



In the Matter of:

ROBERT GAIN,

COMPLAINANT,

v.

**LAS VEGAS METROPOLITAN
POLICE DEPARTMENT,**

RESPONDENT.

ARB CASE NO. 03-108

ALJ CASE NO. 02-SWD-4

DATE: June 30, 2004

BEFORE : THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Sangeeta Singal, Esq., San Francisco, California

For the Respondent:

***Thomas F. Kummer, Esq., Lyssa M. Simonelli, Esq.,
Kummer Kaempfer Bonner & Renshaw, Las Vegas, Nevada.***

FINAL DECISION & ORDER

This case concerns two complaints filed pursuant to the whistleblower protection provision of the Solid Waste Disposal Act (SWDA), U.S.C.A. § 6971 (West 2002), and implementing regulations at 29 C.F.R. Parts 18 and 24 (2004).

The Administrative Law Judge (ALJ) ruled that Robert Gain's first complaint was not covered by SWDA and that in any case, the complaint was filed after the limitations period allowed by SWDA. *Gain v. Las Vegas Metropolitan Police Dep't*, slip op. at 6, 7, ALJ No. 2002-SWD-0004 (ALJ June 3, 2003). The ALJ concluded that Gain's second complaint was covered by SWDA and was timely filed. However, the ALJ dismissed the complaint on the merits. Recommended Decision & Order (R. D. & O.) slip op. at 16. Gain has petitioned this Board to review the ALJ's Recommended Decision. For the reasons discussed below, we agree with the ALJ that both complaints must be dismissed.

BACKGROUND

Gain began service as a police officer in the Las Vegas Metropolitan Police Department (LVPD) in 1992. In 1998, the LVPD created a Mounted Police Unit (MPU) staffed by six officers and a sergeant. Gain worked in the MPU from November 1998 until approximately September 1, 2000. Tr. 174, 198.

During Gain's tenure at the MPU the unit was housed in temporary quarters another city agency loaned to the LVPD. Conditions at the temporary facility were primitive, and the officers frequently complained within their chain of command about the lack of shade, restrooms, changing quarters, drinking water, and protection from horse manure. Tr. 414; RX 11. Ultimately, Gain filed four complaints about conditions at the MPU – two under Nevada's Occupational Safety and Health program (OSHES) and two under the federal whistleblower protection provision of the SWDA.

Nevada OSHA Safety and Health Complaint

On May 18, 2000, Gain filed a safety and health complaint with Nevada OSHA. Gain complained about lack of shade, restrooms, changing quarters, drinking water, and protection from horse manure. RX 8. On May 22, 2000, OSHES inspected the MPU facility. Commander Ault, chief of the Bureau responsible for the MPU, accompanied the OSHES inspector, correcting on the spot deficiencies that could be corrected immediately, and promising to fix the remaining conditions. Tr. 428; RX 9. In July 2000, OSHES issued a notice of its findings. RX 14. OSHES did not cite LVPD for any safety or health violations. RX 15.

Nevada OSHA Whistleblower Complaint

On September 1, 2000, Commander Ault ordered Gain to be involuntarily transferred out of the MPU. RX 15. On September 8, Gain filed a state law whistleblower complaint with OSHES. CX 5 p. 61; Nev. Rev. Stat. 618.445 (West 2002). Gain asserted that Ault transferred Gain out of the MPU because of Gain's continuing complaints about safety and health hazards there. Tr. 198.

The OSHES inspector assigned to investigate Gain's whistleblower complaint concluded that Gain's complaint had merit and approached LVPD with a settlement offer. Tr. 388 – 389. LVPD turned down the offer. Tr. 390. The record does not reflect the outcome of Gain's OSHES whistleblower complaint.¹

¹ Under Nevada's occupational safety and health act, the agency prosecutes whistleblower complaints on behalf of the complaining employee. Prosecution occurs in state courts rather than in an administrative agency. Nev. Rev. Stat. 618.445(3).

Federal SWDA Whistleblower Complaint No. 1

Gain filed a complaint with federal OSHA pursuant to the whistleblower protection provision of SWDA on March 5, 2002. R. D. & O. slip op. at 2.² Again Gain complained that when Ault transferred him out of the MPU on September 1, 2000, it was retaliatory action. Gain cited additional personnel actions he believed were attributable to Ault's anger over Gain's complaints about the MPU. ALJ X 5. In this complaint Gain stated, "I believe the environmental aspects of my [OSHES safety and health] complaint were overlooked." *Id.*³

The Occupational Safety and Health Administration (OSHA) determined that Gain's complaint concerned workplace hazards, not environmental hazards. ALJ X 5 p. 6. OSHA also concluded that Gain's complaint was untimely because it was filed seven months after the last adverse employment action of which Gain complained. ALJ X 5 p. 6. SWDA complaints must be filed within thirty days of the adverse employment action. 42 U.S.C.A. § 6971(b)

Gain timely appealed from OSHA's ruling, and the case was assigned for a hearing before a Labor Department ALJ. R. D. & O. slip op. at 2.

Federal SWDA Whistleblower Complaint No. 2

Gain filed a second SWDA complaint on June 7, 2002. He alleged that LVPD relieved him of duty on May 25, 2002, because of his safety and health complaints in 2000 about conditions at the MPU. CX 1 p. 5. Gain asserted that LVPD's stated reason – that it removed him from duty because he used excessive force while transporting a prisoner – was pretextual. Gain argued that Ault orchestrated the removal from duty in

² Congress entrusted the Secretary of Labor with authority to enforce SWDA's whistleblower provision. 42 U.S.C.A. § 6971(b). The Secretary has delegated authority for investigating § 6971 complaints to OSHA. 29 C.F.R. § 24.4.

³ Gain also testified that he was concerned about the environmental impact of insect repellants used at the MPU site as well as runoff into nearby lakes and rivers from a large manure pile. Tr. 179, 180. SWDA § 6971 protects employees for making safety and health complaints "grounded in conditions constituting reasonably perceived violations" of the Act. *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-00012, slip op. at 2 (ARB Apr. 8, 1997). But the provision does "not protect an employee simply because he subjectively" thinks the complained of employer conduct might affect the environment." *Id.* at 3. "The structure and purpose of the [Solid Waste Disposal] Act strongly support a reasonableness test for whether an employee complaint . . . is protected under the . . . Act." *Minard v. Nerco Delamar Co.*, No. 92-SWD-1, slip op. 6 (Sec'y Jan. 25, 1994). We find that this record shows that all four complaints focused on workplace hazards rather than the environmental safety and health concerns that SWDA encompasses. Gain invoked SWDA as a means of litigating in a new forum his Nevada OSHA complaints.

further reprisal for Gain's 2000 safety and health complaints. *Id.* Gain's June SWDA complaint was consolidated with his March SWDA complaint.⁴ The ALJ construed Gain's June 7 complaint as reprisal for his March 5 SWDA complaint. R. D. & O. slip op. at 14.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over Gain's petition for review of the R. D. & O. pursuant to 29 C.F.R. § 24.8(a) and Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). On appeal from an R. D. & O. issued pursuant to § 6971 of SWDA, the Board "has all the powers which it would have in making the initial decision." 5 U.S.C.A. § 557(b); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951) (the ALJ's recommended decision and order is an integral part of the record that the Board reviews *de novo*).

DISCUSSION

The ALJ found that Gain's first federal complaint was not covered by SWDA and that if it were, it would be barred for untimeliness. R. D. & O. slip op. 5. But she found that SWDA did cover the second complaint and that it was timely filed. SWDA § 6971(a) applies to an employee who 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 resulting from the administration or enforcement of this chapter." 42 U.S.C.A. § 6971(a). "Complainant's participation in the whistleblower process by filing Complaint #1 is *per se* protected activity as is his preparation to testify in the instant process before this Court." R. D. & O. slip op. at 7.⁵ The complaint was timely because it was filed within 30 days of the May 25 removal from duty. *Id.*

Complaint #2 presented the question whether LVPD took adverse action against Gain because he filed the first SWDA complaint. Gain testified that LVPD was aware of his March 5 SWDA complaint shortly after he filed it and relieved him of duty on May 25, 2002, because of that complaint. Gain testified that the putative reason for relieving

⁴ The record shows that whenever an officer is charged with excessive force, it is LVPD's standard procedure to assign the complaint to its Internal Affairs Bureau for investigation and to temporarily suspend the officer. Tr. 661 - 665. In Gain's case, Internal Affairs investigated the charge against Gain and concluded that Gain did use excessive force. The LVPD then suspended Gain for 80 hours. Tr. 673-674. The ALJ concluded that the none of these personnel actions was pretextual. R. D. & O. slip op. at 14.

⁵ The ALJ determined that she lacked jurisdiction over Complaint #1 because she found that Gain's complaint concerned occupational rather than environmental hazards and because she found the complaint to be untimely. R. D. & O. slip op. at 3. But coverage and timeliness are not jurisdictional matters. *OFCCP v. Keebler Co.*, ARB No. 97-127, ALJ No. 87-OFC-20, slip op. at 10 (ARB Dec. 21, 1999). Therefore, the ALJ had jurisdiction over complaint #1.

him of duty – for an internal affairs investigation into an allegation that he used excessive force on a prisoner – was pretextual. Gain sought to prove that Ault orchestrated the pretextual investigation.

But the ALJ determined that Gain failed to establish by a preponderance of the evidence an essential element of his case: that his removal from duty and internal investigation were the product of illegal reprisal for protected activity. Having carefully studied the record and the briefs of the parties, we find the record supports the ALJ's findings on complaint #2. Furthermore, her conclusions are consistent with applicable law. Therefore, we adopt as our own her comprehensive and well reasoned decision, and append it hereto.

Accordingly, the complaint is **DISMISSED**.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge