

In the Matter of:

RONALD J. BEAUMONT,
COMPLAINANT,

v.

SAM'S EAST, INC.,
RESPONDENT.

ARB CASE NO. 15-025

ALJ CASE NO. 2014-SWD-001

DATE: January 12, 2017

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Ronald J. Beaumont, *pro se*, Flint, Michigan

For the Respondent:

Michael A. Chichester, Jr., Esq.; *Little Mendelson, P.C.*; Detroit, Michigan

Before: Paul Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Anuj C. Desai, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Solid Waste Disposal Act (SWDA) and its implementing regulations.¹ Complainant Ronald J. Beaumont, a gas station attendant, alleged that respondent Sam's East, Incorporated,² fired him in violation of the SWDA after he complained about safety issues. After an evidentiary hearing on the merits of his claim, a Department of Labor Administrative Law Judge (ALJ) dismissed his complaint. Beaumont appealed to the

¹ 42 U.S.C.A. § 6971 (Thomson/Reuters 2012); 29 C.F.R. Part 24 (2016).

² Sam's Club East, Inc., is the operating entity for Sam's Club No. 8291 in Flint, Michigan, and runs a gas station. Walmart is the parent company.

Administrative Review Board (ARB). We summarily affirm the ALJ's dismissal of Beaumont's whistleblower complaint.³

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated authority to issue final agency decisions in cases arising under the SWDA to the ARB.⁴ The ARB reviews an ALJ's findings of fact for substantial evidence, and conclusions of law de novo.⁵

BACKGROUND

Initially, we commend the ALJ's summary of the testimony and documentary evidence in this case as well as his detailed findings of fact and conclusions of law. To reiterate briefly, Beaumont began working in the Sam's East gas station in 2005. In August 2012 new EPA (Environmental Protection Agency) regulations took effect; their implementation prompted a series of events which led to Beaumont's involvement with safety issues regarding gas station operation such as underground storage tanks, delivery and dispensing of fuel, clean-up of spills, storage of solid waste, and completion of required documents.

Beaumont raised concerns about whether he should remain inside or outside the attendant's kiosk to monitor customers' refueling, whether he should tell customers to turn off their engines while refueling, and whether he should help disabled customers at the pump. He discussed implementing and complying with the new regulations and the policies of Michigan's Department of Environmental Quality with Sam's East managers on many occasions and sent an e-mail on June 27, 2013, to human resources manager Matthew Waters about using a surveillance camera inside the kiosk to monitor customers who were pumping fuel.⁶

³ While we affirm the ALJ's dismissal of Beaumont's complaint, we do not endorse every collateral legal issue in the ALJ's analysis. For example, the ALJ ruled that T-Mobile's conclusion that Beaumont tampered with the camera was "an intervening activity severing any relationship between the protected activity and adverse action" D. & O. at 14. An intervening event, however, does not necessarily break a causal connection between protected activity and adverse action simply because it occurred after the protected activity." *Franchini v. Argonne Nat'l Lab.*, ARB No. 13-081, ALJ No. 2009-ERA-014, slip op at 18 (ARB Sept. 28, 2015). See *Rudolph v. Nat'l RR Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 18 (ARB Mar. 29, 2013) (intervening events do not automatically negate a finding that protected activity was a contributing factor in the adverse action).

⁴ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. § 24.110(a).

⁵ *Muggleston-Utley v. EG&G*, ARB No. 12-025, ALJ No. 2009-CAA-009 (ARB May 8, 2013).

⁶ Complainant's Exhibits (CX) B-C, hearing transcript (TR) at 44-48, 50-51.

On July 6, 2013, Beaumont complained to inspector Gregory Harris of the state Department of Licensing and Regulatory Affairs (LARA) that Sam's East would not allow him to bother customers while they were refueling even if they violated regulations by sitting in their cars.⁷ Subsequently, Beaumont and his supervisor, Karla Cash, fashioned a procedure to deal with customers who stayed in their cars while the fuel was being pumped.⁸

On July 19, 2013, when Beaumont was not working, Asset Protection Manager Jenna Krease, who also oversaw regulatory compliance, noticed during an inspection that the security camera in the attendant's kiosk was inoperative. She and Cash rewound the camera's film and discovered that it had stopped working two days previously and that Beaumont's face was directly in front of the camera just before it went out.⁹ A repairman discovered that the camera's wires had been cut and fused the wires back together so that the camera worked. Krease took pictures of the cut wires and sent the pictures to her boss, Alexcia Nordin, who was the market asset protection manager for 14 Sam's clubs.¹⁰

Krease recommended that the company fire Beaumont for destroying company property.¹¹ Nordin conducted an investigation and learned about Beaumont's other conduct¹² before scheduling a meeting with him on July 27. At the meeting, Beaumont admitted that he had disabled the camera "as a joke" to "make a disruptive signal." He added that he should not have done it, "absolutely." But, "I didn't hide; I put my face up there so they could see me." His admission prompted Nordin to fire him.¹³

Beaumont filed a complaint with the Occupational Safety and Health Administration (OSHA) on July 29, 2013. After OSHA dismissed his complaint, he requested a hearing, which was held on March 24, 2014.¹⁴ An ALJ denied the complaint on January 9, 2015, and Beaumont appealed to the ARB.

⁷ CX G.

⁸ Respondent's Exhibit (RX) 13; TR at 84, 152, 177.

⁹ TR at 132.

¹⁰ RX 1-2, 4.

¹¹ RX 5, 11.

¹² After the repair, Beaumont was recorded on July 20 using a "flame torch inside the booth" to make a necklace for his daughter, "using a coping saw without permission" to cut laminate on the floor and fashion a wooden cutout for a restroom key, and repairing a fire extinguisher cabinet. RX 19, TR at 79-80.

¹³ RX at 11, TR at 57-59, 77-78.

¹⁴ Appendices B-C and E.

DISCUSSION

The SWDA, as amended, governs solid waste management, providing “a comprehensive framework” for the regulation of the treatment, transportation, storage, and disposal of hazardous wastes.¹⁵ The purpose of the SWDA¹⁶ is to promote the reduction of hazardous waste and minimize the present and future threats of solid waste to human health and the environment.¹⁷

To prevail on a complaint of unlawful discrimination under the environmental whistleblower protection provisions, a complainant must establish that he or she: engaged in protected activity; suffered adverse employment action; and the protected activity caused or was a motivating factor for the adverse action, i.e., that a nexus existed between the protected activity and the adverse action.¹⁸ When a complainant makes this showing, an employer can avoid liability by “demonstrat[ing] by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.”¹⁹

The ALJ found that Beaumont engaged in the following protected activities: (1) his contact with the state LARA inspector about customer fuel dispensing requirements, (2) his work in developing a procedure to address customers who sit in their cars while waiting for their gas tanks to fill, (3) his inquiry about Class A and B operator training for gas station supervisors, (4) his request for heavy-duty gloves and towels to clean up spills, and (5) his complaint about the proper location of a 55-gallon waste drum on the station premises.²⁰ Substantial evidence supports the ALJ’s findings and, accordingly, we affirm them.²¹

¹⁵ 42 U.S.C.A. § 6902(a).

¹⁶ The whistleblower protection provision of the Solid Waste Disposal Act, 42 U.S.C.A. § 6971(a), states: No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan. *See also* 29 C.F.R. § 24.102(b) (“[i]t is a violation for any employer to . . . retaliate against any employee because the employee has” engaged in protected activity).

¹⁷ 42 U.S.C.A. § 6902(b); *Hall v. United States Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005, slip op. at 4 (ARB Dec. 30, 2004).

¹⁸ 29 C.F.R. § 24.109(b)(2); *Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 17-18 (ARB Feb. 28, 2003).

¹⁹ *Id.*, *see also Tomlinson v. EG&G Defense Materials*, ARB Nos. 11-024, 11-027; ALJ No. 2009-CAA-008, slip op. at 8 (ARB Jan. 31, 2013).

²⁰ D. & O. at 13-14.

²¹ *Id.* at 14. Substantial evidence also supports the ALJ’s conclusion that the record evidence did not support Beaumont’s belief that the circumstances of other workplace conflicts and

Turning to causation, the ALJ found temporal proximity between Beaumont's discharge on July 27, 2013, and his last activity, which could be considered protected—a July 20, 2013 e-mail to Waters about cleaning up gasoline spills and ensuring that customers remained outside their cars while dispensing fuel. The ALJ stated that, at first glance, “seven days between the protected activity and adverse employment action” supported Beaumont's case, but in reality the email was not a complaint, but rather a “thank you” correspondence expressing appreciation for his employer's efforts to address Beaumont's concern about monitoring customers to his satisfaction.²²

The ALJ found no temporal proximity between Beaumont's other protected activities, such as the legibility of emergency shut-off signs, a fuel delivery company's failure to clean up its spills, the inadequate gloves and towels he had, and the location of a 55-gallon waste disposal drum, and any retaliation by Sam's East. He determined that Sam's East managers were “generally supportive, at worst indifferent, and sometimes unaware of [Beaumont's] protected activities.”²³

The ALJ considered Beaumont's argument that Sam's East failed to follow company procedures on termination of employment but found that the record did not support Beaumont's assertion that after “so many years of employment without any disciplinary action” Sam's East should have imposed lesser discipline. The ALJ relied on Sam's East's “Coaching for Improvement” policy, which stated that if misconduct occurs, an appropriate response may include immediate termination.²⁴ The ALJ found that Beaumont did receive coaching after Sam's East managers discovered he had spent 43 minutes at work beading a necklace for his daughter, which he admitted was also gross misconduct.²⁵ The ALJ concluded that tampering with a security camera prompted Beaumont's discharge based on gross misconduct. Substantial evidence supports the ALJ's conclusion that temporal proximity and procedural irregularity were insufficient to demonstrate that any of Beaumont's protected activity motivated his discharge.

Alternatively, the ALJ also determined that Sam's East would have terminated Beaumont's employment in the absence of his protected activity because the sole reason it fired him was that he damaged company property. The ALJ relied on the credibility of Sam's East's three witnesses and the physical evidence of camera tampering to conclude that Sam's East would have fired Beaumont for gross misconduct even if he had never raised any regulatory concerns. The ALJ relied on Krease's testimony that Beaumont commented frequently about his

interactions with other employees, managers, and outside vendors were also protected. For example, the sandwich-receipt incident with another employee who retaliated against him for not helping her download music on her electronic device was “entirely unrelated to protected activity” under the SWDA. *Id.* at 18-19.

²² *Id.* at 14-15.

²³ *Id.* at 17.

²⁴ RX 9.

²⁵ TR at 144.

distaste for camera surveillance and on Beaumont's own testimony that he disabled the camera as a way of saying, "please stop the excessive surveillance."²⁶

The ALJ also found that the record did not support Beaumont's belief that Sam's East "targeted" him for surveillance because of his protected activity. Beaumont testified that the gas station kiosk had a surveillance camera prior to his working there, and the ALJ credited Cash's testimony that roughly 200 such cameras covered about 90 percent of the premises at all times.²⁷ The ALJ concluded that Sam's East use of cameras was wide-spread and consistent throughout Beaumont's employment and discharge. The ALJ's fact-finding and credibility assessments amply support his conclusion that Sam's East would have fired Beaumont even if he had never raised any regulatory concerns.

CONCLUSION

For the reasons the ALJ articulated in his analysis of causation and the affirmative defense Sam's East proffered, and based on the ALJ's findings of fact and conclusions of law, we **AFFIRM** the dismissal of Beaumont's complaint as supported by substantial evidence.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

ANUJ C. DESAI
Administrative Appeals Judge

²⁶ TR at 148-49.

²⁷ TR at 54-58, 183.