U.S. Department of Labor

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

In the Matter of:

B. DAVID MOURFIELD, II, **ARB CASE NO. 00-055**
00-056

COMPLAINANT, **ALJ CASE NO. 99-CAA-13**

v. **DATE: December 6, 2002**

FREDERICK PLAAS & PLAAS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward A. Slavin, Jr., Esq., *St. Augustine, Florida*

For the Respondent:
Alec J. Beck, Esq., David A. Davenport, Esq., *Edina, Minnesota*

FINAL DECISION AND ORDER

When Respondent Plaas, Inc. (Plaas) laid off Complainant Bruce David Mourfield, II, in a seniority-based scheduled reduction in force as the construction project he was working on neared completion, Mourfield filed a complaint of discrimination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (West 1995), the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998), the Solid Waste Disposal Act (SWDA), 42 U.S.C.A. § 6971 (West 1995), and the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 1995). After a full hearing on the merits, the ALJ dismissed the complaint on the grounds that Complainant failed to show that Respondent's proffered reasons for the lay-off were pretextual. Recommended Decision and Order (R. D. & O.) at 83.

The record in this case has been reviewed and we agree with the ALJ that the

Complainant did not carry his burden of proving that discrimination was a motivating factor in the adverse actions taken against him.[1]

Facts

The facts are stated in considerable detail in the ALJ's R. D. & O. at pp. 4-52. Briefly, Plaas is an industrial mechanical contractor that was performing welding work on a new construction project for Bimbo Cereal in Dawn, Texas, when Mourfield was hired on November 10, 1998, as a welder/pipefitter. R. D. & O. at 4, 6. Plaas was scheduled to begin work on that project in August 1998, but actually began work in September. R. D. & O. at 7. The work was to be completed in December. R. D. & O. at 5. Mourfield was laid off on December 23, 1998, in accordance with a reduction in force plan arrived at in November 1998. R. D. & O. at 8. Plaas continued to reduce its workforce at the Bimbo Cereal site until April 1999, when no Plaas personnel or equipment remained at the worksite. R. D. & O. at 49.

Mourfield alleged that he engaged in a number of protected activities before his lay-off, including union organizing activities and complaints about occupational safety and health. Mourfield's alleged protected complaints pertained to: 1) leaking of argon gas from cylinders used in welding; 2) open burning of trash on nearby land; 3) the existence of a hostile work environment; 4) failure to train him in the Hazard Communication (Right to Know) program and the Material Safety Data Sheet (MSDS) program; 5) the presence of an intoxicated worker on the job site; 6) miscellaneous unsafe work practices.

ALJ's Decision

With the exception of a November and a December 16th complaint about leaking argon (and complaints made in a private meeting with the OSHA investigator about argon leaks and chemical releases from burning trash),[2] the ALJ found that all of Mourfield's other activities were not protected under the above statutes. He found that many of Mourfield's complaints related to occupational safety and health, not environmental concerns. Applying the Secretary's and the ARB's standard that complained of hazards must be reasonably perceived as directly affecting the

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[1] For the reasons discussed below, we also have serious doubt as to whether any of Mourfield's asserted protected activities were even covered by the statutes he invoked.

[2] The ALJ found that Plaas had no knowledge of the protected activities revealed in the private meeting and therefore those complaints could not have been the basis of retaliatory action. R. D. & O. at 73-74.

environment, *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997); *Crosby v. Hughes Aircraft Co.*, 85-TSC-2, slip op. at 11 (Sec'y Aug. 17, 1993), the ALJ found that the complaints about open burning and an intoxicated worker did not meet this standard. In addition, he determined that the complaints about lack of HAZCOM and MSDS training did not "touch upon" the environmental laws and therefore were not protected activities under those laws. *See* R. D. & O. at 55-66.

Although the ALJ questioned whether leaks of argon gas could constitute an environmental hazard, he concluded that Mourfield's belief that release of large quantities of argon into the air would violate an environmental statute was reasonable, given Mourfield's limited education in chemistry. R. D. & O. at 57.

The ALJ identified five possible adverse employment actions:

- Hostile work environment
- Alleged discharge on December 16, 1998
- The lay-off on December 23, 1998
- Breaking off settlement negotiations
- Blacklisting

R. D. & O. at 74-78. He found that the latter four did constitute adverse employment actions, but that Mourfield did not carry his burden of showing that they were motivated by retaliation. Mourfield withdrew his claim that complaints about a hostile working environment were protected activities. R. D. & O. at 65. In any event the ALJ found that any hostile work environment came from Mourfield's fellow workers in response to his union activities, and that Mourfield failed to establish Plaas' responsibility for any such environment. R. D. & O. at 75.

The ALJ concluded that the only evidence linking or showing a "nexus" between Complainant's November report of leaking argon gas and any adverse action was the proximity in time between that report and the adverse actions in December or later. He found "under the facts of this case, the court is not persuaded a nexus exists on that basis alone." R. D. & O. at 79. As to Mourfield's alleged "firing" on December 16,[3] the ALJ determined that it occurred before he engaged in any protected activity that day. *Id.*

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[3] Mourfield and a supervisor argued on December 16 about Mourfield's right to leave his duty station and search the work site for an OSHA investigator. The parties strenuously disagreed on whether Mourfield was "fired" at that time. There seems to be no dispute, however, that Mourfield continued to work for Plaas at the Bimbo Cereal site until December 23, 1998.

The ALJ found that Mourfield had shown that his report on December 16 of leaking argon was a "likely cause" of both his layoff on December 23 and his blacklisting (that is, the Termination Form marking him ineligible for rehire C (Complainant's Exhibit) 2.) Further, he held that the same protected activity "could have motivated Respondents' [sic] to break off settlement negotiations."[4] R. D. & O. at 80. Summing up, the ALJ said "the court concludes Mr. Mourfield has made a ***prima facie*** case [emphasis added] that his environmental protected activity" was the cause of these three adverse actions.[5] *Id.*

The ALJ further found that Respondent demonstrated that it had a legitimate, non-discriminatory reason to lay off Mourfield on December 23, that is, a seniority-based, economically necessary lay-off plan that had been arrived at before Mourfield's protected activity of December 16. *Id.* at 81. The ALJ also said he was "persuaded that any blacklisting was a result of Respondent's displeasure with Mr. Mourfield's pro-union activity, and not with any environmental protected activity." *Id.* at 82. While noting that he did not have jurisdiction of claims of retaliation under other labor laws, the ALJ offered his opinion that "the primary source of any animus between Mr. Mourfield and Respondents resulted from his union activity,[6] and to a lesser extent from his multiple [occupational] safety concerns . . .." *Id.* Finally, the ALJ concluded that Plaas had legitimate reasons for breaking off settlement negotiations, *i.e.*, the impasse reached over payment of Mourfield's attorney's fees, and Plaas' need to hire another welder as soon as possible. *Id.* at 82.

The ALJ found that Mourfield had failed to demonstrate that Plaas' reasons for its actions were pretexts for discrimination and that Mourfield had not carried his burden of proof that protected activity was a motivating factor in the adverse actions. The ALJ recommended that the complaint be dismissed. *Id.* at 84.

Complainant's Position on Appeal

Complainant does not contest before us any of the ALJ's factual findings. His

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[4] The ALJ assumed "for the purposes of this case and the sake of argument, that Respondents' ending of negotiations was an adverse employment activity." R. D. & O. at 77.

[5] See discussion below at 5 of *prima facie* case and proof of discrimination by a preponderance of the evidence analyses.

[6] The termination form noted "at times disrupted job site (union organizer)." Complainant's Exhibit 2 A and B.

principal argument is that the ALJ's tangential, somewhat tentative finding that Plaas may have been motivated in its adverse actions against Mourfield by anti-union animus and by Mourfield's OSHA complaints, demonstrates that Plaas acted out of "illegitimate" motives. Mourfield challenges the ALJ's legal conclusion, which was based on the Secretary's and the ARB's decisions under the environmental whistleblower laws, that the safety or health hazard complained of must "touch upon" or be "reasonably perceived" as a hazard to the environment and *public* safety and health to be protected and that hazards limited to a workplace but not endangering the public are not protected. Mourfield also seeks review of the ALJ's finding that pro-union activities do not "fall under environmental whistleblower protection." R. D. & O. at 64.

Mourfield's brief assumes that he proved that discrimination was a motivating factor in Plaas' adverse actions and that the ALJ should have reached the "dual motive" stage of the analysis. Under that analysis, Mourfield's key argument is that an employer cannot carry its burden of proof that it would have taken the same action against the Complainant for legitimate reasons when the reasons assigned by the employer are unlawful under other laws. Mourfield argues, "[t]he employer bears the burden to show that it would have taken action without its illegal motives. A 'legitimate' reason is a lawful reason. *See* Black's Law Dictionary. A facially discriminatory explanation is definitely not 'legitimate.'" Brief of Complainant David B. Mourfield, II, at p. 5. Mourfield continued, "Respondent's discrimination against union protected activity is not a legitimate reason because it is an unlawful reason." *Id.* at 8.

Discussion

To state a claim under the environmental acts, the complainant must show: 1) that he engaged in protected activity; 2) that the respondent knew about the protected activity; 3) that the respondent took adverse action against him; and 4) that the protected activity was the likely reason for the adverse action. *See Carroll v. Bechtel Power Corp.*, 91-ERA-46 (Sec'y Feb. 15, 1995), *aff'd sub nom. Carroll v. Dep't of Labor,* 78 F.3d 352 (8th Cir. 1996), citing *Dartey v. Zack Co. of Chicago,* 82-ERA-2, slip op. at 7-8 (Sec'y Apr. 25, 1983). In other words, the complainant must prove by a preponderance of the evidence that the employer discriminated intentionally and thus the burden rests always with the complainant. To meet this burden, a complainant may prove that the legitimate reasons proferred by the employer were not the true reasons for its action, but rather were a pretext for discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-508 (1993).

As a threshold matter, there is considerable doubt that Mourfield proved that any of his activities were protected under the environmental statutes on which he relied here. We agree with the ALJ that all of the alleged protected activities, except for the complaint about leaking argon, were not protected. It is questionable whether the latter belief was reasonable; as the ALJ noted, the hazards of argon gas are asphyxiation, which could only occur in a confined space, and cylinder rupture, both of which are clearly occupational safety hazards, not environmental. This issue is moot, however, in light of our ultimate conclusion, discussed below, that Mourfield did not carry his burden of proof that retaliation for raising environmental safety concerns was a motivating factor in any of the alleged adverse actions taken against him.

This case is similar to *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352 (8th Cir. 1996), and the ALJ's analysis should have proceeded along similar lines:

> Assuming Carroll established a prima facie case under *Couty* [*v. Dole*], Bechtel met its burden of production by articulating a legitimate nondiscriminatory reason for releasing and subsequently terminating Carroll: a general decline in available work for which Carroll was qualified coupled with a policy of retaining more highly-qualified engineers. At that point, the issue of whether or not Carroll had previously established a prima facie case under *Couty* became irrelevant. "The presumption [of retaliatory discharge created under the *Couty* factors], having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture." [*St. Mary's Honor Center v.*] *Hicks*, 509 U.S. at 510-11 . . . .. Once the employer has met its burden of production, "the trier of fact proceeds to decide the ultimate question." *Id.* As such, we conclude that the Secretary's order properly focused on whether Carroll proved by a preponderance of the evidence that Bechtel had retaliated against him for engaging in protected conduct rather than whether Carroll had articulated a prima facie case under *Couty*.

78 F.3d at 356.

We reject Mourfield's argument that Plaas did not establish that it had legitimate, nondiscriminatory reasons,[7] for laying off Mourfield and breaking off settlement

[7] "Legitimate nondiscriminatory reasons" in this context refers to reasons which would allow the trier of fact to conclude the actions did not occur because of discrimination

negotiations, and that Plaas blacklisted him for discriminatory reasons. Plaas presented abundant evidence, and the ALJ found, that the lay-off of December 23 was based on a pre-existing plan for a reduction in force as the construction project was nearing completion and fewer workers were needed. R. D. & O. at 37-39; 81. Mourfield had been identified as one of the workers to be laid off on the basis of seniority and and his lay off carried out on that basis. Mourfield's claim that marking his lay-off notice "Not eligible for rehire" amounted to blacklisting is questionable because Plaas offered to rehire him in January 1999, R. D. & O. at 44, and there was no evidence that Plaas conveyed the information on that form to any other employer. Moreover, there was uncontested testimony that two other companies had contacted Plaas seeking references on Mourfield and were told he was "a good hand" and "a good welder." R. D. & O. at 78. The evidence was that if any animus existed, it was based on Mourfield's union activity, not any environmental protected activity. C-2B; R. D. & O. at 82. Furthermore, Plaas demonstrated that it broke off settlement negotiations because of Mourfield's demand for attorney's fees and because Plaas needed to hire another welder immediately. R. D. & O. at 82.[8]

In addition, we reject Mourfield's argument that motives that are illegal under other laws, such as the National Labor Relations Act or the Occupational Safety and Health Act, establish discrimination under the environmental whistleblower laws. The Clean Air Act, as an example, prohibits discrimination *because* an 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*, (2) testified or is about to testify *in any such proceeding*, or (3) assisted or participated or is about to assist or participate in any manner *in such a*

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under the cited statutes. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981) ("We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employee articulates lawful reasons for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.").

[8] Although we find that Mourfield has not carried his burden of proof, assuming retaliation had been shown to be a motivating factor in the adverse actions, for the reasons discussed in the text, we would find that Plaas would have met its burden of showing the same result under a dual motive analysis. *See Korolev v. Rocor International*, ARB No. 00-006, ALJ No. 98-STA-27, slip op. at 4-5 (ARB Nov. 26, 2002).

> *proceeding or in any other action to carry out the purposes of this chapter.*

42 U.S.C.A.§ 7622(a) (emphasis added).

The Secretary and the Board have held that to be protected, safety and health complaints must be related to requirements of the environmental laws or regulations implementing those laws; the employee protection provisions protect employees from retaliation only if they have reported safety and health concerns addressed by those statutes. The seminal case so holding is *Aurich v. Consolidated Edison Co. of New York*, No. 86-CAA-2, slip op. at 4 (Sec'y Apr. 23, 1987) ("Any complaints regarding effects on public safety or health, or concerning compliance with EPA regulations, under the CAA, are protected under the CAA, but those related only to occupational safety and health are not."). *See also Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-2, slip op. at 4 (ARB Apr. 8, 1997); *DeCresci v. Lukens Steel Co.*, 87-ERA-13, slip op. at 4-5 (Sec'y Dec. 13, 1993), and cases discussed therein. If complaints closely related to public health and safety, such as complaints about air quality in the workplace, are not protected, *a fortiori,* complaints or activities protected under other laws not even touching upon health and safety, such as the right to organize under the NLRA, are not protected under the environmental whistleblower laws. In addition, the Secretary and the Board have held that "[a]n employee's complaints must be 'grounded in conditions constituting reasonably perceived violations' *of the environmental acts. Johnson v. Old Dominion Security*, Case Nos. 86-CAA-3, 86-CAA-4, and 86-CAA 5, Final Dec. and Order, May 29, 1991, slip op. at 15; *see also, Aurich v. Consolidated Edison Co.*, Case No. 86-ERA-2 [sic], Sec. Rem. Order, Apr. 23, 1987, slip op. at 4." *Crosby v. Hughes Aircraft Co.*, 85-TSC-2, slip op. at 26 (Sec'y Aug. 17, 1993) (emphasis added). The record is clear that, with the possible exception of leaking argon,[9] Mourfield could not have reasonably perceived the conditions of which he complained to be violations of the environmental laws. Rather, they may be violations of OSHA.[10]

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[9] But see discussion above at 5.

[10] We reject Mourfield's contention that any concern raised about a hazardous chemical for which a material safety data sheet is required under the Occupational Safety and Health Act gains automatic protection under the CERCLA. See 42 U.S.C.A § 11022(c) (West 1995). Among other things, this would require us to assume that Congress intended that there be two employee protection procedures applicable to the same complaint, namely the CERCLA whistleblower provision and the OSHA 11(c) protection, regardless of the inconsistencies between them.

Similarly, we do not accept Mourfield's interpretation of the CERCLA provision protecting any employee who "has provided information to a State or to the Federal

We find that Plaas produced legitimate nondiscriminatory reasons for its actions and that Mourfield did not demonstrate that those reasons were pretextual. Mourfield did not carry his burden of proving by a preponderance of the evidence that discrimination was a motivating factor in the adverse actions taken by Plaas.

Accordingly, for the reasons discussed above, the complaint in this case is **DENIED.**[11]

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

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government," 42 U.S.C.A § 9610(a), as protecting under CERCLA complaints to OSHA concerning only occupational safety or health hazards. Here again, this would require an assumption that Congress intended the employee protection provision of CERCLA to be a comprehensive whistleblower statute protecting any and all disclosures to government, not even limited to safety and health concerns. This we are unprepared to do.

[11] Plaas' protective petition for review, docketed as ARB No. 00-055, is denied as moot.