U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

CHRISTINE EVANS, **ARB CASE NO. 03-001**

COMPLAINANT, **ALJ CASE NO. 01-CAA-4**

v. **DATE: July 30, 2004**

BABY-TENDA
a/k/a BABEE-TENDA
a/k/a TENDA,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Dale L. Ingram, Esq., ***Law Office of Dale L. Ingram, P.C., Kansas City, Missouri***

For the Respondent:
S. Ruth Lehr, Esq., ***Law Offices of S. Ruth Lehr, Kansas City, Missouri***

FINAL DECISION AND ORDER

This case is before the Administrative Review Board (ARB) pursuant to the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 1995) and the Department of Labor's (DOL) implementing regulations set out at 29 C.F.R. Part 24 (2003). Christine Evans asserts that her employer, Baby-Tenda, violated the employee protection (whistleblower) provisions of the CAA when Baby-Tenda harassed and then terminated her for raising environmental safety concerns. Following a hearing, an Administrative Law Judge (ALJ) concluded that Baby-Tenda had violated the CAA. In his Recommended Decision and Order (R. D. & O.), he ordered Baby-Tenda to reinstate Evans, and to pay back wages, compensatory and exemplary damages, and medical and relocation costs. Baby-Tenda appealed. We reverse.

BACKGROUND

Baby-Tenda, located in Kansas City, Missouri, manufactures and sells baby furniture. Evans was employed in Baby-Tenda's plant from March 1999 until her termination on March 8, 2000.

Evans testified that she filed a complaint with the Occupational Safety and Health Administration (OSHA) in October 1999 in which she claimed that Baby-Tenda did not have safety guard catches on some of its equipment, that an employee was injured on the job, and that paint fumes were escaping from Baby-Tenda's manufacturing plant into the outside air. HT at 230-231; *see also* Respondent's Exhibit (RX) 1. The record, however, does not contain a copy of this complaint that Evans says she filed with OSHA.

Thereafter, on January 4, 2000, Baby-Tenda's management gave Evans a written warning after she had confronted other employees concerning her personal life. RX 2; CX 1 at 93. Evans received a second written warning on February 8, 2000, because she ignored a verbal warning to avoid personal conversation with other employees and because she worked too slowly. RX 3; CX 1 at 92.

Also in February 2000, David Jungerman, Baby-Tenda's owner and president, and two other employees, Leo Wynne and Kenny Neff, removed asbestos insulation from pipes inside the Baby-Tenda plant during after-work hours. HT at 36, 78, 122, 237-241, 301. Evans testified that she learned about the asbestos removal from Neff, who was her boyfriend. HT at 236, 241, 301. Evans then called the Kansas City Health Department (KCHD) and requested literature regarding the hazards of asbestos, though, as discussed below, the record is not clear about the details of this call. HT at 242-243, 304-306, 311-312.

Lisa Jeter, another employee of Baby-Tenda, was also concerned with the asbestos removal. On March 7, 2000, she filed an asbestos complaint with KCHD, OSHA, and the Environmental Protection Agency (EPA). RX 18; HT at 76, 88, 106-107; *see also* CX 1 at 217-252. That same day KCHD inspectors arrived at the plant, but Baby-Tenda's secretary did not allow them to enter the plant because the plant manager was at lunch. RX 18. Then, the next morning, Evans asked her supervisor why there was dust on her worktables and why the tables had been moved from their usual location. HT at 249-251, 307. Later that morning, after meeting with Evans, Jungerman terminated her. Jungerman asserts that he did so because that morning Evans had been wandering around the plant talking and gossiping with other workers despite two previous warnings about leaving her workstation to wander and gossip. RX 17; HT at 260-261, 392-393. Shortly after Evans had been terminated, the KCHD inspectors arrived again and, with Jungerman, inspected the plant for asbestos. HT at 42, 394-395; *see also* RX 18.

Evans filed a whistleblower complaint with OSHA on April 4, 2000. CX 1 at 1. She alleged that Baby-Tenda management had harassed her and finally terminated her "after accusing her of contacting OSHA and the EPA." *Id*. OSHA found the complaint to be valid. CX 1 at 16-17, 21, 24. Subsequently, Baby-Tenda requested a hearing with

the Office of Administrative Law Judges. CX 1 at 13. The ALJ conducted a hearing on November 6 and 7, 2001, in Kansas City, Missouri. The ALJ issued his Recommended Decision and Order on September 30, 2002.

ISSUE

Did Evans prove by a preponderance of evidence that she engaged in activity protected under the CAA?

JURISDICTION AND STANDARD OF REVIEW

The environmental whistleblower statutes, such as the CAA, authorize the Secretary of Labor to hear complaints of alleged discrimination because of protected activity and, upon finding a violation, to order abatement and other remedies. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). The Secretary has delegated authority for review of an ALJ's initial decisions to the ARB. 29 C.F.R. § 24.8. *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, *inter alia*, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in *de novo* review of the recommended decision of the ALJ. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

DISCUSSION

The Legal Standard

Pursuant to the CAA:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) –
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan . . . [or,]

> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C.A. § 7622(a)(1), (3). *See also* 29 C.F.R. §§ 24.2(a), 24.3(a), 24.4(d)(3).

To prevail under the CAA, the complainant must establish by a preponderance of the evidence that she engaged in protected activity, that the respondent was aware of the protected activity, that she suffered adverse employment action, and that the protected activity was the reason for the adverse action, i.e., that a nexus existed between the protected activity and the adverse action. *Seetharaman v. General Electric Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21, slip op. at 5 (ARB May 28, 2004).[1]

In cases arising under the environmental whistleblower statutes, subject matter jurisdiction exists only if the complainant is alleging that the respondent illegally retaliated against him for engaging in activities protected by the environmental statutes' whistleblower provisions. *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 00-CAA-20, 01-CAA-09, 01-CAA-11, slip op. at 8 (ARB June 30, 2004). That is, the complainant must have alleged activities that further the purposes of those acts or relate to their administration and enforcement. *See* 29 C.F.R. § 24.2(a), (b). According to OSHA, in her April 5, 2000 complaint, the subject of this case, Evans alleged that Baby-Tenda violated the CAA. *See* CX 1 at 16-17, 21, 24. We note, however, that the record does not contain a copy of this complaint. Nevertheless, we will assume that Evans properly alleged violations of the CAA in her complaint. Therefore, the Department of Labor ALJ, and the ARB, have jurisdiction to decide this case.

Still, as noted, in order to prevail under the CAA, Evans must establish by a preponderance of the evidence that she engaged in protected activity. *Seetharaman*, slip op. at 5. To do so, Evans must demonstrate that her complaint was based on a reasonable belief that Baby-Tenda was violating the CAA by emitting paint fumes and asbestos into the ambient air. *See Kemp v. Volunteers of America of Pa., Inc.*, ARB No. 00-069, ALJ No. 00-CAA-6, slip op. at 4, 6 (ARB Dec. 18, 2000). The ALJ found that Evans engaged in activities protected under the CAA. We disagree. Although she may have engaged in activity protected under the Occupational Safety and Health Act, 29 U.S.C.A. § 651 *et seq.* (West 1999), Evans did not prove by a preponderance of the evidence that she engaged in CAA protected activity.

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[1] In discussing the legal standard governing proof of discrimination in cases arising under the CAA, the ALJ misstates the respondent's burden of proof under a "dual motive" analysis. *See* R. D. & O. at 16. Under the CAA, once the complainant has proven discrimination, the respondent need only demonstrate by a preponderance of evidence, not "clear and convincing" evidence, that it would have taken the same unfavorable personnel action in the absence of protected activity. On the other hand, under the Energy Reorganization Act, 42 U.S.C.A. § 5851(b)(2)(D) (2000), the respondent's dual motive burden is by clear and convincing evidence. *See Cox v. Lockheed Martin Energy Sys., Inc.*, ARB No. 99-040, ALJ No. 97-ERA-17, slip op. at 6 n.7 (ARB Mar. 30, 2001).

Generally, regulations issued under the OSH Act govern occupational exposure hazards, such as paint fumes and asbestos. *See* 29 U.S.C.A. § 651 *et seq.* (West 1999)*; see also* 29 C.F.R. § 1910.1001 (2003).[2] The purpose of the CAA, however, is to protect the public health by controlling air pollution. 42 U.S.C.A. § 7401(b)(1); *Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 764 (D.C. Cir. 1984). Under the CAA, an "air pollutant" is defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters *the ambient air*." 42 U.S.C.A. § 7602(g) (emphasis added). EPA regulations implementing the CAA define "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e) (2003). Exposure hazards to the general public in the ambient air, such as paint fumes and asbestos, are governed by EPA regulations issued under the CAA. Thus, the key to coverage of a CAA whistleblower complaint is potential emission of a pollutant into the ambient air. *Stephenson v. NASA*, ARB No. 98-025, ALJ No. 94-TSC-5, slip op. at 15 (ARB July 18, 2000).

Furthermore, to be protected under the whistleblower provision of an environmental statute such as the CAA, an employee's concerns or complaints must be "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Minard v. Nerco Delamar Co.*, 1992-SWD-1, slip op. at 5 (Sec'y Jan. 25, 1994). Employee concerns or complaints about purely occupational hazards are not protected under the CAA's employee protection provision. *Minard*, slip op. at 5-6. Consequently, in order for us to conclude that Evans's activities are protected under the CAA, we must determine whether Evans has adequately proven that, when she was expressing concerns or complaints about the paint fumes or asbestos, she had a reasonable belief that Baby-Tenda was emitting paint fumes or asbestos into the ambient air outside the plant building, thereby posing a risk to the general public. *Kemp*, slip op. at 4. We also note that, at least in this case, whether Evans engaged in CAA protected activities does not turn on demeanor based credibility determinations. *See* R. D. & O. at 18 (Evans's credibility) and 24 (Jungerman not credible).

Evans argues that the record supports the ALJ's findings that she engaged, either directly or "by extension," in four activities protected under the CAA. *See* Complainant's Response Brief at 7-10. We address each of Evans's activities.

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[2] Both the OSH Act and the CAA prohibit employers from discriminating against employees who engage in protected activity. *See* 29 U.S.C.A. § 660(a); 42 U.S.C.A. § 7622. As already noted, the Secretary of Labor has delegated final decision making authority in whistleblower actions under the CAA to this Board, but we have no comparable authority under the OSH Act. There, the sole whistleblower enforcement mechanism is an action the Secretary brings in a United States district court. *See* 29 U.S.C.A. § 660(c)(2).

1. October 1999 OSHA Complaint

Evans testified that in October 1999, she called OSHA, in part, because of her concern that paint fumes were escaping from Baby-Tenda's plant into the outside, ambient air. OSHA advised Evans that she had to file a written complaint before it would investigate. Soon thereafter OSHA investigated. The ALJ credited this testimony and found that Evans established that she engaged in protected activity under the CAA. R. D. & O. at 16-18, 25; HT at 230-233.

We disagree. Evans did not demonstrate by a preponderance of the evidence that she filed the October 1999 OSHA complaint or that she raised a concern therein about paint fumes escaping from Baby-Tenda's plant into the outside, ambient air.

The record does not contain a copy of the written complaint to OSHA. Evans even testified that she did not have any proof or confirmation that she filed the complaint. *See* HT at 335. Indeed, OSHA later determined that "Evans never actually lodged" the complaint. *See* CX 1 at 24.

Furthermore, OSHA compiled a list of the violations it found after investigating this October 1999 complaint. *See* RX 1. But this list does not mention any concern or violation regarding paint fumes escaping from Baby-Tenda's plant into the outside, ambient air. Nor does the OSHA list mention who filed the complaint.

The ALJ found that the testimony of Evans's co-workers, Stacey Hedrick and John Gilbertson, confirmed her testimony that she had complained to OSHA about paint fumes escaping from the plant. R. D. & O. at 17-18. Therefore, the ALJ found that the fact that paint fumes were not mentioned in the OSHA listing was not dispositive as to whether Evans mentioned paint fume emissions in her October 1999 complaint. R. D. & O. at 18.

According to the ALJ, Hedrick "testified that, to her knowledge, paint fumes were a large part of the 1999 OSHA complaint" and that she often had to utilize fans to alleviate her "work area" of paint fumes. R. D. & O. at 17. But Hedrick actually testified that OSHA investigated the paint fumes because Baby-Tenda was not keeping "the fumes from coming out into the rest of the plant." HT at 194. And when asked whether there was any allegation that paint fumes were going into the outside air, she responded, "I don't know." *Id.* Thus, Hedrick's testimony does not address or support Evans's testimony that she filed the October 1999 OSHA complaint, in part, because of her concern that paint fumes were escaping into the outside, ambient air. At best, Hedrick's testimony might support a finding that the October 1999 OSHA complaint articulated a concern about an occupational workplace hazard that the OSH Act, not the CAA, would cover.

Likewise, the ALJ misstates Gilbertson's testimony. The ALJ says that Gilbertson testified that Evans discussed her concerns with him about paint fumes escaping from the plant paint room "into the plant and the outside air." R. D. & O. at 17. But Gilbertson testified that Evans only expressed concerns about paint fumes "getting into the rest of the area" and that she was talking about paint fumes "in the paint room." HT at 139-140. Therefore, Gilbertson's testimony does not support a finding that Evans discussed a concern about paint fumes escaping into "the outside air." Moreover, the ALJ did not consider the contrary testimony of another of Evans's co-workers, Annette Begula, who testified that she did not remember anything being said about paint fumes at the time of the October 1999 OSHA complaint investigation. *See* HT at 162.

In short, the ALJ's finding that Evans filed the October 1999 OSHA complaint, in part, because of her concern that paint fumes were escaping from Baby-Tenda's plant into the outside, ambient air and, therefore, that it constituted protected activity under the CAA, is not supported by the preponderance of the evidence. Even assuming that Evans filed the October 1999 OSHA complaint, that complaint did not involve a concern that paint fumes were escaping from Baby-Tenda's plant into the outside, ambient air. Therefore, as to the October 1999 OSHA complaint, we conclude that Evans did not meet her burden to establish that she engaged in CAA protected activity.

2. Kansas City Health Department Asbestos Inquiry

The ALJ credited Evans's testimony that she contacted the Kansas City Health Department (KCHD) to get information on the hazards of asbestos exposure and raised concerns regarding asbestos leaving her workplace. R. D. & O. at 19, 25; HT at 242-243, 304-306, 312. The ALJ determined, and Evans argues, that this testimony established that she was about to commence, or cause to be commenced, a proceeding under the CAA and, therefore, that contacting the KCHD constituted protected activity. 42 U.S.C.A. § 7622(a)(1); R. D. & O. at 19, 25; Complainant's Response Brief at 9-10.

But we find that Evans did not demonstrate by a preponderance of the evidence that she notified the Health Department that asbestos was being emitted from the Baby-Tenda plant into the ambient air. Nor did she prove that she was about to commence, or cause to be commenced, a proceeding under the CAA, or that she filed a complaint.

Evans testified that after learning of the asbestos removal occurring at the Baby-Tenda plant, she contacted KCHD and asked to get "information about asbestos." HT at 242-243. She stated that she told the Health Department that she "felt that the plant I was working in had been removing asbestos illegally, that it had been brought into my home . . . and I just wanted to know the hazards of asbestos." HT at 243. She reiterated that she informed the Health Department that she "felt like there was asbestos illegally removed from where I worked at." HT at 304. But Evans seems to contradict this testimony when, on cross examination, she also testified that she did not notify the Health Department about the suspected asbestos exposure:

> Q: You did not notify OSHA in 2000 about any suspected asbestos removal, is that correct?
> A: That's correct.
> Q: And you didn't notify the EPA?
> A: No, I did not.
> Q: And you didn't notify the Kansas City Health Department about the asbestos exposure.
> A: No, I did not.
> Q: And you never talked to Mr. Jungerman about any of those concerns.
> A: No, I did not.

HT at 311-312.

And contrary to the ALJ's finding that Evans was about to commence, or cause to be commenced, a proceeding under the CAA, Evans's own testimony leads us to find just the opposite. Evans testified that she did not ask KCHD to come and inspect Baby-Tenda because it "was the Health Department" she was contacting, and she "just wanted some literature for myself." HT at 304-306.[3] She testified that she did not think of reporting her concern that Baby-Tenda was emitting asbestos because she "didn't think about that" and "didn't know how about going [sic] about that." HT at 305.

Therefore, when Evans called KCHD, she did not specify that Baby-Tenda, her employer, was removing the asbestos. Instead, Evans merely informed the Health Department that asbestos was removed from "the plant I was working in" and "from where I worked at." HT at 243, 304. There is no evidence that Evans identified her employer to KCHD. Thus, she informed KCHD only about a general concern relating to asbestos. Consequently, we find that Evans did not file a CAA complaint when she called KCHD because she did not report or otherwise indicate that her employer may have been violating the Act. Furthermore, this testimony does not constitute evidence that she specifically complained that asbestos was being emitted into the outside, ambient air.

3. March 2000 Asbestos Removal Complaints

The record indicates that on March 7, 2000, Lisa Jeter filed complaints against Baby-Tenda with KCHD, OSHA, and EPA regarding the asbestos removal. Jeter was concerned not only about protecting herself from asbestos dust, but also protecting her family from the dust she took home on her clothes. HT at 76-77, 80-81, 106-107; *see*

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[3] Pursuant to the Kansas City Air Quality Control Code, Chapter 8 of the Code of Ordinances, City of Kansas City, Missouri, the Kansas City Health Department inspects businesses when asbestos is being removed to guarantee removal is conducted properly and also responds to outdoor air complaints under the CAA. *See* [Kansas City] Code of Gen. Ords., Chapter 8, §§ 8-1- 8-20.

also CX 1 at 217-252. The ALJ found that these complaints clearly evidenced a concern about the air outside of the Baby-Tenda plant and were therefore protected acts. R. D. & O. at 20. The ALJ then found that because Jungerman mistakenly believed that Evans filed these complaints, Jeter's protected acts were attributable to Evans "by extension." R. D. & O. at 20.

Jungerman terminated Evans on the morning of March 8. HT at 260-261. The ALJ therefore concluded that Jungerman violated the CAA because by firing Evans the day after Jeter complained to the agencies about the asbestos, he clearly was terminating Evans because of protected activity, albeit Jeter's protected activity. R. D. & O. at 24.

Without deciding whether the ALJ properly attributed Jeter's protected acts to Evans, we nevertheless cannot agree that Jungerman violated the CAA when he terminated Evans the day after Jeter's complaints to OSHA, EPA, and KCHD. We find that Evans did not demonstrate by a preponderance of the evidence, as she must, that Jungerman knew about Jeter's protected acts (which the ALJ attributed to Evans) when he terminated Evans. *See Seetharaman*, slip op. at 5. Though KCHD inspectors arrived at the Baby-Tenda plant the same day that Jeter filed the complaints, the inspectors' record of their visit indicates that they were not allowed entrance into the plant because the plant manager (Jungerman) was at lunch. RX 18. We find no evidence that the inspectors told Jungerman or any other Baby-Tenda employee the reason for their visit on March 7. And it was only after Evans had been terminated on March 8 that the Health Department inspectors returned to the plant and inspected for asbestos. See HT at 42; *see also* RX 18.[4] Therefore, Evans cannot succeed on the theory that Jeter's protected acts are attributable to her because she has not proven that Baby-Tenda (Jungerman) knew about the protected activity when he terminated her.

4. Evans's March 8, 2000 Workplace Complaint About Asbestos Dust

Finally, Evans argues that the ALJ's determination that her questions to her supervisor about asbestos dust in her workplace on the day that she was terminated constituted protected activity under the CAA. R. D. & O. at 20, 25; HT at 249-251, 307; Complainant's Response Brief at 10. We reject this argument too because, again, Evans did not demonstrate by a preponderance of the evidence that she expressed a concern about asbestos escaping outside of the plant into the ambient air. Therefore, she did not engage in CAA protected activity.

Evans testified that on the morning of March 8 she asked her supervisor why there was dust on her worktables and why the tables had been moved from their usual location. HT at 249-250. Stacey Hedrick testified that, on March 7, she too had asked her supervisor about why there was dust in her work area and why tables had been moved.

[4] The record also indicates that OSHA and the EPA did not investigate the complaints that were filed with them until after Baby-Tenda had terminated Evans. *See* RX 19, 21; CX 1 at 217-252.

HT at 185-186. The ALJ determined that "[i]n combination with the testimony of Ms. Jeter, Ms. Hedrick, and Mr. Gilbertson, it is clear that the concern over the asbestos dust included the concern that it would escape from the Baby-Tenda facility to outside of the plant." R. D. & O. at 20.[5]

But the record simply does not support the ALJ's finding that Evans and Hedrick were concerned with anything other than conditions within the plant. Evans and Hedrick only expressed their concern with an occupational exposure hazard. The OSH Act, not the CAA, covers that concern.

CONCLUSION

Evans must demonstrate by a preponderance of the evidence that she engaged in CAA protected activity. Because she has not done so, this whistleblower claim must fail. And even when we assumed, *arguendo*, that Jeter's CAA protected acts could be attributed to Evans, her claim also fails because, again, she did not prove by a preponderance of the evidence another necessary element to prevail in CAA whistleblower litigation: namely, that Baby-Tenda (Jungerman) knew about the protected acts when it terminated her. Therefore, we **DISMISS** this complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

[5] Jeter and Gilbertson also testified about their concerns regarding the asbestos removal but did not indicate that they expressed their concerns to Baby-Tenda's management. HT at 72-82, 88, 98-101, 105-107 (Jeter); 120-125, 131-139, 141-153 (Gilbertson).