillance camera at all times. Ms. Cash testified Complainant mentioned he was concerned with being on camera constantly. She said she told him that 90 percent of the building was under camera at all times. The record shows Complainant frequently commented about his distaste for cameras. He testified that he disabled the camera as a way of saying "please stop the excessive surveillance." In an email to OSHA Complainant wrote that he subscribed to a political philosophy called Anarcho-Syndicalism. The philosophy embraces workers taking direct action against employers in order to make changes in labor conditions. Rather than a punitive measure for engaging in protected activity as Complainant asserts, Respondent's use of cameras was wide-spread and did not in any way single out Complainant. Further, Respondent's use of cameras remained consistent from before Complainant's protected activity through his termination.

I do not find credible Complainant's testimony that he was unaware of Respondent's camera policy. Complainant demonstrated his ability to research and access information and regulations applicable to his job. He researched state and federal regulations for underground storage containers and showed an aptitude for navigating LARA and OSHA websites for pertinent information. As such, his claim that he was unaware of Respondent's safety and camera policies, specifically that tampering can lead to termination, is not credible. These policies were readily available on Respondent's intranet site. In addition, Complainant testified, "I have training as a multimedia artist and can do video editing." (TR 11) One of Complainant's evidentiary submissions is a video he produced. Complainant's training and skills suggest a familiarity with camera and video equipment that undermine his contention that he simply unplugged a phone jack connected to the camera. Rather, the evidence shows someone removed the camera from the wall, tampered with its enclosed mechanism by deliberately disconnecting two wires which had been spliced and capped together, and placed the camera back on the wall. On July 19, 2013 Ms. Krease and Ms. Nordin observed the camera and found no visible signs of tampering. The third-party repairman determined the internal, capped wires were intentionally disconnected. Complainant's claims, if true, suggest a conspiracy, involving the third-party camera vendor, staging evidence of a damaged camera in order to oust Complainant because of his protected activity. The evidence does not support Complainant's implied version of events. Instead, I find that Complainant himself disconnected the wires in the camera in an act of defiance and in violation of Respondent's policies.

The preponderance of the evidence does show the repairman was unaware of any of Complainant's protected activity. Ms. Cash was responsive and supportive of Complainant's protected activity. It is unclear when Ms. Nordin became aware of Complainant's protected activity, but the preponderance of the evidence establishes that Respondent terminated Complainant solely because he damaged property. The Complainant did engage in protected activity, but apart from that, the evidence shows a narrative in which Complainant attributed any perceived slight or critical comment, regardless of its source, to Respondent. Complainant had an Orwellian resentment for Respondent's use of cameras. Due to a review of camera footage, Complainant received coaching for using 43 minutes of work time to bead a necklace. After the camera was repaired, and while Respondent was investigating the camera tampering, Complainant was viewed sparking an electrical outlet, using a torch, and using a coping saw, all

of which are gross misconduct. At the conclusion of its investigation, Ms. Nordin and Ms. Cash testified Complainant's termination was based solely on his damaging company property. Ms. Nordin testified she takes very seriously and would not violate the Respondent's "Open Door Policy" which allows associates to bring up issues or concerns with supervisors without fear of retaliation. (TR 213) She said retaliation against an associate for initiating or cooperating in an open door review will lead to disciplinary action up to an including termination. (TR 214) On the whole, the record shows Respondent would have terminated Complainant's employment in the absence of his protected activity. Complainant was terminated because his tampering with the camera was gross misconduct in violation of Respondent's policies, which were known to Complainant.

CONCLUSION

Complainant has not met his burden to show by a preponderance of the evidence that his protected activity caused or was a motivating factor in his termination. Accordingly, his complaint is denied. I find in the alternative that Respondent has met its burden to show by a preponderance of the evidence that it would have terminated Complainant for gross misconduct even in the absence of protected activity. Complainant's claim will be denied.

ORDER

For the reasons set forth above, Mr. Beaumont's complaint is **DENIED**.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ,JR./JDP/jcb
Newport News, Virginia

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 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. The date of the postmark, facsimile transmittal, or e-mail communication 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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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 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.