



In the Matter of:

WILLIAM T. KNOX,

ARB CASE NO. 10-105

COMPLAINANT,

ALJ CASE NO. 2010-CAA-002

v.

DATE: April 30, 2012

NATIONAL PARK SERVICE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Paula Dinerstein, Esq.; *Public Employees for Environmental Responsibility,*
Washington, District of Columbia**

Respondent:

**Kerry Creighton, Esq. and Josh C. Hildreth, Esq.; *Office of the Solicitor, U.S.
Department of the Interior,* Washington, District of Columbia**

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge;* Luis A. Corchado,
Administrative Appeals Judge; and Lisa Wilson Edwards, *Administrative Appeals Judge***

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Clean Air Act and its implementing regulations. 42 U.S.C.A. § 7622 (Thomson/West 2011); 29 C.F.R. Part 24 (2011). Complainant William T. Knox alleged that his employer, National Park Service (NPS), subjected him to an adverse action and a hostile work environment in retaliation for having engaged in protected activity. After an investigation, the Occupational Safety and Health Administration (OSHA) dismissed the complaint on September 29, 2009. Knox objected and requested a hearing before a Department of Labor Administrative Law Judge (ALJ).

Following a two-day hearing, the ALJ issued a decision on May 18, 2010, determining that Knox failed to show that he suffered an adverse action, or was subjected to a hostile work environment, because of his protected activity. Knox petitioned for review. We affirm and dismiss the complaint.

BACKGROUND

This case has a lengthy procedural history.¹ Knox was involved in whistleblower litigation under the CAA against the Department of Interior's (DOI's) National Park Service (NPS) from 2000 to 2008, stemming from disclosures that he made concerning the presence of asbestos at his former place of employment, the JPS Job Corps Center at Harper's Ferry, West Virginia. In 2000, as part of a settlement of his claims before the Merit Systems Protection Board (MSPB), Knox was transferred to his present position as an Engineering Equipment Operator at Greenbelt Park, National Capital Parks East, NPS.

Knox's most recent complaint stems from allegations associated with his experiences at his current employment at NPS's Greenbelt Park location, where he asserts that he was subjected to a hostile work environment and was denied training in violation of the Act. The lengthy facts are well laid out in the ALJ's decision at pages 2-24, and are incorporated in this decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the CAA. 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 factual findings for substantial evidence, and legal conclusions de novo. 29 C.F.R. § 24.110(b); *Kauffman v. United States Env'tl. Prot. Agency*, ARB No. 10-018, ALJ No. 2002-CAA-022 (ARB Nov. 30, 2011).

¹ Knox filed his initial complaint with OSHA in April 2000. That initial complaint was administratively litigated and eventually dismissed by the ARB on September 30, 2004. *Knox v. U.S. Dep't of Interior*, ARB No. 03-040, ALJ No. 2001-CAA-003 (ARB Sept. 30, 2004). Knox petitioned for review, and on appeal the court of appeals reversed the ARB's decision and remanded the case for further proceedings. *Knox v. United States Dep't of Labor*, 434 F.3d 721 (4th Cir. 2006). On remand, the ARB issued a decision on April 28, 2006, again dismissing Knox's complaint. *Knox v. U.S. Dep't of Interior*, ARB No. 06-089, ALJ No. 2001-CAA-003 (ARB Apr. 28, 2006). Knox petitioned for review. The court of appeals granted the petition in part, vacated in part the ARB's order, and remanded for further proceedings. *Knox v. United States Dep't of Labor*, 232 Fed. App'x 255 (4th Cir. 2007). On remand, the ARB again dismissed Knox's complaint. *Knox v. U.S. Dep't of Interior*, ARB No. 07-105, ALJ No. 2001-CAA-003 (ARB Aug. 30, 2007). Knox petitioned for review, and on November 20, 2008, the court of appeals dismissed the petition as untimely. *Knox v. United States Dep't of Labor*, 317 Fed. App'x 315 (4th Cir. 2008).

DISCUSSION

The CAA's whistleblower provision, 42 U.S.C.A. § 7622(a), prohibits an employer from discharging or discriminating against an employee for instituting proceedings for enforcement of the Act or carrying out the purposes of the Act.² To prevail under the CAA, an employee must establish by a preponderance of evidence that he engaged in protected activity, suffered an adverse action, and that the protected activity contributed to the adverse action.³

In this case, the ALJ found, and we agree, that Knox established by a preponderance of evidence that he engaged in protected activity. Recommended Decision and Order Denying Complaint (D. & O.) at 24. Knox was engaged in lengthy whistleblower litigation with NPS from 2000 to 2008 when the court of appeals dismissed his petition for review as untimely.⁴ The only issue presented in this case is whether Knox proved by a preponderance of evidence that he was subjected to a hostile work environment due to his protected activity, or that NPS denied his March and May 2009 requests for facilities management training in retaliation for his protected activity. "With the exception of the denial of Mr. Knox's most recent training request[s] in March [and May] 2009, all of the specific incidents identified by Mr. Knox took place outside of the thirty day period for reporting violations to the Department of Labor, and thus if Mr. Knox cannot establish that he was the victim of a hostile work environment, any claim based on those alleged adverse actions is time barred." D. & O. at 24. The ALJ ultimately determined that Knox failed to prove these claims by a preponderance of evidence. *Id.* at 37. On review of the administrative record in this case, we conclude that substantial evidence fully supports the ALJ's determination and affirm the dismissal of Knox's complaint.

1. Knox did not suffer a hostile work environment in violation of the whistleblower provision of the Clean Air Act

A hostile work environment complainant is required to prove:

- 1) protected activity; 2) intentional harassment related to that activity; 3) harassment sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) harassment that would have

² *Knox*, 434 F.3d at 724; see also 29 C.F.R. § 24.102.

³ See *Cante v. New York Dep't of Educ.*, ARB No. 08-012, ALJ No. 2007-CAA-004, slip op. at 4-5 (ARB July 31, 2009); see also *Sylvester v. Paraxel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 15 (ARB May 25, 2011), citing *Knox v. U.S. Dep't of Labor*, 434 F.3d 721, 725 (4th Cir. 2006); 29 C.F.R. § 24.109(b)(2).

⁴ See *supra* n.1, at 2.

detrimentally affected a reasonable person and did detrimentally affect the complainant.^[5]

“Circumstances germane to gauging a work environment include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee’s work performance.”⁶

Knox raised numerous allegations to support his hostile work environment claim, but failed to prove that, viewed as a whole, the harassment he alleged was sufficiently severe to alter the conditions of, or interfere with, his employment, and were due to his protected activity. D. & O. at 26. For instance, as to Knox’s claim that he was denied cash awards, promotions, and details, the record reflects that NPS provided reasonable explanations in refuting Knox’s claims; therefore, the ALJ was not persuaded that these instances were instances of harassment. *Id.* at 31-33; see also, *e.g.*, Hearing Transcript (Tr.) at 255, 278, 320-321. Moreover, Knox claimed that he was subject to a hostile work environment because none of the 37 applications for other positions he applied for ever resulted in a job offer. The ALJ found, based on the record, that there was “no evidence, direct or circumstantial, to support Mr. Knox’s claim that he is being held back from advancement because he is a whistleblower.” D. & O. at 35-36. The ALJ observed that Knox “has not established a prima facie case of non-selection under the environmental whistleblower laws.” *Id.* at 35.⁷ Indeed, the ALJ determined that each of the numerous incidents Knox asserted in support of his hostile work environment claim (including an alleged “gag order,” denial of a gate opener, Knox’s removal from DOI headquarters, his assignment of duties to co-worker Keith Sears, etc.) lacked evidentiary support, and that the agency had reasonable explanations for each of the employment decisions that it made concerning Knox. Again, under the totality of circumstances, the ALJ was not persuaded that there was severe and pervasive harassment based on the various instances spread over the course of several years. Substantial evidence in the record fully supports that determination. *Id.* at 24-36.

Knox argues that the ALJ’s determinations are not supported by substantial evidence because the testimony of some of the NPS witnesses, in particular his supervisors Tony Migliaccio, a Maintenance Worker Supervisor at Greenbelt Park and Knox’s direct supervisor, and Fred Cunningham Park Manager at Greenbelt Park and Knox’s second-in-command supervisor, lacked credibility. The ARB generally “defers to an ALJ’s credibility

⁵ *Hoffman v. Netjets Aviation, Inc.*, ARB No. 09-021, ALJ No. 2007-AIR-007, slip op. at 12 (ARB Mar. 24, 2011). See also *Ryerson v. Am. Express*, ARB No. 09-064, ALJ No. 2006-SOX-074 (ARB July 30, 2010).

⁶ *Hoffman*, ARB No. 09-021, slip op. at 12 (internal quotation omitted).

⁷ See also *Saporito v. Progress Energy Svc. Co.*, ARB No. 11-040, ALJ No. 2011-ERA-006 (ARB Nov. 17, 2011).

determinations, unless they are inherently incredible or patently unreasonable.”⁸ Because substantial evidence fully supports the ALJ’s factual findings and credibility determinations set out in the D. & O. (at pp. 24-36), we afford deference to the ALJ.

2. The agency’s decision to deny Knox’s request to attend a Facilities Management Training Program did not violate the Act

Knox contends that the agency’s denial of his request to attend a year-long training program for facilities managers violated the Act. Comp. Brief at 23-25; Comp. Rebuttal Br. at 9. Contrary to this contention, the ALJ determined that the agency’s decision did not violate the Act because Knox was not eligible for the training. Substantial evidence supports that determination.

The Facilities Management Training Program that Knox requested permission to attend was a program for “new facility managers, first line supervisors, and any other permanent NPS employee ready to take the next career step into a chief of maintenance position.” RX 2 and 3. Knox’s supervisors, Cunningham and Migliaccio, interpreted this to mean that the program was for individuals working in facilities management, not persons seeking jobs in this kind of position. Tr. at 275-276, 290, 340, 343. Knox, at the time, was not a facilities manager, and stated at the hearing that the training would not be related to his current position at Greenbelt Park. Tr. at 139; RX 2 at 1; CX 62. The ALJ found, and the evidence supports, that the agency’s decision to deny Knox’s request was unrelated to his whistleblower activity. Tr. at 276 (Cunningham denying that Knox’s whistleblower activity had any part in decision to deny training); Tr. at 315 (Migliaccio testifying same). Even if Knox had attended the program, which would have taken him away from Greenbelt Park for a year, he would be expected to perform facility management work after completing the program and there was no such job opportunity available at Greenbelt Park at the time. CX 50; Tr. at 296. Further, the ALJ found, based on witness testimony, that the agency provided Knox with ample other training opportunities. D. & O. at 36-37 (ALJ stating that “Mr. Cunningham and Mr. Migliaccio testified that Mr. Knox has taken numerous training courses while at Greenbelt Park, more than any other employee.”); see also Tr. at 276-277. We infer that the ALJ ultimately found that the missed opportunity for training in one instance among the many opportunities over several years was not an adverse action, nor in anyway related to unlawful discriminatory treatment under the CAA whistleblower provision.

Substantial evidence thus fully supports the ALJ’s determination that the agency’s decision to deny Knox’s request to participate in the Facilities Management Training Program did not violate the Act.

⁸ *Luder v. Cont’l Airlines*, ARB No. 10-026, ALJ No. 2008-AIR-009 (ARB Jan. 31, 2012); *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011).

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's Decision and Order and dismiss the complaint.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge