

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD J. BEAUMONT,
Petitioner,

v.

U.S. DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD,
Respondent,

SAM'S EAST,
Intervenor.

On Petition for Review of the Final Decision and Order of the
U.S. Department of Labor's Administrative Review Board
(ARB Case No. 15-025)

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
STATEMENT REGARDING ORAL ARGUMENT.....	vi
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES.....	3
STATEMENT OF THE CASE.....	3
A. <u>Nature of the Case and Course of Proceedings</u>	3
B. <u>Statement of Facts</u>	5
1. <u>Background</u>	5
2. <u>Beaumont's Health, Safety, and Personnel Concerns</u>	5
3. <u>Beaumont's Misconduct and Subsequent Termination</u>	9
4. <u>The ALJ's Decision and Order</u>	12
5. <u>The ARB's Final Decision and Order</u>	20
SUMMARY OF THE ARGUMENT.....	20
ARGUMENT.....	21
I. STANDARD OF REVIEW.....	21
II. THE SWDA AND ITS APPLICABLE BURDENS.....	22
III. SUBSTANTIAL EVIDENCE SUPPORTS THE DETERMINATION THAT BEAUMONT'S PROTECTED ACTIVITY NEITHER CAUSED NOR WAS A MOTIVATING FACTOR IN HIS EMPLOYMENT TERMINATION.....	24
IV. SUBSTANTIAL EVIDENCE SUPPORTS THE DETERMINATION THAT SAM'S EAST WOULD HAVE TAKEN THE SAME ADVERSE ACTION IN THE ABSENCE OF BEAUMONT'S PROTECTED ACTIVITY.....	29

V. THE COURT SHOULD REJECT BEAUMONT'S ARGUMENTS
THAT THE ALJ AND ARB PROCEEDINGS IN THIS CASE
WERE BIASED..... 33

CONCLUSION..... 35

CERTIFICATE OF COMPLIANCE..... 36

CERTIFICATE OF SERVICE..... 37

ADDENDUM

TABLE OF AUTHORITIES

Page

Cases:

<i>Carpenter v. Solis</i> , 439 F. App'x 480 (6th Cir. 2011).....	33-34
<i>Durham v. Dep't of Labor</i> , 515 F. App'x 382 (6th Cir. 2013).....	21
<i>Ind. Mich. Power Co. v. U.S. Dep't of Labor</i> , 278 F. App'x 597 (6th Cir. 2008).....	22
<i>Johnson v. U.S. Dep't of Labor</i> , 205 F. App'x 312 (6th Cir. 2006).....	34
<i>Kuhn v. Washtenaw Cty.</i> , 709 F.3d 612 (6th Cir. 2013).....	28
<i>Mickey v. Zeidler Tool & Die Co.</i> , 516 F.3d 516 (6th Cir. 2008).....	27-28
<i>Nguyen v. City of Cleveland</i> , 229 F.3d 559 (6th Cir. 2000).....	28
<i>Onysko v. Utah Dep't of Env'tl. Quality</i> , ARB No. 11-023, 2013 WL 499361 (ARB Jan. 23, 2013), <i>aff'd</i> , 549 F. App'x 749 (10th Cir. 2013).....	23
<i>Passaic Valley Sewerage Comm'rs v. U.S. Dept. of Labor</i> , 992 F.2d 474 (3d Cir. 1993).....	23
<i>Pillica v. Ashcroft</i> , 388 F.3d 941 (6th Cir. 2004).....	33
<i>Redweik v. Shell Expl. & Prod.</i> , ARB No. 05-052, 2007 WL 4623495 (ARB Dec. 21, 2007).....	23
<i>Sasse v. U.S. Dep't of Labor</i> , 409 F.3d 773 (6th Cir. 2005).....	22
<i>Schmiedebusch v. Comm'r of Soc. Sec. Admin.</i> , 536 F. App'x 637 (6th Cir. 2013).....	34

Cases--continued:

<i>Tomlinson v. EG&G Def. Materials, Inc.,</i> ARB Nos. 11-024, 11-027, 2013 WL 1182304 (ARB Jan. 31, 2013).....	23-24
<i>UAW v. Michigan,</i> 886 F.2d 766 (6th Cir. 1989).....	34
<i>Universal Camera Corp. v. NLRB,</i> 340 U.S. 474 (1951).....	22
<i>Varnadore v. Sec'y of Labor,</i> 141 F.3d 625 (6th Cir. 1998).....	22
<i>Vereecke v. Huron Valley School Dist.,</i> 609 F.3d 392 (6th Cir. 2010).....	27, 28

Statutes:

Administrative Procedure Act, 5 U.S.C. 551 <i>et seq.</i> :	
5 U.S.C. 706.....	21
5 U.S.C. 706(2) (A).....	22
Solid Waste Disposal Act, 42 U.S.C. 6901 <i>et seq.</i> :	
42 U.S.C. 6902 (a).....	3
42 U.S.C. 6902 (b).....	3
42 U.S.C. 6971.....	1
42 U.S.C. 6971 (a).....	22
42 U.S.C. 6971 (b).....	2, 3, 4

Code of Federal Regulations:

29 C.F.R. Part 24.....	1, 23
29 C.F.R. 24.102 (a), (b).....	3
29 C.F.R. 24.103.....	4
29 C.F.R. 24.103 (c).....	4
29 C.F.R. 24.104.....	4
29 C.F.R. 24.105 (a).....	4
29 C.F.R. 24.106.....	4

	Page
Code of Federal Regulations--continued:	
29 C.F.R. 24.106(a)	4
29 C.F.R. 24.109	23
29 C.F.R. 24.109(b) (2)	23
29 C.F.R. 24.110(a)	2, 4
29 C.F.R. 24.112	2

Miscellaneous:

U.S. Dep't of Labor:

Office of the Sec'y:

Delegation of Authority And Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, Secretary's Order No. 01-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912, 2012 WL 194561 (Jan. 25, 2012)..... 3-4

Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, Secretary's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378, 2012 WL 5561513 (Nov. 16, 2012)..... 2

Occupational Safety and Health Admin.:

Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provisions of Six Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as Amended, 76 Fed. Reg. 2808, 2011 WL 131102 (Jan. 18, 2011) (Final Rule)..... 23

STATEMENT REGARDING ORAL ARGUMENT

The Secretary of Labor will gladly participate in any oral argument scheduled by this Court. However, he does not believe that oral argument is necessary because the issues presented may be resolved based on the briefs submitted by the parties.

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RESPONSE BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF JURISDICTION

This case arises under the employee protection ("whistleblower") provision of the Solid Waste Disposal Act ("SWDA" or "Act"), 42 U.S.C. 6971, and the regulations implementing that provision at 29 C.F.R. Part 24. The Secretary of Labor ("Secretary") has subject matter jurisdiction over this case based on a complaint filed on July 29, 2013 with the Occupational Safety and Health Administration ("OSHA") by petitioner Ronald J. Beaumont ("Beaumont") against his former

employer, Sam's East, Inc. ("Sam's East"), pursuant to 42 U.S.C. 6971(b). See Compl., JA 7-8.¹

On January 9, 2015, a Department of Labor ("DOL") Administrative Law Judge ("ALJ") dismissed Beaumont's complaint. ALJ Dec. 22, JA 886. On January 12, 2017, the Department of Labor's Administrative Review Board ("Board" or "ARB") issued a Final Decision and Order affirming the ALJ's decision.² Board FD&O, JA 1224-1231. Beaumont timely filed a petition for review with this Court on February 1, 2017. See 29 C.F.R. 24.112. Because the alleged violation occurred in Michigan, this Court has jurisdiction to review the Board's Final Decision and Order. See *id.*

¹ All record citations are to the ARB's and Sam's East, Inc.'s Joint Appendix ("Appendix") or to the Petitioner's Brief ("Pet'r Br."). Citations to the Appendix are indicated by the abbreviation "JA." Abbreviations to portions of the Appendix are as follows: Beaumont's OSHA Complaint ("Compl."), the OSHA Determination ("OSHA Determ."), Beaumont's objection to the OSHA Determination ("Beaumont Obj."), Beaumont's Hearing Exhibits ("CX"), Sam's East's Hearing Exhibits ("RX"), the Department of Labor Administrative Law Judge's Summary Decision Order ("ALJ Dec."), and the Administrative Review Board's Final Decision and Order ("Board FD&O").

² The Secretary has delegated authority to the Board to issue final agency decisions under the employee protection provision of SWDA. See Secretary's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378, 2012 WL 5561513 (Nov. 16, 2012); see also 29 C.F.R. 24.110(a).

STATEMENT OF ISSUES

1. Whether substantial evidence supports the conclusion that Beaumont's protected activity was not a motivating factor in Sam's East's termination of Beaumont's employment.

2. Whether substantial evidence supports the conclusion that Sam's East would have terminated Beaumont's employment in the absence of his protected activity because he disabled a security camera in his work area.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

The purpose of the SWDA is to "promote the protection of health and the environment and to conserve valuable material and energy resources." 42 U.S.C. 6902(a). The Act aims to reduce or eliminate the generation of hazardous waste when possible, and to treat, store, and dispose of hazardous waste so as to minimize threats to human health and the environment.

42 U.S.C. 6902(b). The whistleblower provisions of the SWDA protect employees from discharge or other discrimination for engaging in protected activity under the Act, including participating in proceedings related to the handling, storage, treatment, transportation, or disposal of any hazardous or solid waste. See 42 U.S.C. 6971(b); 29 C.F.R. 24.102(a), (b). The Secretary has delegated authority for receiving and investigating SWDA whistleblower cases to OSHA. Secretary's

Order No. 01-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912, 2012 WL 194561 (Jan. 25, 2012); *see also* 29 C.F.R. 24.103, .104.

An employee who believes that he has been retaliated against in violation of SWDA may file a complaint alleging such retaliation with OSHA. 29 C.F.R. 24.103(c). Following an investigation, OSHA issues a determination either dismissing the complaint or finding reasonable cause to believe that retaliation occurred and ordering appropriate relief. 29 C.F.R. 24.105(a); *see also* 42 U.S.C. 6971(b). Either the complainant or the respondent may file objections to OSHA's determination with a DOL ALJ. 29 C.F.R. 24.106. The ALJ's decision is subject to discretionary review by the Board, which issues the final order of the Secretary. 29 C.F.R. 24.110(a); *see also* 42 U.S.C. 6971(b).

On July 29, 2013, Beaumont filed a complaint with OSHA alleging that his former employer, Sam's East, terminated his employment after he reported several safety violations. Compl., JA 7-8. OSHA investigated his complaint, and on October 24, 2013, issued a determination that there was no reasonable cause to believe that Sam's East had violated the SWDA's whistleblower provisions. *See* OSHA Determ., JA 2. Beaumont timely objected to OSHA's determination and sought a hearing before DOL's Office of Administrative Law Judges pursuant to 29 C.F.R. 24.106(a). *See* Beaumont Obj., JA 9. Following a hearing, ALJ Paul C. Johnson,

Jr. issued a Decision and Order dismissing Beaumont's complaint on January 9, 2015. ALJ Dec., JA 865-888. Beaumont timely petitioned for review by the Board, and on January 12, 2017, the Board affirmed the dismissal. See Board FD&O, JA 1224-1231.

B. Statement of Facts

1. Background

In October 2000, Beaumont began his employment at Sam's Club No. 9291 in Flint, Michigan ("Sam's Club"), and worked as an attendant at the store's gas station from 2005 until his termination on July 27, 2013.³ ALJ Dec. 2, 5, JA 866, 869. Beaumont's supervisor was Karla Cash ("Cash"), a Member Service Manager. ALJ Dec. 8, JA 872. Jenna Krease ("Krease"), an Asset Protection Manager, was responsible for the gas station's overall compliance with state and federal laws and regulations. ALJ Dec. 6, JA 870. Alexcia Nordin ("Nordin") was the Market Asset Protection Manager for fourteen Sam's Clubs, including store no. 9291, and Krease's supervisor. ALJ Dec. 9, JA 873; Board FD&O 3, JA 1226.

2. Beaumont's Health, Safety, and Personnel Concerns

During Beaumont's tenure as a gas station attendant, he made a series of inquiries to Sam's Club management and to the Environmental Protection Agency ("EPA") and Michigan's

³ Sam's Club No. 9291 is operated by Sam's East, and Wal Mart is its parent company. Board FD&O 1 n.2, JA 1224.

Department of Licensing and Regulatory Affairs ("LARA") about issues with which he was concerned, beginning at some point between 2005 and 2007. During that time, Beaumont reported problems with the gas station to LARA, which resulted in an expensive renovation. ALJ Dec. 6, 16, JA 870, 880; Tr. 119:7-16, 120:1-25, JA 213. He suffered no discipline as a result of his contact with LARA, and other than his own speculation, he had no evidence of any resulting retaliation. ALJ Dec. 6, 16, JA 870, 880; Tr. 121:1-14, JA 214.

In April 2013, while Beaumont was on duty, LARA cited Sam's Club for violating a regulation that required personnel to have customers in view while they were fueling their vehicles. ALJ Dec. 16, JA 880; RX 14, JA 265. Beaumont contacted LARA to clarify his job duties in relation to the regulation. See ALJ Dec. 16, JA 880; Tr. 56:10-23, JA 197. Cash was aware that Beaumont planned to contact LARA and told him that he should do what he felt was necessary to do his job properly. ALJ Dec. 16, JA 880; Tr. 179:5-17, JA 228. On June 13, 2013, Krease contacted the LARA inspector and informed him that the store had a variance that allowed personnel to monitor the pumps from a monitor inside the gas station kiosk. ALJ Dec. 16, JA 880; Tr. 152:6-12, JA 221. Beaumont did not experience any adverse employment action as a result of the contact with LARA that resulted in the mistaken citation. ALJ Dec. 16, JA 880.

In late June or early July 2013, Beaumont inquired with Cash and other managers about signs at the gas station that stated, "The person dispensing fuel should remain outside of their vehicle while dispensing fuel." ALJ Dec. 15, JA 879; Tr. 46:2-7, 46:21-25, JA 195. He wanted to know what to do when customers did not comply. ALJ Dec. 15, JA 879; Tr. 46:8-18, JA 195. Cash said she would find out, but went on bereavement leave, leaving the issue unresolved. ALJ Dec. 15, JA 879; Tr. 49:11-16, JA 196. Beaumont inquired with other managers at the store, but nothing happened, so he contacted the EPA to discuss the problem. ALJ Dec. 15, JA 879. Additionally, he sent e-mails to Greg Harris at LARA on July 6 and July 13, 2013. ALJ Dec. 15, JA 879; CX G, JA 95; CX L, JA 100. When Cash returned from leave, she and Beaumont collaborated to create a procedure to address the issue. ALJ Dec. 15, JA 879; Tr. 55:3-17, 117:8-10, JA 197, 213. Cash believed that Beaumont was satisfied with the solution. ALJ Dec. 15, JA 879; Tr. 182:21-22, JA 229. Additionally, Beaumont contacted LARA to report that "the violations regarding customer re-fueling had been addressed" by Sam's Club management. ALJ Dec. 15, JA 879; RX 22, JA 531.

On June 27, 2013, Beaumont wrote an e-mail to the Region 5 Human Resources manager, Matthew Waters ["Waters"], stating that a supervisor told him to make sure he stayed inside the gas station kiosk and did not sit down outside where customers could

see him. ALJ Dec. 19, JA 883; CX B, JA 90. He stated in the e-mail that this was the result of a "repetitive conflict" and "hostility" from the supervisor. *Id.* On July 18, 2013, he wrote an e-mail to Jason Corbett, General Manager of Sam's Club, regarding an incident in which he was inside Sam's Club and an employee asked to see a receipt for chicken he was eating before he exited the store. ALJ Dec. 19, JA 883; CX N, JA 102. Beaumont believed that the receipt policy was being applied to him in a retaliatory manner. ALJ Dec. 19, JA 883.

Beaumont also expressed a series of concerns, the dates of which are not specified in the record. At some point, Beaumont spoke to Krease and Cash regarding the illegibility of a sign that indicated the location of emergency shutoffs for the gas pumps but allegedly received no response. ALJ Dec. 16, JA 880; Tr. 65:18-25, 66:1-11, JA 200. Beaumont also spoke to Cash about gloves and towels provided to clean up gas spills. ALJ Dec. 16, JA 880; Tr. 60:19-25, 61:1-4, JA 198-99. In response, Cash purchased industry standard gloves and towels. *Id.* Additionally, Beaumont informed Dave Mullen ("Mullen"), a Sam's Club manager, about a company that delivered fuel and failed to clean up its spills. ALJ Dec. 16, JA 880; Tr. 116:5-23, JA 212. After Beaumont spoke to Mullen, the company began cleaning up its spills. *Id.*

3. Beaumont's Misconduct and Subsequent Termination

During the course of Beaumont's employment, he was subject to various Sam's East policies, including its Safety and Health in the Workplace Policy ("Safety and Health Policy"), Coaching for Improvement Policy ("Coaching Policy"), and Closed Circuit Television and Camera Policy ("Camera Policy"), which are available on the company's intranet site. ALJ Dec. 5, 7, JA 869, 871; Tr. 146:23-25, 147:1-6, JA 220. Pursuant to the Camera Policy, no Sam's Club associate is authorized to touch the security cameras, and only asset protection managers are authorized to direct the third party vendor to repair or otherwise touch the cameras. ALJ Dec. 5, 7, 9-10, JA 869, 871, 873-74; Tr. 147:17-25, 148:1-4, 187:20-25, 188:26, JA 220, 230. Violating the Camera Policy may result in discipline up to and including termination. ALJ Dec. 5, 9-10, JA 869, 873-74; Tr. 187:14-19, JA 230. As a gas station attendant, Beaumont's job description did not authorize him to repair or otherwise touch the security cameras. ALJ Dec. 5, JA 869; Tr. 104:12-25, 105:1-10, JA 209-10.

There were roughly 200 cameras located throughout Sam's Club, including inside the gas station kiosk, and nearly all Sam's Club associates were visible on a security camera at all times. ALJ Dec. at 7, JA 871; Tr. 148:15-25, 149:1-3, JA 220-21. Because there was a camera inside the kiosk, Beaumont felt that

he was constantly under surveillance. ALJ Dec. 7, 20, JA 871, 884; Tr. 148:15-19, JA 220. Many times during his employment, he argued with Krease about the camera's presence. *Id.* Beaumont also expressed his concerns to Cash, who informed him that ninety percent of the store was on camera at all times. ALJ Dec. 9, 21, JA 873, 885; Tr. 183:2-10, JA 229.

On July 17, 2013, Beaumont disabled the camera inside the gas station kiosk, which he claimed was a joke with his manager as well as a statement about the "excessive surveillance" he felt subject to. ALJ Dec. 3, 16, JA 867, 880; Tr. 58:21-22, 105:16-20, JA 198, 210. On July 19, 2013, Nordin met with Krease to tour the store. Tr. 134:22-23, 200:5-8, JA 217, 233. They reviewed security camera monitors to make sure all were in working order, and discovered that the camera in the gas station kiosk was inoperative. Tr. 134:22-25, 135:1-15, JA 217. They reviewed video footage and determined that it stopped working on July 17, 2013, two days previously, immediately after an image showed Beaumont standing directly in front of the camera. ALJ Dec. 18, JA 882; Tr. 135:21-25, 136:1-15, 201:2-6, JA 217-18, 234. Nordin and Krease then visited the gas station kiosk to visually inspect the camera and determined that nothing looked unusual. ALJ Dec. 18, JA 882; Tr. 137:1-2, 202:20-25, JA 218, 234. Subsequently, a third party vendor inspected the camera and discovered that it stopped working because two wires were no

longer fused together. ALJ Dec. 18, JA 882; Tr. 140:6-16, JA 218.

Following the inspection, Nordin began an investigation into the camera's deactivation. ALJ Dec. 9, JA 873. In the course of the investigation, Beaumont was observed sparking an electrical outlet, using a torch, and using a coping saw, all of which qualified as "gross misconduct." ALJ Dec. 21-22, JA 885-86. Additionally, Nordin learned that Beaumont had previously used forty-three minutes of work time to bead a necklace, for which he received coaching. ALJ Dec. 9, 21, JA 873, 885. On July 27, 2013, she interviewed Beaumont. ALJ Dec. 9, JA 873; Tr. 204:21-24, 205:22-24, JA 234-35. During that interview, Beaumont admitted to disabling the camera and claimed it was "a joke he was playing" on Kcrease. Tr. 206:18-24, JA 235; see also ALJ Dec. 9, JA 873. Following the interview, Nordin decided to recommend termination of Beaumont's employment solely because "he disabled a camera on purpose" in violation of Sam's East policies. Tr. 207:14-22, 216:21-25, 217:1-3, JA 235, 237-38; also see ALJ Dec. 9-10, 21, JA 873-74, 885. At the time Nordin made her decision, she was not aware that Beaumont had expressed any safety or environmental concerns. ALJ Dec. 10, 18, JA 874, 882; Tr. 215:2-6, JA 237. Her decision was not influenced or directed by anyone else. ALJ Dec. 10, JA 874; Tr. 215:20-25, 216:1-20, JA 237.

On July 27, 2013, upon receiving Nordin's recommendation, Cash terminated Beaumont's employment. Tr. 184:11-22, JA 229. Two days later, on July 29, 2013, Beaumont filed a complaint with OSHA. Compl., JA 7-8; Board FD&O 3, JA 1226. During OSHA's investigation, Beaumont admitted that he disabled the security camera in the gas station kiosk. Tr. 105:12-19, 106:19-25, 109:16-20, 111:3-5, JA 210-11. OSHA concluded that Sam's East had a legitimate, non-discriminatory reason for terminating Beaumont's employment because he tampered with the security camera, therefore, there was no reasonable cause to believe that Sam's East violated the SWDA. OSHA Determ., JA 2-4. After OSHA dismissed his complaint, Beaumont requested a hearing, which was held on March 24, 2014. Board FD&O 3, JA 1226.

4. The ALJ's Decision and Order

Following the hearing, the ALJ issued a January 9, 2015 Decision and Order dismissing Beaumont's complaint. The ALJ concluded that Beaumont failed to show by a preponderance of the evidence that his protected activity caused or was a motivating factor in his termination. ALJ Dec. 22, JA 886. Additionally, the ALJ found that Sam's East met its burden to show by a preponderance of the evidence that, in the absence of his protected activity, it would have terminated Beaumont's employment as a result of his gross misconduct. *Id.*

In his decision, the ALJ recounted the testimonial evidence and the parties' exhibits. ALJ Dec. 2-11, JA 866-75. He noted that the parties never addressed whether Beaumont's actions were protected, but based on the record, the following would qualify as protected activities: (1) contacting the LARA Inspector regarding customer fuel dispensing requirements; (2) working with Cash to develop a protocol to address customers who sit in their cars while filling their gas tanks; (3) inquiring about Class A and B operator training for gas station supervisors; (4) requesting heavy-duty gloves and towels to clean up gas spills; (5) making a complaint about the proper location of a fifty-five-gallon waste drum on the gas station premises;⁴ (6) speaking with Nordin and Krease about the legibility of a sign indicating the location of emergency gas pump shutoffs;⁵ and (7) speaking to

⁴ Beaumont testified that he reported concerns to management about the placement of a fifty-five-gallon drum for the disposal of towels used to clean up gas spills. However, the ALJ found that his testimony on this report was evasive and was not corroborated by any other evidence in the record. Thus, the ALJ concluded that Beaumont did not express his concerns about the fifty-five-gallon drum to management, although it is clear that the ALJ believed such concerns would be protected had they been expressed. ALJ Dec. 14, 17, JA 878, 881.

⁵ Beaumont testified that he spoke to Nordin and Krease about the legibility of these signs and received no response. However, the ALJ found that Beaumont's hearing testimony is the only evidence in the record about this activity, and Beaumont did not claim that he suffered an adverse action as a result of his inquiry. ALJ Dec. 16, JA 880.

management about a company that failed to clean up its spills when delivering fuel.⁶ ALJ Dec. 14, 16, JA 878, 880.

The ALJ found that Beaumont did not demonstrate that the protected activities caused or were a motivating factor in an adverse employment action, *i.e.*, his termination. ALJ Dec. 14, JA 878. Rather, the evidence demonstrated that the termination of Beaumont's employment was based on reasons unrelated to his protected activities. *Id.* Furthermore, the record showed that Beaumont's managers "supported, [were] indifferent to, or [were] unaware of [his] protected activity." *Id.*

Contrary to Beaumont's assertions, the ALJ found that his protected activities lacked temporal proximity to his termination. ALJ Dec. 14-17, JA 878-81. The only activity that was temporally proximate to Beaumont's July 27, 2013 termination was an e-mail from Beaumont to Waters, on July 20, 2013. ALJ Dec. 14, JA 878. However, in the e-mail, Beaumont thanked Waters for responding to issues that Beaumont brought to his attention, such as how to ensure customers remain outside of their vehicles while fueling and cleaning up spills – issues which the record

⁶ The ALJ also found that several incidents were not protected under the SWDA, therefore, the court had no authority to address them. ALJ Dec. 19, JA 883. These included reports to management that another employee asked him to present a receipt proving he had purchased chicken he was eating; and that a supervisor told him to stay inside the gas station kiosk rather than sitting down outside where customers could see him. *Id.*

indicated Sam's Club addressed to Beaumont's satisfaction. *Id.* Also, the ALJ noted that Sam's East completed its investigation into Beaumont's suspected tampering with the security camera on July 27, 2013 and that, based on the facts of this case, Sam East's conclusion that Beaumont tampered with the camera was an intervening event that severed any relationship based on temporal proximity between Beaumont's protected activity and his termination. *Id.*

According to the ALJ, Beaumont's other protected activity "similarly lack[ed] a connection to his termination." ALJ Dec. 15, JA 879. Beaumont's inquiry about what to say to customers who remained inside their vehicles while fueling was protected, however, the record demonstrated that management "listened to the complaint, included [Beaumont] in the solution process, and resolved his concerns to his satisfaction," which demonstrated that the company "was supportive of [Beaumont], not retaliatory." *Id.* Beaumont's contact with LARA to inquire about a violation for which LARA cited the gas station was protected, however, the record demonstrated that management was "not at all upset" and "supported" Beaumont's action. ALJ Dec. 16, JA 880. Beaumont's request for industry-standard towels and gloves for use in cleaning up gas spills was protected, however, Beaumont acknowledged that the company provided him with the requested equipment. ALJ Dec. 16-17, JA 880-81.

Additionally, the ALJ determined that there were no procedural irregularities in Sam's East's application of its employment policies to demonstrate that Beaumont suffered retaliation for his protected activity. ALJ Dec. 17, JA 881. The record did not support Beaumont's argument that he should have received coaching rather than termination. *Id.* Rather, the record showed that when Sam's East learned that the gas station kiosk's camera was not working, it conducted an investigation, which included interviewing Beaumont. ALJ Dec. 18, JA 882. During the interview, Beaumont admitted to disabling the camera. *Id.* In response, Nordin recommended termination of his employment. *Id.* The ALJ noted that Sam's East's "Coaching for Improvement" policy indicated that, depending on the severity of the violation, levels of coaching may be skipped. ALJ Dec. 17, JA 881. And, once the company learned of misconduct, it could conduct an investigation followed by appropriate action. *Id.* The policy stated that "appropriate action . . . may include . . . immediate termination." *Id.*

The ALJ concluded that the evidence showed that Sam's East's policies applied to all associates, and Beaumont "failed to show that [Sam's East] arbitrarily enforced its policy as retaliation to his protected activity." ALJ Dec. 18, JA 882. Beaumont's argument that his termination did not follow procedure "relie[d] on an assumption that is not supported by

facts." ALJ Dec. 19, JA 883. His "uncorroborated belief" was not enough to meet his burden, therefore, Beaumont failed to demonstrate that his protected activity caused or was a motivating factor in his termination. ALJ Dec. 18-19, JA 882-83.

Notwithstanding his conclusion that Beaumont failed to demonstrate a causal connection between his protected activity and his termination, the ALJ proceeded to determine whether Sam's East established that it would have terminated Beaumont's employment in the absence of his protected activity. ALJ Dec. 20, JA 884. Based on witness testimony and physical evidence, the judge determined that Sam's East would have fired Beaumont "based solely on his gross misconduct." *Id.* The ALJ found that Sam's East's witnesses credibly testified that they were either unaware or supportive of Beaumont's protected activity, and that the evidence supported that testimony. *Id.*

On the other hand, the ALJ found that while Beaumont's testimony was mostly credible, some of his claims were "mistaken" and some were "disingenuous." ALJ Dec. 20, JA 884. The judge concluded that although Beaumont sincerely believed he was the victim of retaliation, the record did not support this belief, nor did the record support his belief that he was targeted with increased surveillance. *Id.* On the contrary, the evidence showed that there was a camera in the gas station kiosk before Beaumont began working there, and that nearly all Sam's

Club associates were visible on a security camera at all times. ALJ Dec. 21, JA 885. Therefore, the use of cameras was "wide-spread" and "consistent from before [Beaumont]'s protected activity through his termination." *Id.*

The ALJ found implausible Beaumont's assertion that he did not know that tampering with a security camera was a terminable offense because there were no training modules, meetings, or reviews of the camera policy, as this policy was "readily available" on Sam's East's intranet site and Beaumont "demonstrated his ability to research and access information and regulations applicable to his job." ALJ Dec. 20-21, JA 884-85. He found similarly implausible Beaumont's statement that when he tampered with the camera, all he did was unplug a phone jack. ALJ Dec. 20, JA 884. Rather, the evidence showed that someone removed the camera from the wall and deliberately disconnected two wires that had been spliced and capped together. ALJ Dec. 21, JA 885. The ALJ rejected as unsupported by the evidence Beaumont's suggestion of "a conspiracy, involving the third-party camera vendor, staging evidence of a damaged camera in order to oust [Beaumont] because of his protected activity." *Id.* Furthermore, Beaumont's testimony that he could do video editing and his submission into evidence of a video he produced "suggest[ed] a familiarity with camera and video equipment." *Id.* Thus, the ALJ concluded that Beaumont disconnected the wires "in

an act of defiance and in violation of [Sam's East's] policies.”
Id.

Therefore, the ALJ found that, by a preponderance of the evidence, Sam's East terminated Beaumont's employment “solely because he damaged property.” ALJ Dec. 21, JA 885. The record showed that Cash was responsive and supportive of Beaumont's protected activity, and that Nordin took the company's “Open Door Policy,” which allows associates to bring concerns to supervisors without fear of retaliation, very seriously. ALJ Dec. 21-22, JA 885-86. Therefore, Sam's East would have terminated Beaumont's employment in the absence of his protected activity. ALJ Dec. 22, JA 886.

In sum, the ALJ dismissed Beaumont's complaint because he failed to demonstrate a causal connection between his protected activity and the termination of his employment. In the alternative, the ALJ ruled that even if Beaumont's protected activity caused or was a motivating factor in his termination, Sam's East demonstrated by a preponderance of the evidence that it would have terminated Beaumont's employment in the absence of his protected activity. The ALJ concluded that Sam's East had a legitimate reason for terminating Beaumont's employment based on Beaumont's admitted tampering with the security camera in his work area.

5. The ARB's Final Decision and Order

On January 12, 2017, the ARB affirmed the ALJ's decision. Board FD&O 2, 6, JA 1225, 1229. The Board began by "commend[ing] the ALJ's summary of the testimony and documentary evidence . . . as well as his detailed findings of fact and conclusions of law." Board FD&O 2, JA 1225. The Board then found that "[s]ubstantial evidence support[ed] the ALJ's conclusion that temporal proximity and procedural irregularity were insufficient to demonstrate that any of Beaumont's protected activity motivated his discharge." Board FD&O 5, JA 1228. Moreover, the Board concluded that "[t]he ALJ's fact-finding and credibility assessments amply support[ed] his conclusion that Sam's East would have fired Beaumont even if he had never raised any regulatory concerns." Board FD&O 6, JA 1229.

SUMMARY OF THE ARGUMENT

This Court should affirm the ARB's final decision and order upholding the ALJ's decision. The ARB correctly concluded that substantial evidence supports the ALJ's determination that Beaumont failed to establish that his protected activity caused or was a motivating factor in Sam's East's decision to terminate his employment. Moreover, substantial evidence supports the ALJ's conclusion, affirmed by the ARB, that Sam's East established that it would have terminated Beaumont's employment in the absence of his protected activity. The ALJ made these

determinations following discovery in the case and a hearing on the record at which the ALJ listened to the testimony of witnesses and observed their demeanor.

The evidence in the record demonstrates that Beaumont disabled a security camera in the gas station kiosk, was terminated solely for that reason, and that his termination would have occurred even in the absence of his protected activity. Although Beaumont expressed a series of concerns to his managers and to regulatory agencies, and the ALJ determined that many of these concerns constituted protected activity, Sam's East did not take retaliatory action against him in response. Instead, Beaumont's managers generally supported his efforts to ensure regulatory compliance, although in some cases they were either unaware of his concerns or indifferent. Based on the substantial evidence in the record, this Court should affirm the Board's decision.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews the Secretary's final decision in accordance with the standard of review established by the Administrative Procedure Act ("APA"), 5 U.S.C. 706. See *Durham v. Dep't of Labor*, 515 F. App'x 382, 383 (6th Cir. 2013). Under this standard, a court sustains the Board's decision unless it is "unsupported by substantial evidence" or is "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. 706(2) (A), (E); see *Varnadore v. Sec'y of Labor*, 141 F.3d 625, 630 (6th Cir. 1998).

The ARB's factual findings "must be affirmed if they are supported by substantial evidence, which is more than a scintilla, but less than a preponderance, of the evidence." *Ind. Mich. Power Co. v. U.S. Dep't of Labor*, 278 F. App'x 597, 602 (6th Cir. 2008) (internal quotation marks omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Sasse v. U.S. Dep't of Labor*, 409 F.3d 773, 778 (6th Cir. 2005). A court's review of an agency decision under the substantial evidence standard is "highly deferential" and "requires this Court to defer to the inferences that the DOL derives from the evidence." *Ind. Mich. Power Co.*, 278 F. App'x at 602; see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *Sasse*, 409 F.3d at 778-79.

II. THE SWDA AND ITS APPLICABLE BURDENS.

The SWDA makes it unlawful to "fire, or in any other way discriminate against, . . . any employee . . . by reason of the fact that such employee . . . has filed, instituted, or caused to be filed or instituted any proceeding" under the SWDA. 42 U.S.C. 6971(a). The term "proceeding" encompasses "all phases of a proceeding" including "the initial internal . . . statement or complaint of an employee that points out a violation, whether or

not it generates a formal or informal 'proceeding.'" *Redweik v. Shell Expl. & Prod.*, ARB No. 05-052, 2007 WL 4623495, at *5 (ARB Dec. 21, 2007); see also *Passaic Valley Sewerage Comm'rs v. U.S. Dept. of Labor*, 992 F.2d 474 (3d Cir. 1993).

Actions under the whistleblower provisions of the SWDA are governed by the legal burdens set forth in the applicable regulations at 29 C.F.R. Part 24. These regulations codify the Secretary's longstanding administrative case law interpreting the SWDA and other environmental whistleblower statutes. See 76 Fed. Reg. 2808, 2811, 2011 WL 131102 (Jan. 18, 2011) (Final Rule).

To prevail on an SWDA claim, a complainant must prove by a preponderance of the evidence that protected activity caused or was "a motivating factor" in the adverse employment action. 29 C.F.R. 24.109(b)(2). A motivating factor is a substantial factor in causing an adverse action. See *Onysko v. Utah Dep't of Env'tl. Quality*, ARB No. 11-023, 2013 WL 499361, at *10 (ARB Jan. 23, 2013), *aff'd*, 549 F. App'x 749 (10th Cir. 2013). Once a complainant has demonstrated that protected conduct was a motivating factor in the employer's decision to take an adverse action, the burden of proof shifts to the employer to prove "by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity." 29 C.F.R. 24.109; see *Tomlinson v. EG&G Def. Materials, Inc.*,

ARB Nos. 11-024, 11-027, 2013 WL 1182304, at *7 (ARB Jan. 31, 2013).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE DETERMINATION THAT BEAUMONT'S PROTECTED ACTIVITY NEITHER CAUSED NOR WAS A MOTIVATING FACTOR IN HIS EMPLOYMENT TERMINATION.

The ALJ and Board's determination that Beaumont's protected activity did not cause and was not a motivating factor in his employment termination is supported by substantial evidence in the record as a whole.

In this case, Beaumont has failed to show that his protected activity caused or was a motivating factor in his employment termination. The record demonstrates that Beaumont's employment was terminated following an investigation that determined he intentionally disabled a security camera. See Tr. 206:18-25, 207:1-22, JA 235. Both Cash and Nordin testified that there was no other reason for his termination. Tr. 190:10-12, 207:21-22, 216:21-25, 217:4-7, JA 231, 235, 237-38. Furthermore, Nordin testified that prior to her decision to recommend Beaumont's termination, she was unaware of any of Beaumont's complaints regarding safety or environmental concerns. Tr. 215:2-6, JA 237. Since Nordin had no knowledge of Beaumont's concerns, her recommendation to terminate Beaumont's employment could not have been motivated by his safety-related complaints or related activities. Nor had anyone with knowledge of Beaumont's activities influenced Nordin's recommendation - she

credibly testified that no one in the company directed her to terminate him. Tr. 215:20-25, 216:1-20, JA 237.

Furthermore, the record shows that Sam's East supported, was indifferent to, or was unaware of Beaumont's protected activities. Therefore, those activities were not a motivating factor in his employment termination. The ALJ found that Beaumont's contact with the LARA Inspector regarding customer fuel dispensing requirements, his work with Cash in developing a protocol to address customers who sit in their cars while fueling, his inquiry about Class A and B operator training, his request to Cash for gloves and towels, and his report that a gas delivery company was not cleaning up its spills all qualified as protected activity. ALJ Dec. 14, 16-17, JA 878, 880-81. However, the ALJ found, and the record demonstrates, that none of these activities motivated Sam's East's decision to terminate Beaumont's employment.

As stated above, Nordin testified that prior to her recommendation to terminate Beaumont's employment, she was unaware of any of Beaumont's complaints regarding safety or environmental concerns. Tr. 215:2-6, JA 237. She was aware that Beaumont contacted a LARA inspector to get clarification on an inspection, and "appreciated that he took the initiative to get clarification to make sure we were following the laws and being compliant with the inspection." Tr. 215:7-19, JA 237. Cash was

also aware that Beaumont planned to contact the LARA inspector, and told him to do whatever he felt was necessary to do his job correctly. Tr. 179:5-12, JA 228.

In response to Beaumont's concerns about customers who remained in their cars while fueling, Cash testified that she and Beaumont worked together to create a procedure to address that issue. Tr. 181:1-16, JA 229. Cash believed that the procedure adequately addressed Beaumont's concerns. Tr. 182:21-22, JA 229. Similarly, in response to Beaumont's concerns about the gloves he used to clean up gasoline spills, Cash purchased industry-standard gloves and towels that were recommended by a fuel delivery person. Tr. 60:20-25, 61:1-4, JA 198-99. And, after Beaumont spoke to Mullen about the fuel delivery company's spills, the company began cleaning them up. Tr. 116:5-23, JA 212. According to the record, Sam's East did not retaliate against Beaumont for reporting his concerns to management; rather, management listened to his concerns and responded by enacting solutions that Beaumont found agreeable.

In sum, the record reflects substantial evidence that: (1) Sam's East terminated Beaumont's employment solely because he disabled a security camera; and (2) Sam's East did not take retaliatory action against Beaumont for his protected activity, rather, it supported his actions, was indifferent to them, or was unaware of them.

Beaumont's arguments fail to dent the substantial evidence supporting the determination that his protected activity did not play any role in his employment termination. Beaumont suggests that the ALJ and the Board improperly discounted the temporal proximity between his protected activity and his employment termination in this case. See Pet'r Br. 2-3. In particular, he faults the Board and the ALJ for failing to realize that the gratitude in his July 20, 2013 "thank you" email to Waters was sarcastic and that in fact his concerns had not been resolved. See *id.* at 8-9. Thus, in his view, the ALJ and the ARB failed to properly evaluate the temporal proximity between this e-mail and Beaumont's termination seven days later.

Even if the ALJ and the Board misinterpreted the tone of the e-mail, the evidence in the record so overwhelmingly demonstrates that protected conduct played no role in Sam's East's termination decision that any misreading of the e-mail by the ALJ or the ARB does not significantly change the overall evidentiary support for the Secretary's decision in this case.

In any event, this Circuit has cautioned against drawing an inference of causation from temporal proximity alone. *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 400 (6th Cir. 2010). The case for inferring causation from temporal proximity is strongest where the employer immediately retaliates against an employee upon learning of his protected activity, *Mickey v.*

Zeidler Tool & Die Co., 516 F.3d 516, 524-25 (6th Cir. 2008), however, this Court has "rarely found a retaliatory motive based only on temporal proximity." *Vereecke*, 609 F.3d at 401. Here, Beaumont's employment was terminated several weeks or more after his protected activity, and the record contains no direct or circumstantial evidence of retaliation or retaliatory motive other than the timing of the decision.

Furthermore, Beaumont's tampering with the security camera provides strong motivation for his termination. Indeed, the ALJ specifically found that Beaumont was terminated for that reason. ALJ Dec. 22, JA 886. Therefore, Beaumont's tampering with the security camera was an intervening event that severed any relationship between protected conduct and Beaumont's termination based on temporal proximity. ALJ Dec. 14, JA 878; see *Kuhn v. Washtenaw Cty.*, 709 F.3d 612, 628 (6th Cir. 2013) (holding that an intervening legitimate reason to take an adverse employment action can dispel an inference of retaliation based on temporal proximity); see also *Vereecke*, 609 F.3d at 401 ("[t]he absence of close temporal proximity and the presence of an obviously nonretaliatory basis for the [employer's] decision amount to insufficient evidence to permit an inference of retaliatory motive"); *Nguyen v. City of Cleveland*, 229 F.3d 559, 567 (6th Cir. 2000) ("the fact of temporal proximity alone was not particularly compelling, because the plaintiff's retaliation

case was otherwise weak, and there was substantial evidence supporting the defendant's version of the events"). For the reasons discussed above, Sam's East had a legitimate, nonretaliatory reason to terminate Beaumont's employment, which negates Beaumont's claim of causation based on temporal proximity.

For all of these reasons, substantial evidence supports the determination that Beaumont's protected activity did not cause and was not a motivating factor in his employment termination.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE DETERMINATION THAT SAM'S EAST WOULD HAVE TAKEN THE SAME ADVERSE ACTION IN THE ABSENCE OF BEAUMONT'S PROTECTED ACTIVITY.

Even if Beaumont had demonstrated by a preponderance of the evidence that his protected activity caused or was a motivating factor in his employment termination, substantial evidence in the record supports the ALJ and Board's determination that Sam's East would have terminated Beaumont's employment in the absence of his protected activity. It is undisputed that Beaumont tampered with the security camera, and the record clearly demonstrates that Sam's East terminated his employment solely for this reason and in accordance with established policies and procedures.

In several instances, Beaumont admitted to disabling the security camera. According to his own testimony, on June 17, 2013, he "disrupted the [camera's] signal" as "a way to say

please stop the excessive surveillance." Tr. 57:11, 58:1-12, JA 198. Beaumont had previously complained to both Krease and Cash about the security camera in the kiosk. He told Krease that he did not like the camera and felt he was constantly under surveillance. Tr. 148:11-18, JA 220. He also expressed his concerns to Cash, who informed him that ninety percent of the store was on camera at all times. Tr. 183:2-10, JA 229. When Nordin interviewed Beaumont in connection with her investigation of the incident, Beaumont admitted to disabling it, and claimed he did so as a joke. Tr. 206:18-24, JA 235. Additionally, during OSHA's investigation of this matter, Beaumont made the same admission to the OSHA investigator. Tr. 105:16-265, 106:19-25, 109:16-20, 110:23-25, 111:1-9, JA 210-11; RX 21, JA 528-30.

Furthermore, the record shows that Beaumont's conduct violated Sam's East's Safety and Health Policy, Camera Policy, and Coaching Policy. Krease, Cash, and Nordin all testified that these policies were applicable to all Sam's Club associates and readily accessible on the company's intranet site. Tr. 145:11-22, 147:2-6, 186:3-7, 187:4-6, 208:12-15, 209:10-11, 210:21-23, JA 220, 230, 235-36. Beaumont agreed that these policies applied to him. Tr. 101:17-20, JA 209. Although he claimed that he was unaware of the Camera Policy, the ALJ found this testimony not credible in light of his demonstrated aptitude for researching

and accessing information and regulations applicable to his job.
ALJ Dec. 21, JA 885.

Sam's East's Safety and Health Policy provides the following "Workplace Safety Standards," which Beaumont violated by disabling the security camera:

- Do not tamper with electric controls or switches.
- Do not operate machines or equipment until you have been properly instructed and authorized to do so by your supervisor.
- Do not engage in practices that may be considered inconsistent with ordinary and reasonable commonsense safety rules (for example, horseplay, reckless use of equipment, etc.).

Tr. 102:7-25, 103:1, 145:23-25, 146:1-20, 186:8-20, 208:10-25, 209:1-3, JA 209, 220, 230, 235-36; RX 6, JA 252. Beaumont's misconduct also clearly violated Sam's East's Camera Policy, which states that "[c]ameras may only be operated, added, removed, or moved by authorized associates and must be placed and configured according to the division's specific guidelines."

Tr. 103:4-11, 146:21-25, 147:2-6, 186:21-25, 187:1-19, 209:4-25, 210:1-14, JA 209, 220, 230, 236; RX 10, JA 261. Krease, Cash, and Nordin testified that no Sam's Club associates were authorized to touch or move security cameras, and any handling of the cameras was done exclusively by a third party vendor. Tr. 147:17-25, 148:1-4, 187:20-25, 188:1, 209:155-25, 210:1-7, JA 220, 230, 236. According to this testimony, which the ALJ found

credible, not even asset protection managers had the authority to move cameras. See ALJ Dec. 20, JA 886.

The record shows that the termination of Beaumont's employment complied with the procedures established by Sam's East's policies. The Coaching Policy provides that when Sam's East learns of reported misconduct, it may conduct an investigation followed by appropriate action, which may include immediate termination. RX 9, JA 258. Furthermore, both the Camera Policy and the Coaching Policy authorize the termination of associates who violate their terms. RX 10, JA 261 ("Failure to follow this policy may result in disciplinary action up to and including termination."); RX 9, JA 259. The Coaching Policy states that the following warrant an associate's immediate termination:

- Violence or a safety violation that creates a high risk of injury to people or damage to property.
- Intentional failure to follow a Walmart policy.
- Behavior identified in any of our policies that could result in an associate's immediate termination.

Tr. 188:10-25, 189:1-6, 211:2-23, JA 230-31, 236; RX 9, JA 259. According to testimony, the Coaching Policy authorizes immediate termination for conduct such as Beaumont's. Tr. 188:20-25, 189:1-6, 211:9-23, JA 230-31, 236. Additionally, Nordin testified that she was not aware of any other circumstances where an employee intentionally disabled a security camera, but

if such a circumstance arose, she would recommend termination. Tr. 212:9-18, JA 236.

Thus, substantial evidence supports the ALJ's conclusion, affirmed by the Board, that Sam's East would have terminated Beaumont for tampering with the security camera even in the absence of Beaumont's protected conduct.

V. THE COURT SHOULD REJECT BEAUMONT'S ARGUMENTS THAT THE ALJ AND ARB PROCEEDINGS IN THIS CASE WERE BIASED.

Beaumont argues that the Court should overturn the Secretary's decision because he was not afforded an impartial hearing. In support of this argument, he contends that the ALJ denied his requests for certain discovery and faults the ALJ for crediting the testimony of certain Sam's East witnesses. See, e.g., Pet'r Br. 22-23.

The ALJ proceedings in this case are entitled to a presumption of regularity. See *Pilica v. Ashcroft*, 388 F.3d 941, 949-50 (6th Cir. 2004) (noting that Board of Immigration Appeals proceeding was entitled to a presumption of regularity absent evidence to the contrary). ALJs have discretion to manage discovery in order to elicit the most probative evidence and avoid undue burden on the parties. Beaumont has not pointed to any evidence demonstrating that the ALJ abused this discretion nor has Beaumont demonstrated that he was prejudiced by the ALJ's denial of certain discovery. See *Carpenter v. Solis*, 439

F. App'x 480, 485 (6th Cir. 2011) (noting that ALJ's discovery decisions "do not amount to reversible error unless there is an abuse of discretion and substantial prejudice" (quoting *UAW v. Michigan*, 886 F.2d 766, 771 (6th Cir. 1989))).

Similarly, Beaumont's contentions that certain Sam's East witnesses were not truthful appears to be based on his disagreement with the ALJ's decision to credit the testimony of those witnesses rather than any concrete evidence indicating that their testimony was not credible. On substantial evidence review, this Court accords "great weight and deference" to an ALJ's credibility determinations. See *Schmiedebusch v. Comm'r of Soc. Sec. Admin.*, 536 F. App'x 637, 649 (6th Cir. 2013); see also *Johnson v. U.S. Dep't of Labor*, 205 F. App'x 312, 314 (6th Cir. 2006). Thus, the Court should affirm the ALJ's credibility determinations and discovery rulings and should reject Beaumont's arguments that he did not receive an impartial hearing.

CONCLUSION

For the reasons set forth above, the Secretary requests that this Court affirm the Board's Final Decision and Order dismissing Beaumont's complaint.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume and typeface requirements of Fed. R. JA P. 32(a) because the brief contains 7,484 words, excluding the parts of the brief exempted by Fed. R. JA P. 32(a)(7)(B), and was prepared using mono-faced Courier New, 12-point type.

Dated: July 12, 2017

/s/ Sarah M. Tunney
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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. With the exception of the petitioner, Ronald J. Beaumont, I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I further certify that a copy of the foregoing brief was sent via overnight delivery by United Parcel Service on July 12, 2017, to the following:

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