In the Matter of:

DONNA KUEHU,

COMPLAINANT,

v.

UNITED AIRLINES,

RESPONDENT.

ARB CASE NO. 12-074

ALJ CASE NO. 2010-CAA-007

DATE: February 10, 2014

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Andre S. Wooten, Esq., Honolulu, Hawaii

For the Respondent:
Christopher Cole, Esq., Honolulu, Hawaii

BEFORE: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge;* and Lisa Wilson Edwards, *Administrative Appeals Judge*. Judge Corchado, concurring.

FINAL DECISION AND ORDER

Complainant Donna Kuehu filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that her former employer, Respondent United Airlines (United), 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) (Thomson Reuters 2012); Federal Water Pollution Control Act (FWPCA), 33 U.S.C.A. § 1367 (West 2001); and Solid Waste Disposal Act (SWDA), 42 U.S.C.A. § 6971 (Thomson/West 2003) (collectively, the "Environmental

Acts").[1] In a Decision and Order (D. & O.) issued May 25, 2012, following an evidentiary hearing, the presiding Administrative Law Judge (ALJ) found that Kuehu did not engage in activity protected under the Environmental Acts. The ALJ further held that, even if he had found Kuehu's complaints to be protected, the evidence did not establish that any such protected activity was a motivating factor in Respondent's decision to terminate Kuehu's employment.[2] For the following reasons, we affirm the ALJ's denial of Kuehu'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 Acts.[3] The ARB reviews an ALJ's findings of fact under the substantial evidence standard and an ALJ's conclusions of law de novo.[4]

BACKGROUND[5]

United employed Kuehu from 1989 until January 8, 2010. From 2000 until January 25, 2006, she was employed as a Reservations Sales and Service Representative (RSSR) in the reservation call center, located in the subbasement of a building within the Honolulu International Airport. Kuehu and many other employees frequently complained internally about the conditions at the call center, including sewage overflows and strong odors and fumes inside and surrounding the building. Transcript (Tr.) at 21, 27, 56, 246. On August 29, 2005, she filed a Safety, Health and Environment Concern form with United regarding strong odors emanating from a grease trap on the property. Joint Ex. 57. Beginning in 2005, she also made numerous complaints to state and federal agencies regarding the grease trap, sewer overflows, persistent odors, and other occupational hazards at the call center.

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[1] Regulations implementing these provisions are found at 29 C.F.R. Part 24 (2013).

[2] Although Respondent filed a Motion for Summary Decision before the ALJ, the ALJ held it under advisement until the full record was developed at trial and his decision is based on a review of evidence adduced at that trial.

[3] 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.

[4] 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)).

[5] Unless otherwise noted, the background facts are taken from the "Factual Summary" contained in the ALJ's May 25, 2012 Decision and Order Denying Claims (D. & O.) at 3-7.

January 25, 2006, was Kuehu's last day of active employment with United. On January 26, 2006, United placed her on extended illness status (EIS) due to her poor health.[6] Kuehu alleges that she engaged in numerous instances of protected activity following her placement in EIS status and prior to her termination four years later. Between August 22, 2005, and October 2, 2007, Kuehu filed numerous workers' compensation claims based on her alleged exposure to toxic fumes at the workplace and in 2007, she filed a civil toxic tort claim against Gate Gourmet, Incorporated (the operator of the catering company in charge of the grease trap). On November 3, 2009, Kuehu delivered a letter to the U.S. Environmental Protection Agency containing allegations that she and many other employees in the building had been experiencing "environmental exposures over a long period of time to gases of sulfur compounds, raw sewage odor, mold, leaking pipes including sewer overflows within the building, and poor indoor air quality." JX-20. In the same letter, she alleged also that United was endangering the Manuwai Stream environment, violating the Clean Water Act's storm water requirements and violating NPDES Wastewater regulations through continued operation of the grease trap on its premises. JX- 20; D. & O. at 6. In early December 2009, she wrote similar letters to the U.S. Department of Health and Human Services and to the U.S. Department of Labor. D. & O. at 6; Joint Exs. 21, 22. United terminated Kuehu's employment on January 12, 2010.

As mentioned, United placed Kuehu on extended illness status (EIS) on January 25, 2006, the last day she worked for United. EIS is governed by provisions contained in the Collective Bargaining Agreement (CBA) between Respondent and the International Association of Machinists, which covered Kuehu's position. ALJ Ex. 42 at 1-2; Resp. Ex. 71 at 54-55. The CBA provides that an employee shall be placed in EIS up to a maximum of three years and separation by termination after expiration of the EIS is automatic. Respondent notified Kuehu in August of 2009, 60 days prior to expiration of her EIS status, that her EIS expiration date was set for October 23, 2009, and her termination would be automatic. D. & O. at 3; ALJ Ex. 42; Resp. Ex. 28,

On October 2, 2009, Kuehu's physician released her to work with restrictions, effective two days prior to the expiration of her EIS. In response, United extended her EIS to allow for Kuehu to make arrangements to return to her former job with accommodations. When Kuehu rejected the offer to return to the call center with the use of a mask, her EIS was again extended to allow her to attempt to obtain a position in another location. Although there were no available positions as an RSSR, Kuehu applied through a competitive bid process for a position in Kona, Hawaii as a Customer Representative.[7] On January 7, 2010, Kuehu learned that she was not selected for the position. On January 12, 2010, Respondent notified Kuehu that her employment was terminated (effective January 8, 2010) pursuant to the CBA's EIS provisions. D. & O. at 5.

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[6] When Respondent learned in 2009 that the start date of Kuehu's EIS had been improperly determined based upon a misconception that her EIS was non-occupational, the date of the beginning of her EIS was adjusted to October 23, 2006. Tr. at 400.

[7] An outside contractor administered the application process, which included a written test and two interviews.

DISCUSSION

Kuehu seeks protection for her whistleblower claims under four Environmental Acts – the CAA, SDWA, FWPCA, and SWDA. To prevail under these Environmental Acts, Kuehu must establish that her protected activity was a motivating factor (substantial factor) in an unfavorable employment action that she suffered.[8] The failure to prove any one of these elements (protected activity, unfavorable employment action, causation) 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 adverse personnel action even if the complainant had not engaged in protected activity.[9]

1. Protected Activity

Kuehu alleges that she engaged in protected activity during 2005 when she made numerous complaints to United's management, as well as to state health and safety agencies regarding the indoor environmental quality (IEQ) at the call center and when she sent a letter to the Environmental Protection Agency (EPA) containing IEQ concerns and on November 3, 2009, citing environmental violations pertaining to storm water and the health of the Manuwai Stream environment. In addition, she contends that her requests for documentation relating to her 2007 civil toxic tort claim were protected activity as they alerted management that she was raising environmental concerns in litigation. Similarly, she claims a November 10, 2009 investigation of her former worksite conducted by experts retained in connection with the toxic tort case was protected activity. Tr. at 166.

The ALJ considered Kuehu's claims of protected activity under each of the named environmental acts, beginning with the FWPCA. He found that Kuehu's letter to the EPA in November 2009, although largely concerned with indoor air quality, was potentially protected under the FWPCA. However, after analysis, the ALJ concluded that the letter only incidentally referred to Clean Water Act violations and endangerment of the Manuwai Stream environment and those references were too vague and unsubstantiated to constitute protected activity under the FWPCA. In particular, he found that her belief that the grease trap at Gate Gourmet was polluting the Manuwai Stream was not reasonable because the 2002 e-mails between the State of Hawaii and United Airlines that she claims were the basis of her belief were outdated and do not mention the grease trap. D. & O. at 15-16. The ALJ also rejected Kuehu's contention that a Consent Decree from October 6, 2005, led her to believe that United was violating the FWCPA as the decree does not mention United or Gate Gourmet. *Id.* He also found that Kuehu knew that Gate Gourmet had moved out of the building when she wrote the letter to the EPA, which further diminished the reasonableness of her belief. *Id.* at 17. Substantial evidence supports the

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[8] 29 C.F.R. § 24.109(b)(2); *Morriss v. LG&E Power Servs. LLC*, ARB No. 05-047, ALJ No. 2004-CAA-014, slip op. at 31 (ARB Feb. 28, 2007) (citation omitted).

[9] 29 C.F.R. § 24.109(b)(2); see also *Morriss*, ARB No. 05-047, slip op. at 33 (citation omitted).

ALJ's findings that Kuehu's allegations to the EPA concerning storm water and the Manuwai Stream are not covered under the FWPCA.

The ALJ next addressed Kuehu's IEQ complaints including those contained in the 2009 letter to the EPA. He concluded that all Kuehu's complaints leading up to the November 2009 EPA letter, and all the complaints subsequent to the letter, "focused solely on employee health and safety at the Call Center." D. & O. at 17. For this reason, he ultimately found, as a matter of law, her IEQ complaints were not covered under the FWPCA. *Id.* at 18. He similarly rejected Kuehu's indoor air quality claims under the CAA as he found that her complaints did not address concerns for the general population or relate to the purpose of the CAA. In addition, he noted that Kuehu testified that she was unaware of the SWDA until after termination and that no evidence was presented regarding protected activity under the SDWA. Therefore, the ALJ rejected Kuehu's claims under these Acts.

Like the ALJ, United contends that internal or external complaints limited to occupational hazards or conditions are not protected activities under the environmental acts. We do not agree. In *Tomlinson v. EG&G Def. Materials, Inc.*,[10] the Board held that the fact that the concerns Tomlinson raised related to workplace conditions were covered under the OSH Act does not preclude a determination that he reasonably believed that his concerns also related to the Environmental Acts.[11] However, for purposes of disposition of this case, we need not address the question of whether Kuehu's IEQ (indoor environmental quality) complaints are covered under any of the Environmental Acts. The ALJ's findings of fact and analysis sufficiently demonstrate that no alleged protected activity was a motivating factor in the decision to terminate Kuehu's employment. We therefore focus only on the causation element. In doing so, we make no determination with respect to the ALJ's ruling on whether Kuehu engaged in protected activity.[12]

2. Adverse employment action

The parties do not contest the ALJ's finding that Kuehu suffered an adverse employment action when United terminated her employment. Therefore, we affirm the ALJ's finding that this element has been met. In her brief, Kuehu also lists fourteen instances of alleged retaliatory

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[10] ARB No. 11-024, ALJ No. 2009-CAA-008 (ARB Jan. 31, 2013).

[11] *See also Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001 (ARB Dec. 28, 2012); *Melendez v. Exxon Chems. Am.*, ARB No. 96-051, ALJ No. 1993-ERA-006, (ARB July 14, 2000) (Under the CAA and the other Environmental Acts, a complaint related to air quality that "touch[es] on" concerns for public health and the environment can be sufficient).

[12] *Cf. Drago v. Jenne*, 453 F.3d 1301, 1308 (11th Cir. 2006) (in affirming the lower court's dismissal of the plaintiff's retaliation claim, the appellate court focused on the plaintiff's failure to present sufficient evidence that the alleged adverse action was causally related to the alleged protected activity, assuming for purposes of the appeal but explicitly not deciding that the plaintiff's conduct constituted statutorily protected activity).

conduct. The ALJ found that these alleged retaliatory claims were not part of her complaint or amended complaint and thus would not be considered. We agree and hold that we will not address these claims of retaliation as they were not properly raised or pleaded before the ALJ.[13] *See* ALJ Exs. 1, 11, 20.

3. Motivating factor

Assuming arguendo that her complaint establishes protected activity, Kuehu must also show "by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint."[14] United contends that Kuehu was terminated as a result of the end of a period of Extended Illness Status. The ALJ agreed, finding that Kuehu failed to establish any causal nexus between any protected activity and her discharge. The ALJ noted that EIS is a provision of the Collective Bargaining Agreement and provides for EIS to last a maximum of three years with automatic separation by termination at the end of the period. The initial period was scheduled to end on October 23, 2009, but was extended when Kuehu's physician released her for limited work. United extended the period of EIS again to await the results of Kuehu's interview for an alternate position within the company. Her termination did not take effect until after she was notified that she was not selected for the other position.

The ALJ noted that close temporal proximity existed between Kuehu's letter to the EPA on November 3, 2009, and the notice of termination of her employment on January 12, 2010, creating the possibility of an inference of causation. He correctly observed, however, that the termination process under the EIS had begun well before Kuehu sent the letter to the EPA in November 2009. D. & O. at 23. Beginning in June 2009, United began notifying Kuehu in writing that the expiration of her EIS was approaching. D. & O. at 3; Tr. at 174. The ALJ also found that several intervening events following her November 2009 letter served to diminish any possible inference of causation. These included Kuehu's rejection of an offer to return to her former duties with the aid of a breathing mask, Kuehu's unsuccessful application and interview for a different position through a third-party contractor unaware of her IEQ complaints, United's extension of the EIS until the results of the application were known, and the fact that her termination did not occur until she was unable to obtain the alternate job. D. & O. at 23. The ALJ reasoned that Kuehu's termination was standard procedure under the EIS provisions of the CBA, that the EIS process began before Kuehu's letter to the EPA, and there was no evidence that United proceeded in a discriminatory manner. Indeed, as the ALJ pointed out, Kuehu received two extensions of her EIS, which other employees rarely received. *Id.* at 26.

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[13] Additionally, Kuehu contends on appeal that the ALJ erred in finding that the claims based on the denial of transfer and failure to provide a safe workplace were untimely, as she made an oral complaint on February 1, 2010. We reject this contention as it was not raised before the ALJ. *See Seehusen v. Mayo Clinic*, ARB No. 12-047, ALJ No. 2011-STA-018, slip op. at 4 (ARB Sept. 11, 2013); *Limanseto v. Ganze & Co.*, ARB No. 11-068, ALJ No. 2011-LCA-005, slip op. at 4 n.14 (ARB June 6, 2013).

[14] 29 C.F.R. § 24.109(b)(2).

After a thorough review of the evidence, the ALJ concluded that Kuehu failed to establish causation. On appeal, Kuehu does not contest the ALJ's finding that the termination process had begun before she wrote to the EPA in November 2009, and makes no persuasive argument of any reversible error on causation or that the evidence establishes that her alleged protected activity was a motivating factor in her termination. Substantial evidence in the record supports the ALJ's findings of fact. Therefore, we affirm the ALJ's finding that Kuehu failed to establish a necessary element of her claim, and thus hold that the claim was properly denied.[15]

CONCLUSION

The ALJ's Decision and Order dismissing the complaint is **AFFIRMED**.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS,
Administrative Appeals Judge

Judge Corchado, concurring.

I concur with the majority that the ALJ's ruling on the causation issue disposes of this case, along with the majority's rejection of Kuehu's untimely claims and arguments. I concur only to state briefly my concern about the ALJ's discussion of intervening events.

As the majority noted, the ALJ found that there were several "independent, intervening causes that negate any causation that could have been inferred by the temporal proximity." D. & O. 22. At the risk of being too brief, I must say this statement is confusing but harmless in the end. I find that the concept of "intervening cause" does not neatly transfer into the whistleblower laws we adjudicate and it has been misapplied frequently.[16] In determining whether an event caused an unfavorable employment action in environmental whistleblower cases,[17] the question is whether the complainant persuaded the ALJ that protected activity was a

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[15] *See generally Valenti v. Shintech, Inc.*, ARB No. 11-038, ALJ No. 2010-CAA-008 (ARB Sept. 19, 2012).

[16] *See, e.g., Speegle v. Stone & Webster Constr., Inc.,* ARB No. 11-029-A, ALJ No. 2005-ERA-006, slip op. at 17 (ARB Jan. 31, 2013)(concurrence); *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 9, 11 (ARB Sept. 26, 2012)(involving the contributing factor causation standard).

[17] With the exception of whistleblower claims based on the Energy Reorganization Act, as amended and recodified, 42 U.S.C.A. § 5851 (West 2003 & Supp. 2013).

"substantial factor." If protected activity substantially contributed to setting in motion the unfavorable action, I believe *liability* exists even in the presence of other contributing independent events, but the amount of *damages* might be partially or completely reduced. Independent intervening events do not negate or change the temporal distance between two events, but they can remove the persuasiveness of the temporal proximity as circumstantial evidence of unlawful retaliation.

I find the ALJ's comments harmless in this case because I understand the ALJ to say that he is not ultimately persuaded that Kuehu's protected activity played a substantial part in setting in motion the unfavorable actions. He was persuaded that the events occurring after November 3, 2009, were the substantial factors in the termination of employment and not the preceding protected activity. I reserve further comment for another day.

LUIS A. CORCHADO
Administrative Appeals Judge