In the Matter of:

ARTHUR J. BARRY, **ARB CASE NO. 06-005**

COMPLAINANT, **ALJ CASE NO. 2005-WPC-003**

v. **DATE: November 30, 2007**

SPECIALTY MATERIALS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Jeffrey L. Levy, Esq., *Corrigan & Levy LLP,* Boston, Massachusetts

For the Respondent:
Matthew C. Donahue, Esq., *Eno, Boulay, Martin & Donahue, LLP,* Lowell, Massachusetts

FINAL DECISION AND ORDER

This case arises under the Federal Water Pollution Control Act (WPCA)[1] and its implementing regulations.[2] Arthur J. Barry filed a complaint alleging that his former

[1] 33 U.S.C.A. § 1367 (West 2001).

[2] 29 C.F.R. Part 24 (2006). The Department of Labor has amended these regulations since Barry filed his complaint. 72 Fed. Reg. 44,956 (Aug. 10, 2007). We have applied the regulations in effect when Barry filed his complaint, and in any event, as explained more fully at note 20, *infra,* even if the amended regulations were applied to this case, they would not change the outcome.

employer, Specialty Materials, Inc. (SMI), violated the WPCA by terminating his employment. After a hearing on the complaint, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) in which she concluded that SMI did not violate the WPCA. We concur and deny the complaint.

BACKGROUND

SMI produces high performance fibers for various automotive, aerospace, and sporting goods applications. When producing boron and silicon carbide fibers, SMI generates waste water containing mercury. The company is required to maintain a filtration and pre-treatment system that removes the mercury before the waste water is discharged into the water and sewer system of the city of Lowell, Massachusetts.[3]

Barry began working for SMI's predecessor company in 1986.[4] During his employment at SMI, Barry's duties included installing equipment and assisting in plant renovations.[5]

In December 2003, SMI experienced a decrease in company earnings. In the Spring of 2004, John Menzel, the owner of the company, hired an independent consulting firm to evaluate the company's finances and recommend changes to improve profits.[6] The firm discussed various options, including consolidating facilities and reducing the workforce, with Menzel and Monte Treasure, President of SMI.

In the summer of 2004, Steve Pilioglos, Barry's supervisor, asked Barry to seek the training required to obtain a license to operate the waste water pre-treatment system. Shortly thereafter, Barry began a Level II class to prepare for the licensing exam. Barry contends that during the course, his instructor told him that he should be taking a Level III class because, in the instructor's opinion, SMI's pre-treatment system appeared to be more complicated than a Level II system.

Barry passed his examination, and received a Level II license in the mail sometime in early August 2004.[7] He was required to activate his license by completing an application and describing the type of system he would be operating. Barry testified

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[3] Transcript (Tr.) 25-26, 84.

[4] SMI started as a company called AVCO, which was purchased by Textron. Textron went through several structural changes before selling off a division, which became Specialty Materials, Inc. in 2001. Tr. 82-84.

[5] Tr. 18.

[6] *Id.* at 89-93.

[7] Complainant's Exhibit (CX) 1; Complainant's Brief at 4.

that, when he submitted his application, he included a statement in the application that he believed SMI's system was not rated. [8]

Prior to receiving his activated license, Doug Smith, Assistant Manager of SMI, began to train Barry on the pre-treatment system. Barry told Pilioglos that "until his license became active, and until his legitimate concerns about operating an unrated system (that was probably a Level III) with a Level II license could be addressed, he was uncomfortable adding the waste water treatment system to his already lengthy list of responsibilities at SMI."[9]

Feeling that Pilioglos was dismissive of his concerns, Barry sent an e-mail message to Treasure on August 19, 2004.[10] In the message, Barry repeated his concern about operating the system without an active license. He indicated that he needed to contact the Board of Registration "to get a ruling on this issue before I get myself and the company in trouble."[11] Barry also expressed concerns about the handling of mercury inside of the treatment facility. He concluded the message by stating that he did not "want to resort to having OSHA come in" and "clean our laundry."[12]

The day after Barry sent the e-mail message, Treasure called a meeting, which Barry, Treasure, Pilioglos, and Al Kumnik, SMI's principal scientist, attended. Barry testified that during the meeting, Treasure expressed his dissatisfaction with Barry's message. Treasure testified that discussions during the meeting "were at [an] impasse on the water treatment system," and that he told Barry that Pilioglos, who had an active license to operate the system, would operate the system until Barry's license was activated.[13]

SMI's financial problems continued, and in response, the company consolidated its operations and raised product prices ten percent. By July of 2004, SMI had not reached its financial goals, so it sent a notice to its employees that it would delay raises and implement a hiring freeze.[14]

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8 Tr. 30, 46.

9 Complainant's Brief at 4.

10 CX 2; Tr. 32-35.

11 CX 2.

12 *Id.*

13 Tr. 103-104.

14 Respondent's Exhibit (RX) 3; Tr. 91-94, 96.

Treasure testified that SMI, in conjunction with the consulting firm, concluded that the company needed to reduce costs by $250,000. He also testified that, "in the July timeframe and August timeframe,"[15] he and Menzel began identifying positions that could be eliminated. SMI focused on positions where the job duties could be eliminated or shared by more than one employee.[16]

SMI decided to eliminate positions in three departments. In research and development, one position was eliminated, but the employee identified was not discharged because a different employee decided to voluntarily retire. In the sales and marketing department, one employee was discharged. Finally, in the facilities division, Barry was identified because Pilioglos and Smith could perform his duties.[17] On September 22, 2004, Treasure told Barry that his position was being eliminated as a cost saving measure.[18] By June, 2005, SMI had not hired any new employees in the facilities division to replace Barry.[19]

Barry filed his complaint on September 24, 2004. The Occupational Safety and Health Administration investigated the complaint and concluded that SMI did not violate the WPCA when it terminated Barry's employment. Barry requested a hearing, which the ALJ conducted on June 27, 2005. Following the hearing, the ALJ issued an R. D. & O. in which she concluded that Barry engaged in activity protected by the WPCA but failed to prove a causal connection between this activity and his discharge. Barry submitted a Petition for Review of the R. D. & O. to this Board on October 7, 2005.

JURISDICTION AND STANDARD OF REVIEW

The WPCA's employee protection provision authorizes the Secretary of Labor to hear complaints of alleged discrimination because of protected activity and, upon finding a violation, to order abatement and other remedies.[20] The Secretary has delegated authority to the Administrative Review Board (ARB) to review an ALJ's initial decision.[21]

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15 Tr. 108.

16 *Id.* at 109.

17 *Id.*

18 *Id.* at 47.

19 *Id*. at 118.

20 33 U.S.C.A. § 1367(b).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision.[22]

DISCUSSION

The WPCA prohibits employers from retaliating when their employees engage in certain protected activities:

> 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 has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.[23]

To prevail on his complaint, Barry must prove by a preponderance of the evidence that he engaged in protected activity, that SMI was aware of the protected activity, that he suffered adverse employment action, and that the protected activity was the reason for the adverse action.[24]

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[21] 29 C.F.R. § 24.8. *See also* 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)).

[22] *See* 5 U.S.C.A. § 557(b) (West 2000); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571- 1572 (11th Cir. 1997); *Masek v. The Cadle Co.*, ARB No. 97-069, ALJ No. 1995-WPC-001, slip op. at 9 (ARB Apr. 28, 2000). The WPCA's amended regulations provide for substantial evidence review of the ALJ's factual findings. 29 C.F.R. § 24.110(b) (2007). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). As indicated above, even if the Board applied a substantial evidence review to the ALJ's findings in this case, such review would not change the outcome of our decision, because applying the less restrictive de novo review standard, we agree with the ALJ's ultimate recommendation that Addis's complaint be denied.

[23] 33 U.S.C.A. § 1367(a).

[24] *McKoy v. North Fork Servs. Joint Venture*, ARB No. 04-176, ALJ No. 2004-CAA-002, slip op. at 5 (ARB Apr. 30, 2007).

Barry engaged in WPCA-protected activity when he told Pilioglos that he could not operate the water treatment system, and when he sent the e-mail message to Treasure on August 19, 2004, expressing his concerns about operating the system and suggesting that he would contact OSHA if his concerns were not addressed. Therefore, SMI had knowledge of Barry's protected activity when it terminated his employment on September 21, 2004.[25]

The fact that Barry's position was eliminated only one month after he complained to the company president (and, in effect, threatened to contact OSHA) raises the inference that SMI may have decided to fire Barry to continue operating the water treatment system without addressing his concerns.[26] But the record also indicates that SMI was conducting a number of operational changes prior to and concurrent with Barry's complaints. Therefore, the issue before the Board is whether Barry has established a causal connection between his protected activity and his discharge. We conclude that he has failed to do so.

Barry has not put forth any evidence other than the temporal proximity between his discharge and his complaints about the status of his license and the water treatment system. Temporal proximity is sufficient to raise an inference of causation.[27] But once an employer articulates a legitimate, nondiscriminatory reason for its actions, the employee then must prove by a preponderance of the evidence that the employer intentionally discriminated against him because of his protected activity, and that the employer's articulated reason was pretext.[28]

Barry has not proven that SMI's decision to eliminate his position for financial reasons was pretext. SMI presented evidence to support its contention that it took steps to cut costs, and that one of those steps was a reduction of its workforce.[29] Barry did not present any evidence to rebut this contention. Treasure testified that he eliminated

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[25] Barry may have engaged in protected activity if he stated on his license application that SMI's system was not rated, but there is no evidence that SMI had knowledge of such a statement.

[26] Treasure testified that Pilioglos spoke with a representative of the city of Lowell and that the city was behind schedule on rating systems. He also testified that it was his understanding that a licensed operator could work on an unrated system. Tr. 104-06.

[27] *See Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995) (*citing Couty v. Dole*, 886 F.2d at 148 ("[p]roximity in time is sufficient to raise an inference of causation")).

[28] *See Jenkins v. U.S. Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 18 (ARB Feb. 28, 2003).

[29] *See, e.g.*, RX 4.

Barry's position for financial reasons, and that he did not consider Barry's complaints when he decided to eliminate the position.[30] Treasure also testified that, after Barry's discharge, work in the facilities division was divided between Pilioglos, Smith, and himself, and that SMI did not hire any employees to replace Barry.[31] On cross examination, Barry's attorney did not elicit any testimony from Treasure to contradict these assertions.

We therefore conclude that SMI's legitimate, nondiscriminatory reason for eliminating Barry's position was not pretext, and that Barry has failed to prove that SMI violated the WPCA when it terminated his employment. [32]

CONCLUSION

Barry bore the burden of proving intentional discrimination by a preponderance of the evidence. We find that he has failed to do so. We therefore **DENY** his complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

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30 Tr. 108-11.

31 *Id*. at 118.

32 We note that the ALJ focused her analysis on whether Barry made out the elements of a prima facie case. R. D. & O. at 7-11. But once a case has been tried on the merits, the question whether the complainant has established a prima facie case is irrelevant. Instead, the question is simply whether the complainant has proven that the respondent intentionally discriminated against the complainant because he engaged in protected activity. *See Seetharaman v. Stone & Webster, Inc.*, ARB No. 06-024, ALJ No. 2003-CAA-004, slip op. at 4 (ARB Aug. 31, 2007).