



In the Matter of:

JAMAL KANJ,

ARB CASE NO. 12-002

COMPLAINANT,

ALJ CASE NO. 2006-WPC-001

v.

DATE: August 29, 2012

**VIEJAS BAND OF KUMEYAAY
INDIANS,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Scott A. McMillan, Esq., *The McMillan Law Firm, APC*, La Mesa, California

For the Respondent:

George S. Howard, Jr., Esq., *Jones Day*, San Diego, California

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

The Complainant, Jamal Kanj, filed a retaliation complaint under the employee protection provisions of the Federal Water Pollution Control Act (FWPCA, the Clean Water Act, or the CWA), and its implementing regulations. 42 U.S.C.A. § 1367 (West 2001); 29 C.F.R. Part 24 (2007). He alleged that his former employer, Viejas Band of Kumeyaay Indians (the Tribe), violated the FWPCA whistleblower protection provisions when it retaliated and

discriminated against him because he complained about FWPCA violations. Complaint at 2 (Oct. 3, 2005). The ALJ dismissed the case after a hearing on the merits. The Administrative Review Board (the ARB or the Board) affirms the ALJ's Decision and Order (D. & O.).

BACKGROUND

The Tribe hired Kanj as its Director of Public Works and Deputy Tribal Government Manager on August 21, 2000. D. & O. at 2. In the Spring of 2003, Kanj identified a source of fecal coliform contamination of the Viejas Creek and reported it to the Tribal Council. *Id.* at 2, 37-38 (citing Tr. at 332-33, CX 25). The Tribe did not view resolution of the contamination issue as a high priority. *Id.* at 48. Kanj identified the source of the creek's contamination as the livestock owned by a Tribal Elder, Tom Hyde. *Id.* at 2; (citing Tr. at 269). Kanj approached Hyde about fencing in the creek to keep the livestock away from it, but Hyde insulted him, and Kanj was unsuccessful in his effort. *Id.* at 2.

In 2004, the Tribe started to discuss the construction of a gymnasium recreation center, expected to commence by the end of the year. *Id.* at 43. In September of 2004, the Tribe awarded the project. *Id.* at 43 (citing Tr. at 380-81).

In April of 2005, Kanj submitted to Wendy Parnell, the Tribal Manager, his vacation request for a thirty-day leave, the purpose of which was to visit his mother, who was expecting to undergo surgery in mid-2005, and his father, who himself had undergone surgery in January of 2005. *Id.* at 46-47 (citing Tr. at 379-80). By that time, Kanj had already accrued enough vacation days to take a thirty-day vacation. *Id.* at 46 (citing Tr. at 380). He was informed at the time of his hiring that Viejas' vacation policy of at most ten consecutive vacation days was relaxed and enacted merely to prevent people from abusing vacation time. *Id.* at 46-47 (citing Tr. at 385, 692).

In late April of 2005, before she submitted Kanj's vacation request to the Tribal Council for approval, Parnell had a discussion with Kanj about the reasons why she thought a month-long vacation request was inappropriate: (1) it circumvented the terms of his employment; and (2) the timing was inopportune because Kanj was representing the Tribe in supervising the construction of the gymnasium project, which was a high priority for the Tribe. *Id.* at 47 (citing Tr. at 892-93). Moreover, the Tribe was engaged in a senior landscaping project in which Kanj's supervision was very important. *Id.* (citing Tr. at 892). The Tribal Council rejected Kanj's vacation request. *Id.* (citing Tr. at 894). Parnell offered Kanj a three-week vacation as a compromise solution. *Id.* (citing Tr. at 894).

While Kanj was on vacation, Parnell arrived at her decision to terminate Kanj's employment upon discovering problems with Kanj's work performance. *Id.* at 42 (citing 888-91). The ALJ found Parnell's testimony about the reasons for her decision to terminate Kanj's employment to be very credible including her testimony that Kanj's complaints about fecal coliform contamination in no way related to the termination decision. *Id.* at 25. Parnell decided to terminate Kanj's employment for several reasons: (1) Kanj proposed a severance; (2) Parnell detected a lack of dedication on Kanj's part, as evidenced by his leaving in the middle of the gymnasium project and near the close of the water reclamation retrofit project, both of which

were under his leadership; and (3) Parnell lost confidence that Kanj was still committed to the job. *Id.* at 47-48 (citing Tr. at 911-12).

Steven Jones was employed with the Viejas tribe as an employment manager and then as a project manager who oversaw construction projects for the Tribe. *Id.* at 14-17. The ALJ found his testimony very credible. He testified that Kanj was uncompromising, adversarial, and potentially litigious in his dealings with the Contractor over PCOs. He also testified that the Tribe considered the gymnasium project to be very important. Specifically, it was important that the gymnasium open before July 4 because the Tribe wanted to hold its July Fourth celebration at the gymnasium. Further, he testified that Kanj noted in the June 6, 2005 meeting minutes that he was taking a month off and was not sure if or when he would return.

Anthony Pico was Chairman of the Tribe between 1995 and 2007. *Id.* at 29-32. The ALJ found Pico to be generally credible and credited Pico's testimony that Parnell expressed misgivings relating to Kanj's handling of the construction projects and his request to take an extended vacation.

Bobby Barrett worked for the Tribe for twelve years, first as a casino manager, then vice-Chairman, finally becoming Chairman of the Tribe in 2007. The ALJ found Barrett's testimony to be credible because it was consistent with much of the other testimony. *Id.* at 18-20. He testified that Kanj asked for more vacation time than they allow and that his request was denied because there were several ongoing projects at the time. Parnell performed Kanj's duties while he was on vacation. He testified that Parnell saw problems with his work while he was gone and wanted to terminate him. Tom Hyde was not present when the tribe met to discuss terminating Kanj. Barrett testified that Hyde would never have had any kind of decision-making power over whether to terminate Kanj's employment or any influence in that kind of decision. The coliform contamination was not mentioned at the meeting to terminate Kanj. Barrett learned from council's conversations with Parnell that Kanj was not bringing forth PCOs for approval, which was holding up the gym project. The project was over budget by about 3 million. The majority of the Tribal council supported Parnell's decision to terminate. Like Kanj, Barrett took steps to fence in the creek. He did not hear any allegations of retaliation against Kanj until after his termination. The Council never discussed Kanj's claim of retaliation leading up to its decision to terminate. Barrett said the two reasons they fired him were poor work performance and his request for a severance package, which indicated to the council that he wanted to leave.

Brian Frasier was a project manager for Big D Construction, who had a construction contract with the Tribe. *Id.* at 32-35. The ALJ found his testimony very credible even though he was on opposite sides of the construction issues from the Complainant. Frasier's testimony confirms the concern that Parnell had with Kanj over the construction issues and the temporal relationship between Parnell having the meeting over the construction issues and the decision to terminate Kanj's employment shortly after. He testified that Kanj flatly rejected or failed to approve promptly many of the PCOs. Kanj told Big D to consult an attorney. Frasier reached out to Parnell to try to resolve issues. He met with Parnell on June 6, 2005, and he told Parnell that he thought that Kanj was causing problems by not responding to him and not giving direction and not being a team player. After the meeting Parnell told Frasier to copy her on all

the work documentation because Kanj would not be returning to work. Frasier never heard Kanj complain about cattle pollution in the creek.

On June 23, 2005, the Tribe notified Kanj that it was terminating his employment. *Id.* at 2. The Tribal government based its termination of Kanj on two reasons: Kanj's allegedly poor work performance, particularly in reference to his supervision of the gymnasium project; and two, Kanj's conflict with the Tribal Council over his vacation. *Id.* at 43 (citing Tr. at 584, 642-43). The ALJ found these reasons to be adequate grounds for his termination in sum, even if neither of the reasons was determinative. *Id.* at 43.

PROCEDURAL HISTORY

Kanj filed this claim on August 5, 2005. Comp. Br. at 4. On November 14, 2005, the Tribe filed a motion for summary judgment on the ground that it was protected by the doctrine of tribal immunity, which the ALJ denied. D. & O. at 3. The Tribe appealed to the Board and we affirmed the ALJ and remanded for further proceedings. The Tribe next moved to file an amended answer supplementing its pleadings to assert that some of Kanj's claims were time-barred and then argued that all of Kanj's claims were time-barred. *Id.* The ALJ held the hearing and refused to decide the issue of timeliness until hearing all of the evidence in the case. *Id.* After the hearing, the ALJ issued a D. & O. dismissing the complaint and finding that Kanj's complaint was untimely. *Id.* Kanj appealed to the Board, and we agreed with Kanj that the Tribe was bound by their admissions that Kanj's complaint was timely. Therefore, we remanded to the ALJ for further proceedings.

On remand, the ALJ dismissed Kanj's complaint because he found that while Kanj proved protected activity, knowledge, and adverse action by a preponderance of the evidence, Kanj failed to establish that his protected activity was "a contributing factor to the adverse employment action that he suffered." D. & O. at 40. The ALJ also found that even if Kanj had not participated in protected activity, that the Tribe still would have terminated his employment. *Id.* at 48.

Kanj appealed the ALJ's decision. Complainant's Petition for Review (Sept. 29, 2011). The parties each filed briefs and appendices. We hereby accept Kanj's reply brief filed on July 30, 2012.¹

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (Board) to issue final agency decisions in cases arising under the FWPCA's employee protection

¹ Well after the deadline for a reply brief expired, Kanj's counsel requested an extension of time to file a reply brief, and the Tribe objected to the request. Kanj's counsel also filed a reply to the Tribe's objection. Given our disposition of this case, rather than decide whether the reply brief is inexcusably late, we find it more expedient in this instance to accept it.

provisions. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

The ARB reviews the ALJ's decision.² 29 C.F.R. § 24.8 (2005). The Board reviews the ALJ's conclusions of law de novo. *Jay v. Alcon Labs., Inc.*, ARB No. 08-089, ALJ No. 2007-WPC-002, slip op. at 3 (ARB Apr. 10, 2009).

DISCUSSION

Under the Water Pollution Control Act:

[n]o 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 has testified or is about to testify in any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

33 U.S.C.A. § 1367(a).

Under the FWPCA and other environmental acts, a complainant must establish by a preponderance of the evidence that his protected activity was a motivating factor in the adverse action. *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).³ An employer may avoid liability by demonstrating by a preponderance of the evidence that it would have discharged the complainant even if he had not engaged in protected activity. *Morriss*, ARB No. 05-047, slip op. at 33 (citation omitted).

² We note that the regulations have been amended since this complaint was filed. 29 C.F.R. § 24. 72 Fed. Reg. 44,956 (Aug. 10, 2007). The regulations now expressly provide for review of findings of fact under the substantial evidence standard. 29 C.F.R. § 24.110(b).

³ The regulation at 29 C.F.R. § 24.8 was in effect when Kanj filed his complaint in August 2005. DOL amended 29 C.F.R. Part 24 in August 2007. 72 Fed. Reg. 44,956 (Aug. 10, 2007). *Accord* 29 C.F.R. § 24.100(a), 24.109(b)(2) (2009) (requiring a FWPCA complainant to demonstrate by a preponderance of the evidence that the protected activity was a motivating factor in the unfavorable personnel action and if he so proves, requiring an employer to prove by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity).

We note that the ALJ laid out an incorrect standard for causation and made some findings that strayed from the relevant whistleblower issues.⁴ However, the record as a whole supports the ALJ's finding that the Tribe proved by a preponderance of the evidence that it would have terminated Kanj's employment absent any protected activity. D. & O. at 48. The ALJ cited the standard for the Tribe's burden to prove that it would have terminated Kanj's employment absent protected activity as one of "clear and convincing evidence." The standard is however, only a preponderance of the evidence. Therefore, whether the ALJ applied the clear and convincing evidence standard, or the preponderance of the evidence standard, the Tribe met its burden to prove that it would have terminated Kanj's employment absent any protected activity by a preponderance of the evidence.

The ALJ made many credibility determinations during the course of the hearing, specifically finding that Steven Jones, Bobby Barrett, Wendy Parnell, Anthony Pico, and Brian Frasier were credible, especially in regards to the reasons that the Tribe terminated Kanj's employment – that there were problems with Kanj's performance with respect to the construction project and with his request for vacation time. We give ALJ credibility determinations great deference, and rely on them here. The ARB generally defers to an ALJ's credibility determinations unless they are "inherently incredible or patently unreasonable." *Caldwell v. EG&G Def. Materials, Inc.*, ARB No. 05-101, ALJ No. 2003-SDW-001, slip op. at 12 (ARB Oct. 31, 2008) (quotation omitted). As the Board stated in *Caldwell*:

In weighing the testimony of witnesses, the fact finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of their testimony, and the extent to which their testimony is supported or contradicted by other credible evidence.

⁴ The ALJ stated that a complainant must prove his protected activity was a contributing factor, citing *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 06-041, ALJ No. 2005-ERA-006, slip op. at 8 (ARB Sept. 24, 2009), when the FWPCA regulations at 29 C.F.R. § 24.109(b)(2) state that a complainant must demonstrate "by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action." The ALJ also wrote on pages 36 and 43 that a complainant must demonstrate by a preponderance of the evidence that the respondent's proffered reasons are merely pretext for retaliation. While "pretext" evidence may be used as circumstantial evidence of true motives, the complainant is not required to show pretext but merely prove that "the protected activity caused or was a motivating factor in the adverse action," even if it was only one of several motivating factors. 29 C.F.R. § 24.109(b)(2). Several of the ALJ's conclusions were unhelpful because they did not conform to the law including his conclusion that Kanj's termination "likely was not the result of any retaliatory motive on the part of his employers," and "the sum total of these reasons provides adequate grounds for Kanj's termination." D. & O. at 43. The issue is what caused the adverse action, more specifically, if protected activity motivated it, not what likely did not cause the adverse action. Further, the Act does not ask whether a respondent had good reasons to discriminate against a person, only whether the discrimination was motivated in any way by protected activity.

ARB No. 05-101, slip op. at 12 (citation omitted).

Therefore, relying on the ALJ's credibility determinations, and the facts he found because of those credibility determinations, we **AFFIRM** the ALJ's ruling in the Tribe's favor. Accordingly, we **DISMISS** Kanj's complaint.

ORDER

We **AFFIRM** the ALJ's Decision and Ordering Dismissing the Complaint with prejudice.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge