U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

IN THE MATTER OF

FRANCES MACLEOD,

COMPLAINANT,

v.

LOS ALAMOS NATIONAL LABORATORY,

RESPONDENT.

ARB CASE NO. 96-044

ALJ CASE NO. 94-CAA-00018

DATE: APR 23 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1]

DECISION AND ORDER OF REMAND

Complainant Francis MacLeod (MacLeod) filed this complaint under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988 and Supp. V 1993).[2] MacLeod was employed as a technician at Respondent Los Alamos National Laboratory (Los Alamos) from March 17, 1992, until July 2, 1993, when she was released by the laboratory back to her contractor. She claims that her termination by Los Alamos was directly related to the numerous nuclear safety concerns she raised during her employment.

In a Recommended Decision and Order (R. D. and O.) issued on November 22, 1995, the Administrative Law Judge (ALJ) concluded that the complaint should be dismissed. He found that MacLeod failed to meet her burden to prove that her termination was based in whole or in part on her protected activity. R. D. and O. at 33. Upon review, we find that the ALJ's recount of

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[1]On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under this statute and the implementing regulations to the newly created Administrative Review Board (Board). Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996. Secretary's Order 2-96 contains a comprehensive list of the statutes. executive order, and regulations under which the Board now issues final agency decisions.

[2]*See* MacLeod's Complaint, filed December 27, 1993; Recommended Decision and Order at 2. The ALJ docket number erroneously indicates filing under the Clean Air Act (CAA) but is maintained for record keeping consistency.

the evidence is thorough and his relevant findings of fact are supported by the record. However, we disagree with his legal conclusion and his recommendation to dismiss this claim. *See* 29 C.F.R. § 24.6 (1996).

The ALJ properly found that MacLeod engaged in protected activity under the ERA when she: (1) disclosed to a Department of Energy (DOE) auditor that a tank in the Los Alamos facility had been leaking, (2) threatened to have her superiors held accountable for the fact that she often worked on the Dicesium Hexachloroplutonate (DCHP) Experiment without proper supervision or certification, and (3) raised questions about Los Alamos' compliance with ALARA.[3] R. D. and O. at 28-29. The ALJ further found that while MacLeod established a *prima facie* case of retaliation based on the first two of these protected activities, she failed to prove either that Los Alamos' stated reasons for her termination were pretextual or that her protected activity more likely motivated the decision. R. D. and O. at 29-32. The ALJ credited the testimony of Mark Dinehart who testified that he made the decision to terminate MacLeod during a meeting convened on July 1, 1993. We find that under applicable law Dinehart's testimony establishes that improper motives contributed to his decision.

LOS ALAMOS' EXPLANATION FOR THE TERMINATION

MacLeod's termination followed an incident that occurred on June 25, 1993. On that day, for the second time in a short period, MacLeod failed to properly account for special nuclear material on the MASS computerized system.[4] Transcript (T.) at 228-29. Dinehart testified that MacLeod's mistake on the MASS system was significant and that he and MacLeod's immediate supervisor, Mary Ann Reimus, decided to document the error to impress upon MacLeod the importance or seriousness of her making this same mistake twice. T. at 403-404. Dinehart and Reimus met with MacLeod on June 28 to discuss the issue. Los Alamos' Exhibits (LX) 35. Dinehart had no intention of terminating MacLeod at that time. T. at 404.

At the meeting, MacLeod admitted that she made the mistake, but she believed that He proposed reprimand was unfair because she committed the error in the course of working on the DCHP experiment while not properly supervised or certified. T. at 177. MacLeod stated that if she was going to be held accountable, then everyone up the line should be held accountable. T. at 181; MacLeod's Deposition (M.D.) I at 87. Dinehart perceived her reaction as a threat and as a failure to accept ownership or responsibility for her own workplace conduct. T. at 370, 405.

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[3]ALARA is an acronym for "as low as is reasonably achievable." Nuclear Regulatory Commission regulations promulgated pursuant to the ERA require licensees to make every reasonable effort to maintain radiation exposures and releases of radioactive materials in effluents to unrestricted areas as low as is reasonably achievable. 10 C.F.R. § 20.1(c) (1992); Transcript at 262-65.

[4]MASS refers to a material accountability safeguards and security system whereby data is entered in the computer to track the location of special nuclear materials within the facility. T. at 168-69, 408.

Dinehart tried to arrange another meeting with MacLeod to discuss the issue further but she either refused or made herself unavailable. T. at 406-407. MacLeod claims that she wanted a representative present. M.D. II at 10, 12. At this point Dinehart notified security to have her laboratory access privileges removed. Dinehart and Reimus discussed the amount of time being wasted on the conflict and the fact that the project was winding down, and Dinehart began considering and seeking authorization for termination. T. at 409, 411.

Rose Ann Casale, a manager for MacLeod's contractor, was aware that Dinehart was considering terminating MacLeod. Casale Deposition (C.D.) at 13. In fact, her office sent out a termination notice on June 29, which MacLeod received on June 30 or July 1. C.D. at 15-16; M.D. II at 16-17. MacLeod contacted Casale, who explained that the notice was an "accident." M.D. II at 13. MacLeod or her contractor arranged another meeting. T. at 410.

Dinehart, MacLeod, Casale, and another contractor representative met on July 1. *Id.* They discussed MacLeod's refusal to meet with Dinehart, the MASS incident, her lack of contribution to the DCHP experiment, her problems being a team player, and her "Rocky nets mentality." *Id.; see* C.D. at 14. During the process of the meeting, Dinehart informed MacLeod that Los Alamos no longer needed her services. T at 41 1.

In a letter written at the request of the contractor immediately following the meeting, Dinehart elaborated that the primary reason for MacLeod's termination was her inability to work as a team member. LX 37. In addition he cited her "union mentality," her skill level, and Los Alamos' overstaffing.

Dinehart testified that at the time the July 1 meeting convened, he had not made up his mind to terminate MacLeod, although he already had gotten clearance to do so. T. at 411. Termination was a likely event, but "there was no reason that [he] was held to that decision at that point." *Id.* Reflecting back, Dinehart stated that MacLeod's threat to hold him and other managers accountable "contributed" to his termination decision in the sense that she was not taking ownership or responsibility for her mistake. T. at 371-72. He explained:

> I think she just had to say, "I recognize I made a mistake. It is the second time I've made this mistake. I either don't understand the process or I need some help on it or I need to pay more attention to this part of the experiment." . . . I think we would have still documented that issue, but if she'd accepted ownership of that, I don't think the events that happened immediately preceding that or quickly after that would have probably happened. They may have happened, I can't tell what would happen in the future.

T. at 406; *see* R. D. and O. at 15-16.

In addition, according to Dinehart, MacLeod developed a "union mentality" when she worked in a unionized workforce at a nuclear facility in Rocky Flats, Colorado, and "carried" it over to Los Alamos. T. at 415-16; LX 37. He explained that the workforce at Rocky Flats was very compartmentalized and performed singular tasks whereas Los Alamos employees are expected to understand all aspects of the process. T. at 415-16. Dinehart also explained his use of the phrase "union mentality" as follows:

Q. Did Ms. MacLeod's non-union way of doing things and her union mentality include environmental safety and health [ES&H] concerns by her?

A. If you categorize the mezzanine issue as a ES&H safety issue, yes. Some people think glove sizes, ring sizes, other things, are safety issues, so I'm not going to categorically say those aren't safety issues.

Q. So these were included in what was the reference to her non-union way and union mentality?

A. That reference was mostly just in the way of doing business, not to deal with safety issues.

T. at 358-59. The following excerpt from the hearing transcript, quoting a passage from Dinehart's deposition, provides additional insight into the meaning of his "union mentality" phrase:

Answer by you: "That's just my way of describing the fact that if we didn't do it the Rocky way, it was not the right way to do it."

Question: "Do what the Rocky way?"

Answer: "The number of things she mentions."

Question: "The ES&H things?"

Answer: "I'm not sure they're all ES&H related. They're process related."

Question: "Some of them are ES&H related?"

Answer: " Certainly. "

Is that correct, that some of her, regarding this union way of doing things, were ES&H related?

A. I'm specifically talking about gloves and things, so yes.

Q. And ALARA, correct? The mezzanine issue as you put it?

A. Yes.

T. at 359-60.

ANALYSIS

MacLeod argues that Dinehart's description of "union mentality" to include her ALARA concerns is irrefutable evidence that protected activity was an underlying cause of her termination and proves, at minimum, that the termination decision was based on both legitimate and illegitimate reasons, *i.e.*, "dual motives." We agree. Although the ALT acknowledged this description of the phrase "union mentality" in his recitation of the hearing testimony, R. D. and O. at 18, he did not discuss Dinehart's admission in his legal analysis. The ALJ found Dinehart's

testimony to be credible and we agree. His candid testimony regarding what he meant by "union mentality" is significant and cannot be ignored.

Dinehart's description of MacLeod's "union mentality" explicitly includes, at least in part, her complaints about ALARA and glove sizes. Los Alamos does not seriously dispute the ALJ's finding that MacLeod's ALARA concerns about radiation exposure in the mezzanine were protected. Even if, as the ALJ found, MacLeod's refusal to remain in the mezzanine area based on these concerns lost protection after being addressed by management, R. D. and O. at 29 n.15; 31, Dinehart's criticism was directed in part to the complaints themselves and the nuisance of MacLeod's persistent action in raising these complaints.

The ERA's whistleblower provision specifically forbids discharge of an employee because that employee "notified [her] employer of an alleged violation of the ERA ...." 42 U.S.C. § 5851(a)(1)(A). This provision is interpreted broadly to protect nuclear or radiation safety complaints based on reasonably perceived violations of the ERA and its implementing regulations. *Keene v. Ebasco Const., Inc.,* ARB Case No. 96-004, Feb. 19, 1997, slip op. at 7-8; *see Mosley v. Carolina Power & Light Co.,* Case No. 94-ERA-23, ARB Dec., Aug. 23, 1996, slip op. at 4; *Sprague v. American Nuclear Resources, Inc.,* Case No. 92-ERA-37, Sec. Dec., Dec. 1, 1994, slip op. at 5-7 (complainant's questions about radiation exposure protected). Protection is not dependent on proving an actual violation of the ERA. *Robainas v. Florida Power & Light Co.,* Case No. 92-ERA-10, Sec. Dec., Jan. 19, 1996, slip op. at 11 n.7.

In accordance with this case law, MacLeod's complaints that spending idle time in the mezzanine violated ALARA requirements were protected. MacLeod objected to employees remaining in the "hot" plutonium facility when no immediate work was required to be performed in the glove box. T. at 141.[5] She complained about employees unnecessarily playing cards and computer games in the mezzanine located in the hot area. M.D. I at 60; T. at 386. She was concerned about exposure and the danger and complication of exiting the hot area in the event of a release. M.D. I at 62. In Reimus' opinion, ambient transmission of radiation was no greater in the mezzanine than in cold areas. T. at 237. However, she acknowledged that the risk of radiation exposure in the mezzanine could be greater in the event of an accident. T. at 237-38. Even though Dinehart believed that MacLeod's concerns were ultimately wrong, he agreed that they were reasonable. T. at 351.

In addition, MacLeod's complaints about oversized gloves were protected as reasonable, nuclear safety-related complaints. *See* 42 U.S.C. § 5851(a)(1)(A); *Bechtel Const. Co. v. Secretary of Labor,* 50 F.3d 926, 931 (11th Cir. 1995) (complainant's questioning instructions on safety procedures protected). MacLeod complained that she was afraid she would drop a sample of plutonium because her gloves were too big, and she requested that Los Alamos supply her with gloves in half sizes. M.D. I at 110. Accidents can and have occurred at Los Alamos involving escapes of plutonium through a breach of the glove box. T. at 238-39. Plutonium is a radioactive material that poses an environmental and health hazard if mishandled. T. at 182-83. Although MacLeod did not allege these complaints as protected activity in the earlier stages of litigation,

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[5]A hot area is one where radioactive substances are being worked with and there is the potential for an exposure event. T. at 147.

we are not precluded from considering the issue now. MacLeod referred to these particular complaints as safety complaints in her deposition testimony prior to hearing, and thus, Los Alamos was on notice that such allegations existed. Moreover, Dinehart testified at the hearing concerning these particular complaints about oversized gloves and conceded that they could be deemed safety issues. T. at 358, 360. *Cf. Yellow Freight Sys. Inc. v. Martin, 954* F.2d 353, 358-59 (6th Cir.1992)(unpleaded issue may be tried by implied consent).

The evidence concerning the protected activity component of MacLeod's "union mentality" amounts to direct evidence of discrimination and demonstrates that Dinehart was motivated in part by illegitimate reasons. Furthermore, we find that MacLeod's reaction to Dinehart's proposed reprimand for the MASS transaction error had both protected and unprotected aspects. While she may have failed to assume full responsibility for her actions, she also threatened to hold the chain of command accountable. T. at 370. Even if MacLeod did not specifically reference a government agency contact, Dinehart perceived her statements as a threat to expose alleged wrongdoing -- inadequate supervision and certification. T. at 370, 195. Reimus' testimony supports a finding that MacLeod's allegation constituted a reasonably perceived violation. T. at 178-82. The ALJ found MacLeod's threat to be protected, R. D. and O. at 28, and we adopt his finding. The whistleblower provision protects an employee who is "about to commence or cause to be commenced" or "about to assist or participate in any manner" in a proceeding under the ERA. 42 U.S.C. § 5851(a)(1)(D) and (F).

The ALJ's acceptance of Dinehart's criticism of MacLeod's reaction to the proposed reprimand is based in some part on the erroneous finding that these "complaints of inadequate supervision were irrelevant to [MacLeod's] failure to adequately perform the MAS[S] transactions, but were merely presented as a way to avoid responsibility for her mistakes at a task essential to a safe work environment. " R. D. and O. at 31. Ordinarily, where the complainant has a reasonable belief that the respondent is violating the law, other motives he may have for engaging in protected activity are irrelevant. *Robainas,* slip op. at 15; *Oliver v. Hydro-Vac Serv., Inc.,* Case No. 91-SWD-00001, Sec. Dec., Nov. 1, 1995, slip op. at 14; *Carter v. Elec. Dist. No. 2,* Case No. 92-TSC-11, Sec. Dec., Jul. 26, 1995, slip op. at 19. Contrary to the ALl's finding, MacLeod's complaints about inadequate supervision and certification were related to her error on the MASS transaction. MacLeod was not properly supervised at the time of the error, and despite her training and certification, reasonably believed that inadequate supervision contributed to her mistake. *See, e.g.,* M.D. I at 78-81; T. at 177-79. Reimus' testimony indicates that it was reasonable for MacLeod to believe that others should have been disciplined for their failings related to this incident. T. at 181-82. Thus, in this case, as in *Robainas* and *Oliver,* the threat to whistleblow and the employee's plea to management were interrelated. In sum, while MacLeod may not have exhibited the maturity or responsibility that Dinehart sought in an employee by failing to "take ownership" of the mistake, she also was making protected allegations and threats to expose wrongdoing by management.[6]

MacLeod's absence from the worksite, if unprotected; her skill level; and the winding down of the experiment were legitimate reasons contributing to Dinehart's decision. R. D. and O.

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[6]We agree with the ALJ's finding that MacLeod's comment to a DOE auditor was not a motivating factor in her termination. R. D. and O. at 32.

at 31. However, illegitimate reasons also contributed to his decision and Los Alamos may, therefore, avoid liability only if it "demonstrates by clear and convincing evidence" that it would have taken the same action in the absence of the protected activity. 42 U.S.C. § 5851(b)(3)(D); *Yule v. Burns Int'l Sec. Serv.,* Case No. 93-ERA-12, Sec. Dec., May 24, 1995, slip op. at 7-8; *Gaballa v. Atlantic Group, Inc.,* Case No. 94-ERA-9, Sec. Dec., Jan. 18, 1996, slip op. at 34 and cases cited therein; cf. *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) (Title VII).

Los Alamos failed to meet its burden. It neither argued nor proved that it would have made the same decision in the absence of MacLeod's "union mentality," which included her protected complaints about safety issues. To the contrary, the fact that Dinehart memorialized and emphasized this particular reason in his post-termination explanation letter indicates the significant role it played in forcing his ultimate decision. On the other hand, the record shows that MacLeod's absence from the mezzanine, her skill level, and Los Alamos' overstaffing were not problems that would have resulted in Dinehart terminating MacLeod in the absence of MacLeod's protected activity. Just a few months earlier Dinehart considered MacLeod for a promotion and although Reimus told him MacLeod was not ready yet, Reimus thought that MacLeod eventually would be ready to move up. T. at 193. Furthermore, before prompting, Reimus testified repeatedly that MacLeod's absence from the mezzanine area was not much of a problem for her. T. at 187, 205-206.

It is clear from the record that MacLeod would not have been terminated but for her reaction to Dinehart's reprimand. However, Los Alamos was required to prove, by clear and convincing evidence under the ERA, that its legitimate reasons, standing alone, would have induced it to make the same decision to terminate MacLeod. *See Price Waterhouse,* 490 U.S. at 252. Los Alamos did not make such a showing. Los Alamos bore the risk that the influence of legal and illegal motives could not be separated. *Passaic Valley Sewerage Comm'rs v. Martin.* 992 F.2d 474, 482 (3d Cir. 1993).[7]

[7]We need not address MacLeod's argument concerning an alleged adverse action that occurred in October 1992. That action, occurring over one year before she filed her complaint, was time barred. 42 U.S.C. § 5851(b)(1).

ORDER

MacLeod does not seek reinstatement. This case is remanded to the ALJ for a recommended decision on an appropriate remedy. 42 U.S.C. § 5851(b)(2)(B).

SO ORDERED.

DAVID A. O'BRIEN
Chair
KARL J. SANDSTROM
Member
JOYCE D. MILLER
Alternate Member