U.S. Department of Labor

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

In the Matter of:

STEVEN W. JONES,

COMPLAINANT,

v.

EG&G DEFENSE MATERIALS, INC.,

RESPONDENT.

ARB CASE NO. 97-129

ALJ CASE NO. 95-CAA-3

DATE: December 24, 1998

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Joanne Royce, Esq., *Government Accountability Project, Washington, D.C.*

For the Respondent:
Lois A. Baar, Esq., *Parson, Behle & Latimer, Salt Lake City, Utah*

ORDER GRANTING MOTION TO AMEND IN PART AND LIFTING STAY

This case arises under the employee protection provisions of the Clean Air Act, 42 U.S.C. §7622 (CAA), the Toxic Substances Control Act, 15 U.S.C. §2622 (TSCA), and the Resource Conservation and Recovery Act, 42 U.S.C. §6971 (RCRA) (1994) (collectively, "the environmental acts").

In 1994, Complainant, Steven W. Jones (Jones), was hired as the Safety Manager at the Tooele Chemical Agent Disposal Facility in Utah (Disposal Facility). Respondent, EG&G Defense Materials, Inc. (EG&G), operates the facility, which incinerates stockpiled chemical weapons under a contract with the United States Army. The chemical weapons are called "agents."

Jones raised a number of safety and environmental issues concerning the Disposal Facility. After only two months on the job, EG&G counseled Jones and informed him that he was near to being fired. Less than a month after the counseling session, EG&G discharged Jones.

Jones filed a complaint under the environmental acts, alleging that he was discharged because he raised issues of compliance with the environmental acts and regulations. In a Final Decision and Order issued on September 29, 1998 (final decision, or FD), the Board found that EG&G violated the environmental acts when it counseled and discharged Jones. The Board ordered EG&G to reinstate Jones to his former position and to pay him back pay and compensatory damages.

EG&G filed two motions concerning the final decision. The first is denominated a Motion to Amend Findings of Fact and for New Hearing On, or Amendment Of, Reinstatement Order. In the second motion, EG&G sought a stay of remedy during the pendency of its reconsideration motion. In an Order issued on November 24, 1998, we treated the motion to amend as a motion for reconsideration and granted it. We also granted a stay pending our reconsideration.

EG&G seeks several additions to, and a few corrections of, the findings of fact in the final decision. To the extent it seeks additional findings, we deny this request for a second bite at the apple. We believe that the factual findings in the final decision were sufficient to explain our reasoning and the nature of EG&G's violation of the employee protection provisions of the environmental acts. We do, however, revise two factual findings to make them reflect the record more accurately and without ambiguity.

We affirm the reinstatement order in light of the affidavits and additional documents submitted by the parties. With a minor revision to the order concerning back pay, we also affirm the other remedies ordered in the final decision. Finally, we lift our stay issued on November 24, 1998, and deny a stay pending judicial review.[1/]

I. Amendment of two factual findings does not alter the outcome of the Final Decision

A. MSB laboratory

EG&G's General Manager, Henry Silvestri, criticized Jones's handling of the shut down of the Monitoring Support Building Laboratory (or MSB Lab) at the Disposal Facility. *See* FD at 4,

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[1/] On December 4, 1998, Jones submitted a pleading entitled Complainant's Motion for Clarification and for Leave to File and for Oral Argument. In his Motion, Jones asked that we identify which of the findings of our final order we would consider clarifying. In addition, Jones sought leave to file a pleading responsive to EG&G's rebuttal brief.

Jones's response was submitted to the Board on December 18, 1998, and we accept it into the record in this case. In light of our decision in this Order, we deem the motion for clarification and the request for oral argument to be moot.

noting that Silvestri used foul language when discussing the Lab closing and believed Jones acted too abruptly.

EG&G has pointed out a factual misstatement concerning the MSB Lab closing at page 4 of the final decision: "There, workers dilute the agent to a strength of two parts per million for testing the ACAMS, a chemical agent monitoring system." Memorandum in Support of Motion to Amend at 2. The record shows that the dilution routinely takes place in the Chemical Assessment Lab, about two miles away from the MSB Lab. Administrative Law Judge's Recommended Decision (RD) at 13-14; Hearing Transcript (T). 1696-97.[2/]

Since the testimony indicates that dilution of the agent to a strength of two parts per million generally occurs at the Chemical Assessment Lab, we will amend page 4 of the final decision, second paragraph, second sentence, to read in reference to the MSB Lab: "There, workers *handle agent that has been diluted to a strength of a few parts per million* for testing the ACAMS, a chemical agent monitoring system. T. 1700-01." We make this correction in the interest of clarifying what the record states.

Also in regard to the discussion of the MSB Lab, we correct a typographical error. On page 4, fourth paragraph, fourth sentence, the reference to the exhibit is corrected as follows: "No one informed Jones that there was an existing document, CX *39*, providing a waiver to the MSB Lab from complying with the Army's general regulations governing chemical agent laboratories."[3/]

B. <u>The site safety submission</u>

In the final decision, we stated: "The treaty compliance building was being constructed at Tooele by a contractor other than EG&G. Apparently there was no site safety submission for the building." FD at 6. We explained that Jones raised the issue of the lack of a site safety submission with Silvestri, who told Jones that the issue was none of EG&G's concern. *Id.* We also indicated that Silvestri suspected that Jones raised the site safety submission issue with the Army unit that oversaw the Disposal Facility (the Army's Office of Program Manager for Chemical Demilitarization, or PMCD) and with the Army's Inspector General. *Id.*

[2/] Apparently some type of dilution has taken place in the MSB Lab, at least on occasion, because Jones testified that early in his tenure he observed workers in the MSB Lab diluting agent:

> They were diluting as well as spiking, taking an ampule of agent out so they could go out to the monitors, but they also were diluting agent from one concentration to another so it was unknown to me what concentration that was, if it was a high concentration which should have been done in another type of lab.

T. 153-54.

[3/] In the final decision, the reference was mistyped as "CX 36."

EG&G seeks a corrected finding that the Army did have a site safety submission in hand for the treaty compliance building at the time that Jones raised the issue with Silvestri. Memorandum in Support of Motion to Amend at 4.

EG&G is correct that the Army approved a site safety submission for the treaty building prior to the time Jones began working at the Disposal Facility. We will amend our factual findings accordingly. At page 6, Second full paragraph, the fourth sentence is revised to read: "Apparently *Jones believed that* there was no site safety submission for the building, *although the submission actually had been approved prior to Jones's working at the Disposal Facility. T. 1833; RX 72."*

C. The two factual corrections do not alter the outcome

We applied the "dual motive analysis" in deciding the ultimate legal issue in this case, *i.e.,* whether there was a violation of the employee protection provisions of the environmental acts. Under that analysis, we found that there were both permissible and unlawful reasons for discharging Jones. RD at 16. The permissible reason was Jones's management style. The impermissible reason was Jones's protected activities concerning the disposal facility's compliance with environmental standards. We found that EG&G did not sustain its burden of showing by a preponderance of the evidence that it would have dismissed Jones solely for the legitimate reason, even if he had not engaged in protected activities. FD at 16-18. Accordingly, we found that EG&G violated the environmental acts' employee protection provisions.

As we explain below, the two factual corrections we have made here do not alter the outcome of the case because they do not constitute evidence that EG&G had sufficient legitimate reasons to discharge Jones even if he had never engaged in any protected activities.

The first correction explains that employees merely handled dilute chemical agents at the MSB Lab, rather than routinely diluting the agent to a specified strength at that Lab. This correction does not alter our legal finding that Jones engaged in protected activity when he closed the MSB Laboratory. We affirm our finding that Jones reasonably believed that the laboratory practices he observed there violated the environmental laws or regulations. FD at 12-13.

The second correction concerns one of the asserted legitimate reasons for discharging Jones, his supposed confrontational relationship with the Army unit responsible for destroying chemical weapons, PMCD. The correction shows that Jones merely believed, contrary to actual fact, that there was no site safety submission.

The amendment does not give any additional support to EG&G's contention that Jones had a confrontational relationship with PMCD. The fact remains that EG&G provided only one example of Jones's confrontational relationship, the site safety submission issue. The evidence still shows that Silvestri had "only a suspicion that Jones was responsible for the report of non-compliance [to PMCD and the Inspector General's staff], without any direct knowledge by EG&G of involvement by Jones." FD at 16-17 and n.11. We remain convinced that this was only "sparse evidence of Jones's alleged confrontational style." FD at 17. We reaffirm our earlier legal conclusion that

EG&G did not demonstrate by a preponderance of the evidence that it would have discharged Jones for his confrontational management style even if he had not engaged in protected activities. *Id.*

II. The other factual amendments EG&G seeks are denied because they do not correct any misstatements and they would not alter the outcome

As we explain below, the other factual findings that EG&G seeks do not concern any factual misstatements in the final decision, nor would the additional findings alter the outcome of the case. Accordingly, we will not amend the final decision to include the additional findings.

A. Identifying additional EG&G personnel

EG&G seeks to augment the findings of fact with a complete explanation of the names, titles, and qualifications of managers and subordinates of Jones at EG&G. Memorandum in Support of Motion to Amend at 2. In the interest of brevity, we did not identify all personnel in the final decision.[4/] Rather, we identified the EG&G personnel essential to understanding our reasoning process. Any additional explanations of the personnel are not necessary.

B. Additional finding regarding the MSB laboratory

As we explained above, Jones shut down the MSB Lab because he believed that employees there were not complying with good laboratory practices. *See also* FD at 4. One of the practices Jones questioned was why an employee was not wearing gloves when he handled live agent. *Id.*

EG&G requests a finding that other employees explained to Jones that the MSB Lab had a waiver permitting it to operate without complying with an Army regulation requiring certain safety precautions. Motion in Support of Memorandum at 2. The most direct evidence on this issue consists of the testimony of one employee, Sam Guello, at T. 1248:

> Q: Did Mr. Morris [sic] explain to Steve Jones while you were there or in your presence about the situation?
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> A: From what I recall, Martin explained to Steve that there was some kind of a waiver or an exemption or a change that had taken place to one of the regulations that allowed them to do that operation without the gloves, and that in fact the person with the gloves didn't need to have the gloves.

When asked about the issue, Jones acknowledged that Lab director Martin Morse made statements to that effect. T. 156, 799 (Jones). But neither Morse nor any other employee showed Jones the document granting the MSB Lab a waiver of the Army safety regulation governing

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[4/] The ALJ's recommended decision was 141 single spaced pages in length. Our final decision was 26 pages long.

practices in laboratories that handle live agent until after Jones had closed the Lab with the concurrence of EG&G managers. T. 161-62; CX 39. Jones closed the Lab while he researched whether the regulation governed practices at the MSB Lab. FD at 4; T. 156-57. When the waiver document was produced, the Lab promptly reopened.

Jones sincerely believed that the Lab was in danger of emitting live agent into the atmosphere. Even if we were to add the additional finding that Morse verbally informed Jones of some type of permission for the Lab to operate in the manner he observed, it would not alter our legal finding that Jones engaged in a protected activity when he shut down the Lab. FD at 12-13.

C. Hydrogen cylinder incident

In this incident, employees discovered that hydrogen was leaking from a cylinder that fed into the MSB Lab. FD at 4. Jones directed a subordinate to notify both the fire department and the Disposal Facility's control room. *Id.* Silvestri believed that Jones overreacted to the hydrogen leak. *Id.*

EG&G desires additional factual findings to explain "the policy which required notification to the control room so that it could contact the fire department." Memorandum in Support of Motion to Amend at 3.[5/] The company contends that the additional findings would help to explain Silvestri's reaction to Jones ordering notification to the fire department. *Id.*

A leak of highly flammable gas in a system connected to the MSB Lab, near which there were stores of hazardous chemical agents, clearly posed an imminent danger. We found that notifying the fire department about the leak was a protected activity under the environmental acts because Jones reasonably believed that the leak could lead to a release of agent into the atmosphere. FD at 13. The requested additional finding about the Facility's policy would not alter that legal conclusion. Nor would the additional finding alter the outcome of the decision under the dual motive analysis: that EG&G did not show that it would have fired Jones for legitimate reasons even if he had not engaged in any protected activities.

D. Brine reduction area incident

The company also seeks additional findings concerning the "brine reduction area" incident in which some workers were exposed to toxic sodium fluoride dust. Memorandum in Support of Motion to Amend at 3. There was no legal finding at issue in this incident, because Jones was not engaging in a protected activity when he sought to aid the workers who had been exposed to the sodium fluoride. See FD at 16 n.10 (explaining that Jones's concern was worker exposure, not an emission into the atmosphere). None of the requested additional findings would alter the outcome of the case.

E. Internal audit

[5/] The additional findings are contained in EG&G's Proposed Findings of Fact and Conclusions of Law, which were attached to its brief to the Board.

There is a point of contention whether Jones submitted to Silvestri the entire document, or only the executive summary, of an audit he performed shortly after going to work at the Dispostal Facility. The executive summary of the audit, which is in the record, RX 36, listed safety deficiencies in many safety programs at the Disposal Facility.

Both before the ALJ and the Board, EG&G maintains that "it is not credible for Jones to claim he created an internal audit." Memorandum in Support of Motion to Amend at 3. The company seeks a finding to that effect because it believes such a finding would call into question Jones's veracity.

There is no need to reach a finding as to whether Jones submitted the entire audit document or just the executive summary, since EG&G agrees that Jones did an audit and that he submitted the executive summary to Silvestri. *See* Proposed Finding No. 64 attached to EG&G Brief.

The critical finding concerning the audit is that General Manager Silvestri reacted angrily to the executive summary and told Jones never to put anything negative in writing about the plant. FD at 6, citing T. 225-26, 267-68. Like the ALJ, we credited Jones's testimony about Silvestri's reaction to the executive summary of the audit, which listed numerous deficient elements in the safety program.

EG&G contends that the record supports additional findings concerning the contents of the executive summary of the audit. According to the company, Jones focused exclusively upon Army safety regulations, rather than the environmental acts or their requirements, when he listed deficiencies in safety program elements.. Memorandum in Support of Motion to Amend at 3-4, citing Findings 68-82 in EG&G's Proposed Findings of Fact and Conclusions of Law.

EG&G uses the example of the listed deficiency in the Disposal Facility's Emergency Preparedness Plan to illustrate its thesis. The executive summary of the audit noted a deficiency in the Facility's Chemical Accident/Incident Response and Assistance Plan (CAIRA Plan), also known as the Emergency Preparedness Plan (EP Plan). FD at 13; RX 36. In proposed additional findings, EG&G attempts to separate the requirements of emergency plans under Army regulations from those under the RCRA. Jones, however, clearly viewed the two plans as related: "Partly they [emergency preparedness requirements] were covered by the Army. They were also partly covered by RCRA, which Skip Hayes had started working on. There was a dual path which we would have had to work through to get an emergency preparedness program that met the requirements of the Army, also met the requirements of the RCRA B permit." T. 506

Jones's testimony shows that he believed it was necessary to develop one emergency preparedness program that met the requirements of both the Army regulations and the RCRA. Therefore, when Jones identified deficiencies in the emergency preparedness plan, he stated concerns under both the RCRA and Army regulations. We reaffirm our earlier finding in that regard.

F. <u>MITRE report</u>

Immediately before his discharge, Jones engaged in protected activities regarding the MITRE report, which identified deficiencies in the design, piping, valves, flanges, and machinery at the Disposal Facility. FD at 13; T. 326. EG&G now seeks a finding that General Manager Silvestri "was unaware of any conflicts with respect to this issue." Memorandum in Support of Motion to Amend at 4. We did not find otherwise. *See* FD at 8: "Silvestri, who made the discharge decision, testified that he was unaware of the MITRE report and related issues."

EG&G also seeks findings pointing to evidence that Jones's concerns "were focused on [hazard] analyses he knew were required by OSHA." Memorandum in Support of Motion to Amend at 4. Of course, the fact that some of Jones's concerns centered on the requirements of the Occupational Safety and Health Act, does not negate that he also expressed concerns protected under the environmental acts. As we explained, the MITRE report identified deficiencies in the physical plant, called "RAC 1," that were of imminent catastrophic severity. FD at 13; T. 326-328. Further, for many of the RAC 1 hazards, there was some risk of the release of toxic chemicals into the atmosphere. *See* CX 56 at 363-365, 376-389.[6/] Jones's inquiries about the wisdom or legality of "accepting" the RAC 1 hazards therefore stated a concern under the environmental acts.

G. Jones's management style

EG&G decries the lack of findings about Human Resource Manager Michael Reddish's role in Jones's termination. Memo in Support of Motion to Amend at 4. The company points to Reddish's testimony that some of Jones's subordinates complained to him about Jones's management style.

We think that Reddish's knowledge of employee complaints about Jones is quite telling and we indicated that belief in the final decision, albeit without naming Reddish. See RD at 17: "It seems strange that Smith *and other managers* would not inform Jones of these incidents of demeaning staff members if the incidents were sufficiently serious to merit discharge, especially since Smith arranged the counseling session with the goal of helping Jones improve his behavior and performance." Reddish, the head of Human Resources, is one of the other managers to whom we referred. Even though Reddish was aware that some employees had complained about specific incidences concerning Jones and even though Reddish was present at the counseling session in which Smith gave no specific examples of poor treatment of subordinates, Reddish himself did not speak up. Rather, Reddish testified that he never asked Jones whether he engaged in the conduct about which some subordinates complained, nor did he tell Jones about the various complaints. T. 2213.

We believe that the additional findings that EG&G seeks concerning Reddish would serve only to bolster our decision. Nevertheless, we deny the requested findings since they do not correct any misstatements and would not alter the outcome.

[6/] For example, the RAC 1 hazard listed at page 363 of the MITRE report lists the following potential effects: "Agent from the tank spills into the TOX sump; major spill; HVAC system is overloaded; *agent release outsite the MDB."* At page 377 (back) and page 379 (front and back), the potential effects include "chlorine release to atmosphere."

III. Upon reconsideration, we again order EG&G to reinstate Jones

EG&G contends that events that occurred after the hearing, such as Jones finding employment in Arkansas, require reconsideration of the reinstatement order. We reconsider our reinstatement order in light of the motions, memoranda, affidavits, and other attachments submitted by both parties. The parties' submissions are accepted into the record.

EG&G contends that the Board should rescind its order of reinstatement or order a new hearing on the issue. Memorandum in Support of Motion to Amend at 5. Reestablishment of the employment relationship is a usual component of the remedy in whistleblower cases where a discharge violated an employee protection provision. *See Hoffman v. Bossert,* Case No. 94-CAA-004, ARB Final Dec. and Ord., Jan. 22, 1997, slip op. at 4 (under CAA, respondent has the obligation to offer reinstatement to a successful complainant), *pet. for review dismissed,* No. 97-3142 (3d Cir. Oct. 29, 1997); *McCuistion v. Tennessee Valley Authority*, Case No. 89-ERA-6, Sec. Dec. and Ord., Nov. 13, 1991, slip op. at 23 (under Energy Reorganization Act); *Nolan v. AC Express*, Case No. 92-STA-37, Sec. Dec. and Rem. Ord., Jan. 13, 1995, slip op. at 15 (under analogous provision of Surface Transportation Assistance Act).

EG&G makes several arguments to support its contention that reinstatement is not possible in this case. The company notes that after the hearing, Jones obtained employment in Arkansas. EG&G relies upon cases under Title VII in which the court found that reinstatement was not practical where the plaintiff had obtained a new job. Memorandum in Support of Motion to Amend at 5. The cited cases are inapposite because reinstatement is merely optional under Title VII. *Brito v. Zia Co.*, 478 F.2d 1200, 1204 (10th Cir. 1973); 42 U.S.C. §2000e-5(g) (1994).[7/] In contrast, reinstatement is an automatic remedy under two of the environmental acts.[8/] 42 U.S.C. §7622(b)(2)(B)(ii) (CAA); 15 U.S.C. §2622(b)(2)(B)(ii) (TSCA) (1994).

We start our analysis from the viewpoint that reinstatement is automatic in this case. In rare instances, front pay may be used as a substitute for reinstatement where there is "irreparable animosity between the parties," *Blum v. Witco Chem. Corp.* 829 F.2d 367, 374 (3d Cir. 1987), and "a productive and amicable working relationship would be impossible." *EEOC v. Prudential Federal Sav. and Loan Ass'n,* 763 F.2d 1166, 1172 (10th Cir.), *cert. denied,* 474 U.S. 946 (1985).

[7/] For example, in *EEOC v. General Lines, Inc.*, 865 F.2d 1555, 1560-61 (10th Cir. 1989), cited by EG&G, Memorandum in Support of Motion to Amend at 5, the Court of Appeals affirmed the district court's denial of reinstatement in a Title VII case where the plaintiffs had moved to a different state, found other jobs, and did not ask for reinstatement. Similarly, in *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989), also brought under Title VII and cited by EG&G, the Court of Appeals accepted the trial court's denial of reinstatement where the plaintiff submitted a psychologist's affidavit stating that reinstatement was not appropriate and would be detrimental to the plaintiff's health.

[8/] Under the third environmental act at issue in this case, the RCRA, reinstatement is an optional remedy. 42 U.S.C. §6971(b) (1994).

We will discuss EG&G's various arguments as to the impossibility of a productive and amicable working relationship.

Jones provided an affidavit stating that although he has obtained a job in Arkansas (at significantly lower pay), he still wishes to be reinstated to his position with EG&G and is willing to move back to Utah. We consider it significant that in this case the complainant believes that an amicable and productive working relationship is possible.

EG&G points to evidence of "difficulties" between Jones and some of his subordinates in the safety department as proof that there would not be a productive working relationship upon Jones's reinstatement. Memorandum in Support of Motion to Amend at 6. EG&G stressed in an affidavit of its current General Manager, Michael Rowe, that there have been "dramatic changes" in the safety department's organization, including a trebling of the number of employees, since Jones was the manager in 1994. Affidavit (Aff.) of Michael Rowe at 3-4. We believe that the additional employees and the changes in the department would tend to diminish the impact of past occasions on which Jones and some of his subordinates did not see eye to eye. For example, the person responsible for discharging Jones, former General Manager Silvestri, no longer is in charge. Rowe Aff. at 1, ¶1.

EG&G next objects that reinstatement is not possible because it will bump the current safety manager from his position. Memorandum in Support of Motion to Amend at 6-7. EG&G Defense Materials is a large organization, however, with some 600 employees at the Tooele site alone. Rowe Aff. at 3, ¶6. We think it unlikely that the company cannot find work for the displaced safety manager in such a large organization.

The company also contends that reinstatement is not possible because Jones lacks experience in managing the safety department during "hot operations," when the Disposal Facility burns actual chemical agent. When EG&G hired Jones in June 1994, it contemplated that hot operations would begin within a short time. Therefore, EG&G obviously believed that Jones was competent to manage the safety department during hot operations. There is no reason to believe otherwise now, especially in light of Jones's evidence that he has endeavored to "stay current with respect to the safety and environmental documentation" of the Disposal Facility. Jones Aff. at 8. He also indicates eagerness to take any necessary training to fulfill any new requirements for the safety manager position. *Id*.

We must bear in mind that it was EG&G's unlawful discharge that caused Jones to lack experience with hot operations. To penalize him for the lack of such experience would be contrary to the goal of the employee protection provisions, to restore successful plaintiffs to the position they would occupy but for the discrimination. *Hoffman,* slip op. at 2.

EG&G's final contention with regard to the impossibility of reinstatement is very troubling. It contends that Jones's public appearances in which he discussed chemical weapons destruction, and his participation as an expert witness in a lawsuit by the Chemical Weapons Working Group against EG&G, render his reinstatement impractical. Memorandum in Support of Motion to Amend at 7-8.

According to EG&G, Jones expressed serious reservations about the safety of the plant and stated that management was not supportive of safety. *Id*. at 8; *see* Tabs 6 and 7 attached to Rowe Aff.

Jones's participation in a lawsuit concerning the environmental dangers of the Disposal Facility is exactly the type of activity that the environmental acts protect.[9/] For example, the CAA provides that an employer may not discharge or otherwise discriminate against an employee because the employee "testified or is about to testify" in any proceeding to enforce the act or because an employee has "assisted or participated or is about to assist or participate in any manner in such a proceeding." 42 U.S.C. §7622(a)(2) and (3); *see also* the similar provisions of the TSCA, 15 U.S.C. §2622(a)(2) and (3), and the RCRA, 42 U.S.C. §6971(a).

EG&G paints Jones's testimony and press contacts as personal attacks on the character of EG&G employees and argues that such personal attacks are not protected activity under the environmental acts. EG&G Rebuttal Memorandum at 4-5, citing Rowe Aff.[10/] We do not agree that Jones made personal attacks that preclude a productive working relationship. We have no doubt that a court properly may deny reinstatement in situations where an employee's public criticism of the employer and co-workers is highly personalized and inflammatory, such as where the plaintiff in a racial discrimination case called his supervisor "a plantation adulator" and "an Uncle Tom" and called his management "South African dogs," *see Robinson v. SEPTA,* 64 FEP Cases 246, 248 (E.D. Pa. 1992), *aff'd,* 64 FEP Cases 250 (3d Cir. 1993), or where a plaintiff likened working with the defendants to being "a sharecropper on a plantation," *see Kirsch v. Fleet Street Ltd.,* 71 FEP Cases 1413, 1416 (S.D.N.Y. 1996) (both cases cited in EG&G's Rebuttal Memorandum at 4-5). Such accusations of a pervasive atmosphere of racial hostility show the impracticality of returning the plaintiff to the same workplace.

In this case, however, Jones did not state that there was an atmosphere of pervasive discrimination at EG&G. Rather, he faulted the Disposal Facility's safety, which is his protected right under the environmental acts.[11/] Jones's focus on safety and environmental issues in his public

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[9/] An employee's contact with the press regarding an environmental issue may itself be a protected activity under the environmental acts. *See Carter v. Electrical Dist. No. 2 of Pinal County,* Case No. 92-TSC-11, Sec. Dec. and Rem. Ord., July 26, 1995, slip op. at 21 (under TSCA, employee contact with press, which reflected negatively on employer, was not a legitimate reason for discharge).

[10/] For example, Rowe cites a published article in which Jones was quoted as saying "I want my job back because I know from reviewing the documents and talking to plant workers that Tooele is still operating unsafely and endangering the citizens of Utah. They need some honesty and integrity out there." Rowe Aff. at 9, ¶18. Rowe also cites Jones's testimony that the plant will fail. Id. at 8, ¶17 and at 10, ¶19.

[11/] EG&G also cites *Sprague v. Fitzpatrick,* 546 F.2d 560, 565-66 (3d Cir. 1976), where the district court found that an assistant district attorney's calling his boss (the district attorney) a liar in a press interview precluded any future working relationship. EG&G Rebuttal Memorandum (continued...)

criticism of EG&G distinguishes this case from those in which the court found that reinstatement was not practical.

IV. Amendment to back pay order

EG&G states correctly that Jones's position in Arkansas is relevant to the calculation of back pay. We amend the back pay order in the final decision to provide that EG&G shall deduct Jones's earnings in the Arkansas job (and any other employment since the hearing) from the gross amount of back pay owed. We reaffirm the requirement that, upon EG&G's request, Jones shall produce copies of his federal income tax returns so that the company can calculate the exact amount of back pay owed. *See* FD at 21.

V. The stay is lifted

In light of the likelihood that EG&G will seek judicial review of our decision in this case we will consider its earlier stay request as a motion for a stay pending judicial review.[12/] Three criteria ordinarily are used when considering a request for a stay: the likelihood that the movant will prevail on the merits, whether the movant will suffer irreparable injury in the absence of a stay, and whether a stay is in the public interest. *See Hoffman v. Bossert,* Case No. 94-CAA-004, Sec. Order Denying Stay, Nov. 20, 1995, slip op. at 1-2, citing stay criteria outlined in *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n,* 259 F.2d 921, 925 (D.C. Cir. 1958). We consider each of these criteria in turn.

A. EG&G is not likely to prevail on the merits

EG&G contends that, on judicial review, it is likely to prevail on the issue that it is entitled to a jury trial under the Constitution. The company maintains that it meets the three part test for the availability of a jury trial established in *Granfinanciera S.A. v. Nordberg,* 492 U.S. 33 (1989). We earlier declined to address the merits of the jury trial issue, noting that in the usual case an administrative agency will not opine on the constitutionality of Federal statutes that it administers. FD at 8-9.

[11/](...continued)
at 5. Indeed, in *Sprague,* the discharged assistant district attorney did not even seek reinstatement; he sought damages under 28 U.S.C. §1983. In this case, of course, Jones did not call any of his superiors a liar.

We find this case to be quite different from *Sprague.* Here, rather than calling any manager at EG&G a liar, Jones publicly stated a need to operate the Disposal Facility with honesty, integrity, and concern for the safety of the citizens of Utah. *See* n. 7, above.

[12/] EG&G filed a "protective" petition for review of the final decision. Since this decision does not alter the outcome of the final decision, we anticipate that the company will pursue its petition for review.

Without addressing the argument in full, we note our disagreement with EG&G's view that the employee protection provisions of the environmental acts provide a private right of action that is not closely integrated into the regulatory scheme of those statutes. Rather, we find that the employee protection provisions are a critical piece well integrated into the whole. At least one court has agreed. In reference to the analogous employee protection provision of the Clean Water Act, the Third Circuit explained in *Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 478, *cert. denied,* 510 U.S. 964 (1993):

> Such "whistle-blower" provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment, such as the Clean Water Act and nuclear safety statutes. They are intended to encourage employees to aid in the enforcement of these statutes by raising substantiated claims through protected procedural channels. * * * The whistleblower provision was enacted for the broad remedial purpose of shielding employees from retaliatory actions taken against them by management to discourage or punish employee efforts to bring the corporation into compliance with the Clean Water Act's
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> safety and quality standards. If the regulatory scheme is to effectuate its substantial goals, employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute.

Thus, the public purpose of the environmental acts is protected by the whistleblower provisions that protect employees, who likely will be the first to perceive a violation of the underlying purposes or standards of the act. Therefore, EG&G is not likely to prevail on its argument that the employee protection provisions of the environmental acts provide a private right of action that is not closely integrated into the regulatory schemes of those acts.

Nor is EG&G likely to prevail on the issues of reinstatement and back pay, on which the Board affirmed the recommended order of the Administrative Law Judge.

B. A stay will harm Jones and is contrary to the public interest

Jones bears the stigma of working in a field other than his chosen one, and in a position with less responsibility, challenge, and compensation. A stay would prolong the stigma, as well as frustrate the public interest of restoring a successful complainant under the employee protection provisions to the status he enjoyed prior to the statutory violation. We find that the balance of harm and the public interest both favor Jones, and do not support EG&G's stay request.

C. There is no irreparable harm to EG&G absent a stay

EG&G cites three types of allegedly irreparable harm it would suffer absent a stay. The first is that reinstating Jones will bump the current safety manager, Sam Guello, from his position. As

we stated above, there is little chance that EG&G, a large entity, cannot find satisfactory work for Guello. Moreover, to find that reinstatement constitutes irreparable harm where it will cause another employee to be bumped from his position would be to punish Jones for having worked in a unique, high level position. The whistleblower provisions require reinstatement as a remedy for all complainants, and do not exclude such protection for complainants such as Jones, who occupied a unique, senior position.

Likewise, the other "irreparable harms" cited by EG&G improperly blame the victim of discrimination, Jones. Jones should not be faulted for testifying as an expert witness against EG&G in a citizen action complaint under the environmental laws. Nor should he be punished for lacking experience at managing the safety department during "hot operation" at the plant, since EG&G's discharge prohibited him from gaining that experience. Jones stands ready to undergo any necessary training.

Finally, there is no irreparable harm because Jones publicly has expressed reservations about the safety of the Disposal Facility. EG&G threatens that "it will be unable to establish a good working relationship with Jones" because of his public statements. Like any litigant, EG&G has the power to accept the Board's ruling and instruct its other employees to cooperate fully with Jones when he resumes the position of Safety Manager.

Since EG&G is not likely to prevail on the merits and will not suffer irreparable injury absent a stay, and because a stay would harm both Jones and the public interest, we deny the motion for stay pending judicial review.

CONCLUSION

We amend two factual findings in the final decision, but the amendments do not alter our conclusion that EG&G violated the employee protection provisions of the environmental acts. Upon reconsideration, we again order EG&G to reinstate Jones to his former position and affirm the other remedies ordered in the final decision, with a minor amendment to the back pay order allowing EG&G to subtract the amounts Jones has earned through other employment. We lift the earlier ordered stay and deny a stay pending judicial review.

ORDER

It is **ORDERED** that EG&G:

1. Reinstate Jones to his former position as Safety Manager at the Tooele Disposal Facility with the same wages, benefits, and conditions of employment that he would have enjoyed if EG&G had not discharged him.

2. Pay Jones back pay from the date of termination to the date of reinstatement, or declination of a *bona fide* offer of reinstatement. Any severance payments EG&G made to Jones and any salary Jones has received from other employment shall be deducted from the amount of back pay owed.

EG&G shall pay prejudgment interest on the back pay award at the interest rate set forth in 26 U.S.C. §6621 (1994).

3. Pay Jones compensatory damages of $50,000.00

4. It is further **ORDERED** that the ALJ shall issue a supplemental recommended decision on attorney fees and costs.

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Acting Member