U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

DANIEL M. TRACHMAN, **ARB CASE NO. 01-067**

COMPLAINANT, **ALJ CASE NO. 2000-TSC-3**

v. **DATE: April 25, 2003**

ORKIN EXTERMINATING COMPANY, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Daniel M. Trachman, *pro se, Brooklyn, New York*

For the Respondent:
Douglas H. Duerr, Esq., *Elarbee, Thompson & Trapnell, LLP, Atlanta, Georgia*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C. § 7622 (1994) and the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 (1994). Complainant Daniel M. Trachman also alleged, in his initial complaint of unlawful discrimination, violations arising under the Water Pollution Control Act or Clean Water Act (CWA), 33 U.S.C. § 1367 (1994) and other environmental protection statutes generally. *See* 29 C.F.R. Part 24 (2002) (remaining environmental statutes include the Safe Drinking Water Act (SDWA), the Solid Waste Disposal Act (SWDA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)). Trachman complained that respondent Orkin Exterminating Company, Inc. (Orkin) discriminated against him because he engaged in activity protected under the Acts. In a Recommended Decision and Order Dismissing Complaint (R. D. & O.), an Administrative Law Judge (ALJ) found that the applicable statutes, namely the CAA and TSCA, did not cover Trachman's complaints and that Trachman otherwise had failed to meet his evidentiary burdens. He therefore recommended that Trachman's complaint be dismissed. We agree.

Jurisdiction and Standard of Review

The Administrative Review Board (ARB) has jurisdiction to review the ALJ's R. D. & O. under 29 C.F.R. § 24.8. *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, *inter alia*, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act the ARB, as the designee of the Secretary, acts with all the powers the Secretary would possess in rendering a decision involving the whistleblower statutes. The ARB engages in *de novo* review of the recommended decision of the ALJ. 5 U.S.C. § 557(b) (1994); 29 C.F.R. § 24.8; *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997). The ARB is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"); *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. United States Dep't of Agriculture*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), in rejecting argument that higher level administrative official was bound by ALJ's decision). An ALJ's findings constitute a part of the record, however, and as such are subject to review and must be accorded appropriate weight. *Universal Camera Corp. v. NLRB*, 340 U.S. at 492-497; *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991); *NLRB v. Stor-Rite Products, Inc.*, 856 F.2d 957, 964 (7th Cir. 1988); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1076-1080 (9th Cir. 1977). The ALJ, unlike the ARB, observes witness demeanor in the course of the hearing, and the ARB defers to an ALJ's credibility determinations that are based on such observation. *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 93-ERA-6, slip op. at 6 (ARB July 14, 2000).

Background

For the most part, the facts are not disputed. Orkin, a pest control, extermination, fumigation and termite control business, employed Trachman as a "Branch Account Manager" salesperson at Orkin's Queens Commercial Branch in Long Island City, New York, between November 1999 and his discharge in February 2000. Trachman alleged that prior to discharge he complained internally to his immediate supervisor, Branch Manager Robert Armstrong, and to other managers that Orkin was responsible for public health and environmental hazards. These complaints focused on the lack of protective equipment for handling pesticides and the improper application, storage and disposal of pesticides.

An Orkin regional manager, Joe Bajjani, made the decision to discharge Trachman. Hearing Transcript (T.) 245-246. Bajjani's testimony in this regard is uncontroverted. In December 1999, Bajjani became aware that Trachman reportedly had stalked and photographed two Orkin employees who were at a local bar and grill after working hours. These employees, Al Melo and Mark Martinez, complained to Bajjani that they felt threatened by Trachman and

had become concerned for their safety. They complained to Bajjani rather than supervisor Armstrong because Trachman had informed them that Armstrong had authorized his (Trachman's) actions. T. 235-236. When questioned by Bajjani, Armstrong denied responsibility. Bajjani then directed Armstrong to discharge Trachman. Armstrong contacted Trachman at a training class in Texas and directed him to return to New York in order to discuss his actions. When Trachman threatened to reveal aspects of Armstrong's criminal background (T. 341-342), Armstrong responded that he would attempt to "smooth [matters] out" with Bajjani. He did so by representing that the incident involving Melo and Martinez had occurred as the result of a misunderstanding. T. 237. Bajjani rescinded the discharge decision but resolved to investigate further. T. 236-238.

Bajjani traveled to the Orkin Queens Commercial Branch on February 28, 2000, and met with Trachman to discuss the Melo and Martinez complaints. Trachman admitted that he had followed and photographed Melo and Martinez, but stated that he had done so at Armstrong's direction. He also told Bajjani that he felt threatened by Armstrong and that Armstrong was a convicted felon. T. 71-74, 238-240. Bajjani advised Trachman that he would investigate his allegations about Armstrong. T. 240. That same day, upon questioning some of Trachman's co-workers, Bajjani learned that Trachman, rather than Armstrong, had engaged in threatening and intimidating behavior and that Trachman had directed this behavior toward Armstrong as well as other co-workers. T. 241, 304. Bajjani also questioned Armstrong on the 28th. Armstrong stated that because of the blackmail threat he had not discharged Trachman and had not disciplined Trachman on other occasions because Trachman had threatened the safety of his family. T. 243, 318-320. Bajjani then met with Trachman again on the 28th and confronted him with what he had just learned. Trachman again admitted following and photographing Melo and Martinez and also threatening Armstrong. But he was unapologetic, stating that he perceived nothing inappropriate in his conduct. T. 243, 317-318. Bajjani immediately discharged Trachman and directed Orkin personnel to escort him from the building. T. 244, 317.

Following discharge, and in an attempt to regain employment, Trachman complained to Orkin's Human Resources Department in part about public health and environmental hazards that Orkin allegedly had effected. T. 244-245; Complainant's Exhibit (CX) 5. He also complained to the Environmental Protection Agency and the New York State Department of Environmental Conservation about the public health and environmental hazards Orkin had allegedly created. T. 106-108; CX 9. On March 30, 2000, Trachman filed a complaint of unlawful discrimination under the environmental whistleblower statutes, which ultimately was forwarded to the Occupational Safety and Health (OSH) Administration for investigation. The OSH Administrator found the complaint unmeritorious. Trachman timely requested a hearing, which convened over a two-day period in January 2001. Witnesses included Trachman, Armstrong, Bajjani and other co-workers. In a decision issued on July 12, 2001, the ALJ found that Trachman's complaints were not covered under either the CAA or the TSCA and, alternatively, that Trachman had failed to show that Bajjani was aware of the complaints when he decided to discharge him. R. D. & O. at 3-5.

Discussion

A. The Merits of Trachman's Case

The ALJ limited his consideration of coverage to the TSCA and CAA. The OSH Administrator determined that these environmental statutes applied when processing Trachman's discrimination complaint. Inasmuch as Trachman expressly invoked coverage under "the Toxic Substance [sic] Control Act and the Water Pollution Control Act, and other environmental protection acts" in his March 30, 2000 complaint, the full complement of environmental statutes set out under 29 C.F.R. § 24.1(a) would appear to merit consideration in determining coverage.

To establish that Orkin retaliated against him in violation of the environmental statutes, Trachman must establish by a preponderance of the evidence that activity protected under the statutes motivated Orkin to take adverse action. Protection extends to a range of activities that further the purposes of the respective statutes. Protection for such activities requires proof that the whistleblower reasonably believed that the employer was violating the statute. *See Stephenson v. Nat'l Aeronautics & Space Admin.,* ARB No. 98-025, ALJ No. 94-TSC-5, slip op. at 15 (ARB July 18, 2000); *Melendez v. Exxon Chemicals Americas,* ARB No. 96-051, ALJ No. 93-ERA-6, slip op. at 10-11 (ARB July 14, 2000). Beyond protected activity Trachman must prove that Orkin subjected him to adverse employment action, that the manager who decided to take adverse action was aware of the protected activity at the time of the decision, and that, by a preponderance of the evidence, protected activity motivated the adverse action, at least in part. In the event that Trachman meets this burden, Orkin may avoid liability by establishing that it would have taken adverse action in the absence of the protected activity. *See Melendez v. Exxon Chemicals Americas,* ARB No. 96-051, ALJ No. 93-ERA-6, slip op. at 10-13, 17-18, 41-42 (ARB July 14, 2000) and cases cited therein (general principles of employment discrimination law apply to cases involving 29 C.F.R. Part 24, specifically the CAA and TSCA). *See also Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000) (allocation of evidentiary burdens in cases brought under the Age Discrimination in Employment Act).

At least two of Trachman's complaints, involving hazards presented by toxic agents placed in a sewer system and in a dumpster, arguably qualified for protection under the CWA and CAA due to the potential for pollution of the Nation's waters and ambient air. *E.g., Chevron v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 845-846 (1984); *Train v. Natural Resources Defense Council, Inc.,* 421 U.S. 60, 65 (1975); *Kemp v. Volunteers of America of Pennsylvania, Inc.,* ARB No. 00-069; ALJ No. 2000-CAA-6, slip op. at 4 (ARB Dec. 18, 2000); *Aurich v. Consolidated Edison Co. of New York, Inc.,* 86-CAA-2, slip op. at 3-4 (Sec'y Apr. 23, 1987). Additionally, despite the exclusion contained in 15 U.S.C. § 2602(2)(ii) (excluding from the definition of "chemical substance" any "pesticide" as defined under the Federal Insecticide, Fungicide, and Rodenticide Act "when manufactured, processed, or distributed in commerce for use as a pesticide"), an employee familiar only generally with the TSCA reasonably might believe that misuse of toxic agents violated a statute governing "toxic substances." *Melendez v. Exxon Chemicals Americas,* ARB No. 96-051, ALJ No. 93-ERA-6, slip op. at 27; *Minard v. Nerco Delamar Co.,* 92-SWD-1, slip op. at 6-7, 9 (Sec'y Jan. 25, 1994). On review Trachman argues that coverage should attach under statutes governing hazardous waste disposal,

particularly the SWDA and CERCLA. Trachman letter dated Sept. 1, 2001. This argument derives support from *Crosier v. Westinghouse Hanford Co.*, 92-CAA-3, slip op. at 5-6 (Sec'y Jan. 12, 1994).

For purposes of review we will assume, without deciding, that Trachman's complaints were protected under the whistleblower provisions of the above-referenced environmental statutes and turn to the issue of whether Orkin was aware of the complaints when it decided to discharge Trachman.

The ALJ found that Bajjani, the deciding manager, was unaware of any of Trachman's complaints about hazards to the public health or environment. R. D. & O. at 5. In making this finding, the ALJ examined thoroughly the testimony of Trachman, Bajjani, Armstrong and Naresh Duggal, Orkin's quality control manager. Dependent implicitly on an evaluation of witness credibility, the ALJ found the following:

> Offered to prove this awareness element is [Trachman's] testimony about his final five-minute face-to-face conversation with [Bajjani] just prior to Bajjani's firing of [Trachman]. [Trachman] speaks of his mention to Bajjani of "safety issues," of "the proper application of chemical for public safety," and of "reporting safety problems." But upon close questioning about the detail of this conversation, it is clear that *no reporting, or mention of [Trachman's] previous reporting of safety hazards was made at this meeting to Bajjani.* This becomes clear when [Trachman] is specifically asked to, and finally does, define and specify those "safety allegations" (made by him to Bajjani at this meeting) that Bajjani was intent on investigating during [Trachman's] suspension. And these allegations were "the drinking and driving" of the co-employees [Trachman] was surveiling after working hours. Consistent with this clarification, Bajjani testified that [Trachman] never raised environmental safety complaints to him prior to the firing, nor did [Trachman] mention to him prior to the firing, his previous raising of environmental safety complaints. . . . As finally teased from [Trachman], "[t]he main focus [of Bajjani's meeting with Trachman] was [Trachman's] threats and stalking of employees."

R. D. & O. at 5 (citations and footnotes omitted). The ALJ expressly credited Armstrong and Duggal when they testified that despite their knowledge of Trachman's complaints, they never communicated the complaints to Bajjani prior to Trachman's discharge. *Id.* at 5. The ALJ found Armstrong particularly credible due to "the fact that [Armstrong] had every reason *not* to advise Bajjani of any work disruptive complaints voiced to him by [Trachman], since Armstrong was fearful of [Trachman] because of [Trachman's] threats to expose Armstrong's previous undisclosed criminal situation, for which Armstrong himself was ultimately suspended." *Id.* (citations omitted; emphasis in original).

The record fully supports the ALJ's finding that Bajjani, the decision maker, was not aware of Trachman's protected activity when he terminated him. Trachman therefore did not prove an essential element of his case. *See Melendez*, slip op. at 12. Thus, we concur that the complaint be denied.

B. Trachman's Arguments

Trachman, presently a *pro se* complainant, raises several arguments in his filings on review of the R. D. & O. These filings consist of a letter petitioning for review dated July 16, 200l, a cover letter containing argument together with a document and attachments dated August 23, 2001, a letter with enclosures dated September 1, 2001, and a document with attachments dated October 13, 2001. We construe complaints and papers filed by *pro se* complainants "liberally in deference to their lack of training in the law" and with a degree of adjudicative latitude. *Young v. Schlumberger Oil Field Services,* ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003), *citing Hughes v. Rowe,* 449 U.S. 5 (1980). At the same time we are charged with a duty to remain impartial; we must "refrain from becoming an advocate for the *pro se* litigant." *Id.* We recognize that while adjudicators must accord a *pro se* complainant "fair and equal treatment, [such a complainant] cannot generally be permitted to shift the burden of litigating his case to the [adjudicator], nor to avoid the risks of failure that attend his decision to forgo expert assistance." *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.7 (ARB Feb. 29, 2000), *quoting Dozier v. Ford Motor Co.,* 702 F.2d 1189, 1194 (D.C. Cir. 1983).

Throughout his filings Trachman complains that the ALJ should have considered his complaints protected under environmental statutes other than merely the TSCA and CAA. To this end we have noted that other statutes arguably are applicable, and we have assumed, without deciding, that Trachman engaged in protected activity.

Additionally, Trachman requests that we order the record reopened in order to permit further testimony by a co-worker, Steven Famiglietta. Called as a witness by Trachman's attorney, Famiglietta testified during the January 9, 2001 portion of the hearing on direct, cross and redirect examination. T. 75-84. Trachman now argues that Famiglietta should be allowed to testify concerning an event not raised at the hearing, namely a telephone conversation that Famiglietta allegedly initiated with Bajjani about Trachman's public health and environmental complaints prior to Trachman's discharge.

We note that according to his filings Trachman knew about the alleged conversation prior to the hearing and that the record reveals no impediment that would have prevented Trachman from questioning Famiglietta regarding the conversation. *See, e.g.*, Trachman 8/23/01 cover letter at 2 ("[t]he attorney . . . ignored my specific requests that he include statements from Mr. Famiglietta – contradicting Bajjani's claim – that he had no idea I was complaining about environmental and safety issues"). Once a record is closed, the rules of procedure permit acceptance of additional evidence only "upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c) (2002). Therefore, no basis exists for granting Trachman's request to reopen this

record. In the event that Trachman faults his attorney for failing to pursue the subject during his examination of Famiglietta, his remedy lies in a direct action against the attorney. *Macktal v. Sec'y of Labor*, 923 F.2d 1150, 1157 (5th Cir. 1991) ("[c]onsidering the ethical duties of an attorney to his client, the client's right to seek new counsel, and the availability of a direct action against the attorney," the Secretary's finding that the complainant "should bear the risk of his attorney's alleged misconduct" was not an abuse of discretion).

Finally, Trachman complains that he is unaware whether his counsel received certain subpoenaed materials that the ALJ ordered Orkin to provide prior to closing the record. *See, e.g.*, Trachman 10/13/01 document at 1, 4-5. The circumstances follow: On December 28, 2000, the ALJ issued a subpoena, at the request of Trachman's attorney, directing Orkin to produce thirteen categories of records at the commencement of the January 9-10, 2001 hearing. Orkin objected to the scope of the subpoena. Orkin produced several documents at the hearing, however, and stated that other documents described in the subpoena did not exist. T. 436-438. At the conclusion of the hearing Orkin's attorney agreed to provide Trachman's attorney with specified documents "within another week or so." T. 439. The ALJ stated: "Any problems, you let me know about it. What you [Trachman's attorney] do with these records, you do with these records. The record will remain open relative to these documents." *Id.* The ALJ added: "So if you need an admission of these documents, write me a letter, make a motion is better, and of course, you [Orkin's attorney] will have an opportunity to oppose the motion for admission of any of these documents, but the ball is in your court." *Id.* The ALJ then set a briefing schedule and stated that the record would close "[a]s soon as Mr. Shen [Trachman's attorney] notifies me as to what, if any, disposition he intends to make of these subpoenaed documents, which I expect will be shortly after production." T. 442. The record before the ALJ, including Trachman's post-hearing brief, prepared by attorney Shen, contains no further mention of the documents. Therefore, we infer from this silence that Orkin complied with the ALJ's order and provided the documents to Trachman's attorney. However, even if Orkin did not comply with the order, Trachman has waived any objection to such non-compliance by failing to file an objection with the ALJ prior to the issuance of the R. D. & O.

Conclusion

While Trachman's complaints arguably constituted activity protected under the environmental whistleblower statutes, Bajjani, the Orkin manager who made the decision to discharge Trachman, was unaware of the complaints at the time that he made the decision. Trachman consequently has failed to prove employer knowledge of protected activity, which is requisite to a finding of unlawful discrimination. As a result, the complaint is **DENIED**.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge