



In the Matter of:

BRENDA MUGLESTON-UTLEY,

ARB CASE NO. 12-025

COMPLAINANT,

ALJ CASE NO. 2009-CAA-009

v.

DATE: May 8, 2013

**EG&G DEFENSE MATERIALS,
INCORPORATED,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Mick G. Harrison, Esq., Bloomington, Indiana

For the Respondents:

H. Douglas Owens, Esq., and Lois A. Baar, Esq.; Holland & Hart, LLP; Salt Lake City, Utah

BEFORE: E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Luis A. Corchado, Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals Judge

FINAL DECISION AND ORDER

Complainant Brenda Mugleston-Utley filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that her former employer, Respondent EG&G Defense Materials, Inc. retaliated against her in violation of the whistleblower protection provisions of the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (Thomson/West 2003); Safe Drinking Water Act (SDWA), 42 U.S.C.A. §300j-9(i) (West 1991); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (Thomson/West 2005); Federal Water Pollution Control Act (FWPCA), 33 U.S.C.A. §1367 (West 2001); Solid Waste Disposal Act (SWDA), 42 U.S.C.A. §6971 (West 2003); and the

Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (Thomson Reuters 2009) (collectively, the “Environmental Acts”).¹ In a Decision and Order (D. & O.) issued December 14, 2011, following an evidentiary hearing, the presiding Administrative Law Judge (ALJ) found that the Complainant engaged in protected activity, but that her protected activity did not contribute to the termination of her employment. For the reasons discussed below, we summarily affirm the ALJ’s dismissal of Mugleston-Utley’s complaint.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to issue final agency decisions under the Environmental Act.² The ARB reviews an ALJ’s findings of fact under the substantial evidence standard and an ALJ’s conclusions of law de novo.³

DISCUSSION

To prevail on a whistleblower complaint under the Environmental Acts, the complainant must prove by a preponderance of the evidence that he or she engaged in whistleblower protected activity that caused or was a motivating factor in the adverse employment action taken against the complainant. The failure to prove any one of these elements necessarily requires dismissal of a whistleblower complaint. If the complainant meets his or her 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 unfavorable personnel action in the absence of the complainant’s protected behavior.⁴

The ALJ found that the Complainant’s complaints about wearing adequate protective clothing in the performance of her tasks in the airlocks, as well as concerns regarding an ACAMS wand⁵ being left in an air duct, brine and caustic leaks, and cracked or corroded air hoses constituted protected activity.⁶ The parties do not dispute that the Complainant was

¹ Regulations implementing these provisions are found at 29 C.F.R. Part 24 (2012).

² Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 24.110.

³ 20 C.F.R. § 24.110(b); *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006) (citing *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4 (ARB Dec. 30, 2004)).

⁴ 29 C.F.R. § 24.109(b)(2).

⁵ ACAMS wands were used to measure the amount of agent present on employees in toxic areas. D. & O. at 8, 101.

⁶ D. & O. at 100-104.

subject to an adverse employment action, specifically, the termination of her employment. Nevertheless, the ALJ found that the Complainant failed to prove by a preponderance of the evidence that her protected activity caused or was a motivating factor in the employment termination. Moreover, the ALJ found that the Respondent established that it would have terminated the Complainant's employment even if she had not engaged in protected activity.⁷

In finding that the Complainant failed to establish that her protected activity was a motivating factor in the decision to terminate her employment, the ALJ rejected the Complainant's contentions after comprehensively reviewing the extensive evidence of record. In sum, the ALJ was persuaded, based upon the preponderance of the evidence, that the Complainant's employment was terminated because she had attempted suicide, which caused her to lose the required CPRP certification for maintaining her employment, and that her protected activity was not a motivating factor in the termination decision.

On appeal, the Complainant asserts that the Respondent fired her because she engaged in protected activity, and that the basis given for the termination, *i.e.*, her suicide attempt, was mere pretext. Having reviewed the evidentiary record as a whole, and upon consideration of the parties' briefs on appeal, we conclude that the ALJ's findings of fact upon which the ALJ determined that the Complainant failed to prove that her protected activity was a motivating factor in the termination of her employment are supported by substantial evidence of record. Since the Complainant has failed to demonstrate that the ALJ committed a reversible error, we **AFFIRM** the ALJ's dismissal of the complaint.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

⁷ *Id.* at 122-124.