



In the Matter of:

ERICA SCHELL,

ARB CASE NO. 2017-0079

COMPLAINANT,

ALJ CASE NO. 2015-SWD-00001

v.

DATE: April 21, 2020

MARTIN MARIETTA  
MATERIALS, INC.

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

*For the Complainant:*

Erica Schell; *pro se*; New Braunfels, Texas

*For the Respondent:*

Mike Birrer, Esq.; Sara Romine, Esq.; Brent M. Rubin, Esq.;  
*Carrington, Coleman, Sloman & Blumenthal, LLP*; Dallas, Texas

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

## DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Solid Waste Disposal Act, 42 U.S.C. § 6971 (1980) (“SWDA”), the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (1994) (“SDWA”), and the Federal Water Pollution Control Act, 33 U.S.C. § 1367 (1972) (“WPCA”) (collectively “the Environmental Acts”). Erica Schell (“Schell” or “Complainant”) filed a whistleblower complaint against her former employer, Martin Marietta Materials, Inc. (“Martin Marietta” or

“Respondent”) alleging that Respondent violated the Environmental Acts by retaliating against her after she raised issues regarding a third-party lab’s status and how a contractor was profiling waste spills. The Administrative Law Judge (ALJ) dismissed Schell’s complaint. We affirm.

## DISCUSSION

Erica Schell was hired by Martin Marietta on February 3, 2014, as a Senior Environmental Engineer for Martin Marietta’s Southwest Division. EnviroLIS is a software program that centralizes various land leases and permits for Martin Marietta. Decision and Order (D. & O.) at 7. Updating and entering data into enviroLIS was by June, if not earlier, Schell’s primary responsibility. D. & O. at 7-9. Martin Marietta established a goal that all documents be entered into enviroLIS by December 31, 2014.

On September 24, 2014, a diesel fuel spill occurred at the Beckmann Quarry facility. Schell became involved in the spill on or around October 10, 2014. Schell was concerned with how the spill was being handled, whether the waste was deemed hazardous, and whether a lab assigned to assist in the disposal of the contaminated material had current or expired certification forms. On October 14, 2014, a copy of the lab’s current, non-expired certification was provided to Schell. D. & O. at 14-15.

That same day, October 14, 2014, Schell contacted a landfill about the Carthage spill to determine whether the disposal site had a compliant waste acceptance plan. D. & O. at 16.

Also on or about October 14, 2014, and again on October 17, Schell’s supervisor asked for a status report on Schell’s enviroLIS work. Schell explained that she had roughly 32 of 140 sites complete. Schell’s performance became a point of concern given the December 31, 2014 deadline. D. & O. at 20. Human resources was contacted, and it was decided in late October to place Schell on a Needs Improvement Plan (“PIP”), which was finalized on November 6, 2014. D. & O. at 25-27. Schell did not meet the December 31, 2014 deadline. On January 5, 2015, Schell’s supervisor and other Martin Marietta personnel discussed Schell’s performance and progress on the PIP, including the enviroLIS assignment. Because of Schell’s lack of progress, the decision was made to terminate Schell’s employment. D. & O. at 39-40.

On November 8, 2014, Schell filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent had unlawfully retaliated against her under the SWDA. On January 28, 2015, Schell amended her complaint to include allegations under the SDWA and FWPCA. OSHA dismissed the claims.

Schell objected to OSHA's findings and requested a hearing before an Administrative Law Judge (ALJ). The ALJ assigned to the case held a hearing and thereafter dismissed Schell's complaint. The ALJ found that while Schell engaged in protected activity when she reported her concerns as to how the Beckmann spill was being handled, neither that protected activity nor her complaints of alleged retaliation were a motivating factor in her PIP or her termination.<sup>1</sup> Rather, the ALJ found that the "sole motivation" for the termination was Schell's performance problems surrounding her work on the enviroLIS program. D. & O. at 62; *id.* at 68.

Schell appealed her case to the Administrative Review Board (ARB or Board).<sup>2</sup> Having reviewed the evidentiary record, and upon consideration of the parties' briefs on appeal, we conclude that the ALJ's decision in favor of Martin Marietta is supported by the record. None of Schell's arguments demonstrate that the ALJ abused her discretion or committed reversible error.<sup>3</sup> We agree with the ALJ's finding that Schell did not carry her burden to prove that either her PIP or her termination were motivated by her protected activity. We further agree with the ALJ that Martin Marietta would have taken these adverse actions even if Schell did not engage in protected activity because of the poor performance in updating the enviroLIS program. Accordingly, we summarily **AFFIRM** the ALJ's decision and deny the petition.

### **SO ORDERED.**

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<sup>1</sup> The ALJ found that Schell's report concerning the Carthage spill was not protected activity. Schell appealed the ALJ's finding. We find no error.

<sup>2</sup> The Secretary of Labor has delegated to the Administrative Review Board (ARB or Board) authority to review ALJ decisions and issue agency decisions in cases arising under the Environmental Acts. Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020); 29 C.F.R. § 24.110 (2014).

<sup>3</sup> Schell argues that the ALJ erred because one of her complaints had not been investigated by OSHA and thus the ALJ lacked jurisdiction. Respondent cites 29 C.F.R. § 24.109(c) for the point that the ALJ hears cases de novo and is not permitted to remand the matter back to OSHA to complete an investigation. We agree with Respondent.