



In the Matter of:

THOMAS J. CREAN,

ARB CASE NO. 2017-0048

COMPLAINANT,

ALJ CASE NO. 2015-CAA-00002

v.

DATE: May 27, 2020

125 W. 76TH REALTY CORPORATION,

RESPONDENT.

Appearances:

For the Complainant:

Thomas J. Crean; *pro se*; Waterbury, Connecticut

For the Respondent:

**Barry G. Margolis, Esq.; *Abrams, Garfinkel, Margolis & Bergson, LLP*;
New York, New York**

**Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge*,
Heather C. Leslie and James A. Haynes, *Administrative Appeals Judges***

DECISION AND ORDER

PER CURIAM. This case arises under the whistleblower provisions of the Clean Air Act (CAA), 42 U.S.C. § 7622 (1977), and implementing regulations at 29 C.F.R. Part 24 (2018). Thomas Crean (Complainant) filed a complaint with the Occupational Safety and Health Administration alleging that his former employer, 125 W. 76th Street Realty Corporation (Respondent), retaliated against him after he called the New York City Department of Environmental Protection (DEP) about

asbestos in Respondent's boiler room. In a Decision and Order (D. & O.) issued May 31, 2017, following an evidentiary hearing, the presiding Department of Labor Administrative Law Judge (ALJ) found that Complainant's report to the DEP was not a motivating factor in Respondent's decision to discharge him. D. & O. at 21. For the reasons discussed below, we summarily affirm the ALJ's dismissal of Crean's complaint.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or Board) has jurisdiction to review the ALJ's decision pursuant to 29 C.F.R. § 24.110. *See also* Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020). The ARB reviews an ALJ's findings of fact under the substantial evidence standard and an ALJ's conclusions of law de novo. 29 C.F.R. § 24.110(b); *see also Rooks v. Planet Airways, Inc.*, ARB No. 2004-0092, ALJ No. 2003-AIR-00035, slip op. at 4 (ARB June 29, 2006).

DISCUSSION

To prevail on a whistleblower complaint under the CAA, the complainant must prove by a preponderance of the evidence that he or she engaged in whistleblower activity that caused or was a motivating factor in the adverse employment action taken against the complainant. The failure to prove any one of these elements necessarily requires dismissal of a whistleblower complaint. If the complainant meets his or her burden of proof, the respondent may nevertheless avoid liability if it proves by a preponderance of the evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior. *Mugleston-Utley v. EG&G Defense Materials, Inc.*, ARB No. 2012-0025, ALJ No. 2009-CAA-00009 (ARB May 8, 2013).

Complainant alleged that he engaged in protected activity when he reported asbestos in Respondent's boiler room to the DEP. The parties do not dispute that Complainant was subject to an adverse employment action, specifically, the termination of his employment. Nevertheless, the ALJ found that Complainant

failed to prove by a preponderance of the evidence that his alleged protected activity caused or was a motivating factor in the employment termination.¹ D. & O. at 24. Moreover, the ALJ found that Respondent established that it would have terminated Complainant's employment even if he had had not engaged in protected activity. *Id.* at 27.

In finding that Complainant failed to establish that his alleged protected activity was a motivating factor in the decision to terminate his employment, the ALJ rejected Complainant's contentions after comprehensively reviewing the extensive evidence of record. In sum, the ALJ was persuaded, based upon the preponderance of the evidence, that Complainant was terminated because of his unwillingness to perform his job duties and his hostile and aggressive behavior. *Id.* at 26.

The ALJ was also persuaded that the decision to terminate Complainant was made well before his report to the DEP. *Id.* Here, the ALJ relied upon Respondent's property manager and board of directors meetings with Attorney Peter Finn, Respondent's decision to offer Complainant a buyout/settlement offer, and Respondent's property manager and Complainant's conversation regarding Complainant's retirement plans the morning before his report to the DEP. *Id.* at 27.

On appeal, Complainant asserts that his report to the DEP was the motivating factor behind his termination. Having reviewed the evidentiary record as a whole, and upon consideration of the parties' briefs on appeal, we conclude that substantial evidence supports the ALJ's findings of fact that Complainant failed to prove that his report to the DEP was a motivating factor in the termination of his

¹ As we are affirming the ALJ's findings of fact that Complainant failed to prove that his report to the DEP was a motivating factor in the termination of his employment and alternatively that Respondent would have terminated Complainant in the absence of protected activity, all other arguments are rendered moot and we make no further determinations on the ALJ's protected activity analysis.

employment and alternatively that Respondent would have terminated Complainant in the absence of protected activity. Since Complainant has failed to demonstrate that the ALJ committed a reversible error, we **AFFIRM** the ALJ's dismissal of the complaint.

SO ORDERED.