



In the Matter of:

DOMINICK VALENTI,

ARB CASE NO. 11-038

COMPLAINANT,

ALJ CASE NO. 2010-CAA-008

v.

DATE: September 19, 2012

SHINTECH, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Michael Howell, Esq.; *Howell Law Firm*; Houston, Texas

For the Respondent:

Steven L. Rahhal, Esq.; *Little Mendelson*; Dallas, Texas

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

Dominick Valenti filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that his former employer, Shintech, Inc., retaliated against him in violation of various employee protection provisions, including the whistleblower provisions of the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (Thomson/West 2003); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (Thomson/West 2005); and the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (Thomson Reuters 2009) (collectively, the "Environmental Acts").¹ On March 14, 2011, an Administrative Law Judge (ALJ) dismissed the complaint because he found that Valenti failed to prove by a preponderance of the evidence that he engaged in protected activity, and that even if there was protected activity, that Valenti failed to show that the employer was

¹ Regulations implementing these provisions are found at 29 C.F.R. Part 24 (2012).

aware of his protected activity or that the protected activity was a contributing factor in the unfavorable action taken against him. The ARB reviews an ALJ's findings of fact under the substantial evidence standard. 20 C.F.R. § 24.110(b). We summarily affirm on the issue of causation.

In summarily affirming the ALJ's Decision and Order (D. & O.), we limit our comments to the most critical points. Valenti asserts that Shintech fired him because he engaged in protected activity. To prevail on his whistleblower complaint Valenti must prove by a preponderance of the evidence that (1) he engaged in protected activity, (2) which protected activity caused or was a motivating factor in, (3) adverse action that was taken against him. 29 C.F.R. § 24.109(b)(2). The failure to prove any one of these elements necessarily requires dismissal of a whistleblower claim.² The ALJ's analysis and facts of this case readily demonstrate that no alleged protected activity was a motivating factor in the decision to terminate Valenti's employment.³ Therefore, we focus only on the causation element. In doing so, we explicitly make no determination with respect to the ALJ's ruling on whether Valenti engaged in protected activity.⁴

The ALJ found that Valenti failed to establish any nexus between any protected activity and his discharge. D. & O. at 23. The ALJ listened to and observed the demeanor of the witnesses at the hearing and found that Jim Hodges', Michelle Hickner's, and Michael Irvin's testimony was credible regarding the events surrounding the termination of Valenti's employment. *Id.* Pursuant to the ALJ, Hodges testified credibly that he terminated Valenti's employment because of an incident that occurred between Valenti and Irvin when "Valenti was attempting to goad Irvin into an altercation." *Id.* The ALJ credited that Hodges was concerned about Valenti's threats that he would "get Mike, he has more money than Mike, I will take this outside and we'll take care of it then." *Id.* The ALJ found that Hickner's testimony was credible and corroborated Hodges' explanation. Specifically, the ALJ credited Hickner's testimony that the Respondent terminated Valenti's employment because he made threats to Irvin

² "A failure of proof on any one element of [a complainant's] claim means that his entire case must fail . . ." *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Nos. 07-021, 07-022; ALJ No. 2004-SOX-011, slip op. at 3 (ARB Jan. 13, 2010) (citing *Davis v. Rock Hard Aggregate, LLC*, ARB No. 07-041, ALJ No. 2007-STA-041 (ARB Mar. 27, 2009)).

³ We note that the ALJ appears to have applied a contributing factor causation standard when the standard of proof with regard to claims of whistleblower retaliation under the CAA, TSCA, and CERCLA pursuant to 29 C.F.R. § 24.109(b)(2), is a "motivating factor" standard. The error is harmless in this matter, however, because the "contributing factor" standard is a less demanding causation standard of proof than "motivating factor."

⁴ *Cf. Drago v. Jenne*, 453 F.3d 1301, 1308 (11th Cir. 2006) (in affirming the lower court's dismissal of the plaintiff's retaliation claim, the appellate court focused on the plaintiff's failure to present sufficient evidence that the alleged adverse action was causally related to the alleged protected activity, assuming for purposes of the appeal but explicitly not deciding that the plaintiff's conduct constituted statutorily protected activity).

after he had been told following another incident involving Irvin to come to Human Resources or talk to a supervisor if there were any further issues between the two. *Id.* at 23-24. The ALJ also found that Irvin's testimony was credible and was consistent with Hodges' and Hickner's. The ALJ also noted that Irvin's testimony was verified by the audiotape recording. *Id.* at 24. According to the ALJ, Irvin testified that Valenti approached him, got very upset, and told him that he "would take care of him outside the plant." *Id.* The ALJ credited that Irvin felt very threatened during the confrontation. *Id.*

In addition to the testimony of the witnesses, the tape recording Valenti made on July 18, 2009, includes statements that Valenti made to Irvin such as "You're gonna talk to me right, I'm telling you that," "Don't push me Mike, I'm telling ya, don't push me, because you know what? If I don't get no help from Michelle or somebody else, I'll take care of things outside of here," and "It's gonna cost you Mike, I'm telling ya. You better just wise up." *Id.* at 25. The ALJ found that there "was no doubt that Valenti's tone [on the tape] is threatening." *Id.* Based on the ALJ's review of the evidence and observation of the demeanor of the witnesses, the ALJ concluded that Shintech fired Valenti "because of his confrontation with Irvin on July 18, 2009, not because of any environmental complaints." *Id.* Substantial evidence in the record supports the ALJ's findings of fact.

CONCLUSION

The substantial evidence of record supports the conclusion that Valenti's alleged protected activity was not a motivating factor in Shintech's decision to terminate Valenti's employment. Accordingly, we **AFFIRM** the ALJ's order dismissing Valenti's complaint.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge