



In the Matter of:

ANTHONY HO, JR.,

ARB CASE NO. 2019-0051

COMPLAINANT,

ALJ CASE NO. 2017-CAA-00001

v.

DATE: January 27, 2021

STATE OF HAWAII  
DEPARTMENT OF ACCOUNTING  
AND GENERAL SERVICES,

RESPONDENT.

Appearances:

*For the Complainant:*

Anthony P. X. Bothwell, Esq.; *Law Offices of A. P. X. Bothwell*; San Francisco, California

*For the Respondent:*

Claire W.S. Chinn, Esq.; *Department of the Attorney General, State of Hawaii*; Honolulu, Hawaii

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

## DECISION AND ORDER

PER CURIAM. This case arises under the whistleblower provisions of the Clean Air Act (CAA) and its implementing regulations.<sup>1</sup> Anthony Ho, Jr. (Complainant) filed a complaint with the Occupational Safety and Health Administration alleging that his former employer, State of Hawaii Department of Accounting and General Services (Respondent), retaliated against him after he reported asbestos safety

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<sup>1</sup> 42 U.S.C. § 7622 (1977); 29 C.F.R. Part 24 (2020).

concerns at two schools. The presiding Department of Labor Administrative Law Judge (ALJ) dismissed Complainant's claim. We affirm.

### BACKGROUND

Complainant worked as a Building Maintenance Worker I for Respondent.<sup>2</sup> The Naalehu Elementary School discovered asbestos in November, 2004.<sup>3</sup> Removal and abatement procedures were completed on or around May 21, 2007.<sup>4</sup> On May 23, 2007, Complainant reported that he was fixing a storage roof and may have been exposed to airborne asbestos.<sup>5</sup> Between July 30, 2008, and January 28, 2010, the parties communicated several times regarding Complainant's request for a baseline test from his alleged asbestos exposure at Naalehu.<sup>6</sup> Ultimately, Respondent sent a written request directly to Complainant's personal doctor, requesting that he provide Complainant with a baseline asbestos medical examination.<sup>7</sup>

On August 20, 2008, Complainant received a phone call that there was asbestos removal and abatement taking place and that safety regulations were not being followed at Keeau School.<sup>8</sup> Complainant went to Keeau and observed abatement and removal company employees working in the walkways, that there were no signs, safety barriers, or safety monitors present, and that children were able to walk freely in the abatement area.<sup>9</sup> Complainant took pictures of what he felt were gross violations and negligence.<sup>10</sup> The Keeau principal observed Complainant taking pictures, approached him, and an altercation occurred between the two individuals.<sup>11</sup> Respondent investigated and interviewed Complainant regarding the Keeau incident. Respondent determined that Complainant did not identify himself as an employee when he went to the school. Respondent suspended

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<sup>2</sup> D. & O. at 4.

<sup>3</sup> *Id.* at 11; Respondent's Exhibit (RX) B at 858, 871.

<sup>4</sup> D. & O. at 11; RX B at 861.

<sup>5</sup> D. & O. at 11; RX B at 899.

<sup>6</sup> D. & O. at 12-13.

<sup>7</sup> *Id.* at 12; RX B at 920-21.

<sup>8</sup> D. & O. at 14; Hearing Transcript (Tr.) at 76-78, 126-27.

<sup>9</sup> D. & O. at 14; Tr. at 78, 127-28.

<sup>10</sup> D. & O. at 14; Tr. at 80-81, 132; Complainant's Exhibit (CX) 8.

<sup>11</sup> D. & O. at 14; Tr. at 82-84; 659.

Complainant for ten days for his threatening behavior at Keaau, and required him to attend anger management training.<sup>12</sup>

On May 30, 2008, Complainant reported that a co-worker observed a former co-worker viewing child pornography at a worksite.<sup>13</sup> Respondent investigated Complainant's report, but found no evidence supporting Complainant's claim.<sup>14</sup> On October 25, 2010, Respondent received a complaint from the Department of Education Hawaii District (DOE) that Complainant sent an anonymous fax to thirty-four public schools on October 18 and 19, 2010.<sup>15</sup> The fax alleged a cover-up of child pornography by Respondent and the DOE at the Hilo base yard.<sup>16</sup> On November 23, 2010, Complainant faxed a letter with seven attachments to the DOE and Respondent's Personnel Offices in response to the administrative investigation. Complainant's fax stated "if you don't stop and you continue to blame me . . . I will start spreading this out to the community today . . . if no one calls me back by 12 noon today Nov 23 2010 I will start spreading this out after 12 noon today [sic throughout]."<sup>17</sup> Respondent investigated the incident and determined that Complainant sent faxes to thirty-seven schools. The faxes resulted in significant and widespread disruption to the DOE's Hawaii District operations. Respondent also determined that Complainant sent the November 23 fax in an effort to retaliate against the Respondent because the Respondent had opened an investigation into the October faxes, and that Complainant failed to comply with the repeated directive to stop rehashing these complaints since they were previously investigated and dismissed.<sup>18</sup>

On April 25, 2011, Respondent held a pre-discharge meeting during which it gave Complainant the opportunity to offer facts or arguments as to why his discharge would not be appropriate.<sup>19</sup> On May 12, 2011, Respondent terminated Complainant's employment because he sent the faxes, which were disruptive, intimidating, and confrontational, to thirty-seven schools, he was insubordinate for

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<sup>12</sup> D. & O. at 15; RX B at 979; Tr. at 99-100, 128-129; CX 2-13, 2-14, 4-4.

<sup>13</sup> D. & O. at 4.

<sup>14</sup> *Id.* at 4; RX B at 1171-72.

<sup>15</sup> D. & O. at 5; RX A at 719-720.

<sup>16</sup> D. & O. at 6; RX A at 113.

<sup>17</sup> D. & O. at 7; RX A at 80, 101, 231; Tr. at 162-65.

<sup>18</sup> D. & O. at 8-9.

<sup>19</sup> *Id.* at 9.

not complying with directives and warnings to stop rehashing complaints and issues that were previously investigated, and he did not follow the chain of command.<sup>20</sup>

Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) which was dismissed on December 13, 2016. Complainant requested a hearing before the Department of Labor (DOL) Office of the Administrative Law Judges (OALJ) on January 30, 2017.<sup>21</sup>

On April 15, 2019, the ALJ assigned to the case issued a Decision and Order dismissing Complainant's complaint (D. & O.). On April 25, 2019, the Administrative Review Board (ARB or Board) received Complainant's Petition for Review. For the reasons discussed below, we affirm the ALJ's D. & O.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the Administrative Review Board (ARB or Board) the authority to issue agency decisions in review or on appeal of matters arising under the CAA.<sup>22</sup> The Board reviews an ALJ's procedural rulings under an abuse of discretion standard.<sup>23</sup>

Conversely, the ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence.<sup>24</sup> Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>25</sup>

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<sup>20</sup> *Id.*; RX A at 799-805.

<sup>21</sup> D. & O. at 2.

<sup>22</sup> 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. 13186 (Mar. 6, 2020).

<sup>23</sup> *Vander Boegh v. EnergySolutions, Inc.*, ARB No. 2015-0062, ALJ No. 2006-ERA-00026, slip op. at 7 (ARB Feb. 24, 2017) (citing *NCC Electrical Servs., Inc.*, ARB No. 2013-0097, ALJ No. 2012-DBA-00006, slip op. at 6 (ARB Sept. 30, 2015)).

<sup>24</sup> 29 C.F.R. § 24.110(b); *Evans v. EPA*, ARB No. 2017-0008, ALJ No. 2008-CAA-00003, slip op. at 8 (ARB Mar. 17, 2020) (citation omitted).

<sup>25</sup> *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938) (citations omitted).

## DISCUSSION

To prevail on a whistleblower complaint under the CAA, a 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.<sup>26</sup> The failure to prove any one of these elements requires dismissal of a whistleblower complaint.<sup>27</sup> 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 act(s).<sup>28</sup>

Complainant alleged that he engaged in protected activity when he raised safety concerns related to asbestos removal at two schools in Hawaii. Nevertheless, the ALJ found that Complainant failed to prove by a preponderance of the evidence that his alleged protected activities caused or were a motivating factor in Respondent's disciplinary actions and decision to terminate his employment.<sup>29</sup> In finding that Complainant failed to establish that his alleged protected activities were a motivating factor in the adverse actions taken against him, the ALJ rejected Complainant's contentions after comprehensively reviewing the extensive evidence in the record. In sum, the ALJ was persuaded, based upon the preponderance of the evidence, that Complainant was terminated because he sent disruptive, intimidating, and confrontational faxes to thirty-seven schools, he was insubordinate for not complying with directives and warnings, and he did not follow the chain of command.<sup>30</sup>

Complainant argues on appeal that the ALJ erred in determining that his protected activity was not a motivating factor in Respondent's adverse actions against him.<sup>31</sup> Complainant also avers that his complaints were objectively reasonable because he was diagnosed with asbestosis,<sup>32</sup> that Respondent knew of

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<sup>26</sup> *Mugleston-Utley v. EG&G Defense Materials, Inc.*, ARB No. 2012-0025, ALJ No. 2009-CAA-00009, slip op. at 2 (ARB May 8, 2013).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (citing 29 C.F.R. § 24.109(b)(2)).

<sup>29</sup> D. & O. at 44-48.

<sup>30</sup> *Id.*

<sup>31</sup> Complainant's Brief (Comp. Br.) at 5, 9-10.

<sup>32</sup> *Id.* at 6.

his protected activities,<sup>33</sup> that Respondent's explanations for the adverse actions taken against him were pretextual,<sup>34</sup> and that his pornography complaint was protected by the First Amendment.<sup>35</sup>

Upon consideration of the parties' briefs on appeal, and having reviewed the evidentiary record as a whole, we conclude that the ALJ's D. & O. to deny the complaint is supported by substantial evidence. None of Complainant's arguments demonstrate that the ALJ abused his discretion<sup>36</sup> or committed reversible error.<sup>37</sup> We agree with the ALJ's finding that Complainant did not meet his burden to prove that his protected activity was a motivating factor in Respondent's disciplinary actions and termination of his employment. Accordingly, we summarily **AFFIRM** the ALJ's D. & O. and **DENY** the complaint.

**SO ORDERED.**

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<sup>33</sup> *Id.* at 7.

<sup>34</sup> *Id.* at 7-9.

<sup>35</sup> *Id.* at 11-14.

<sup>36</sup> Complainant also claims that the ALJ erred in admitting Respondent's evidence because Respondent defied the pre-hearing order by exchanging its exhibit binder with most of the tabs missing. Comp. Br. at 4. The ALJ determined that Complainant did not raise this objection at the hearing, and complained about the exhibit binder for the first time in his closing brief. D. & O. at 1, n.3. The Board reviews an ALJ's procedural ruling under an abuse of discretion standard. *Vander Boegh*, ARB No. 2015-0062, slip op. at 7. After reviewing the transcript, we agree with the ALJ that Complainant did not object to the exhibit binder at the hearing. Tr. at 689. Therefore, we find that the ALJ did not abuse his discretion when he admitted the exhibit binder into evidence.

<sup>37</sup> We take exception to the ALJ's factual finding that the November 23 fax did not reference asbestos or CAA protected conduct. D. & O. at 38. Upon review, the "action line letter" attachment discusses hazard assessments and alleged asbestos incidents at Naalehu and Keeau. RX A at 83. Nevertheless, the ALJ's error is harmless, because these alleged protected activities are identical to past complaints made by Complainant. The ALJ ultimately analyzed these alleged protected activities and found that Complainant's conduct was either not protected or the protected activity was not a motivating factor in the adverse actions taken against him. *See* D. & O. at 35-37, 44-47.