U.S. Department of Labor
Office of Administrative Law Judges

Date: October 12, 1988
Case No: 87-ERA-35

IN THE MATTER OF

JAMES CARROLL PILLOW JR.
Complainant

v.

BECHTEL CONSTRUCTION, INC.
Respondent.

Michael R. Seward, Esq.
1 S.E. Financial Center
Suite 3520
200 Biscayne Boulevard
Miami, Florida 33131
For the Complainant

William F. Hamilton, Esq.
1200 Brickell Avenue
14th Floor
Miami, Florida 33131
For the Respondent

BEFORE: E. EARL THOMAS
District Chief Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Energy Reorganization Act of 1974, as amended (42 U.S.C. Section 5851 *et seq*.), hereinafter called the Act. This legislation prohibits a Nuclear Regulatory Commission (NRC) licensee from discharging or otherwise discriminating against an employee who has engaged in activity protected under the Act. Protected activity includes commencing or causing to be commenced a proceeding under

the Act, testifying in any such proceeding, or assisting or participating, or about to assist or participate, in

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any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute. 29 C.F.R. Part 24. An employee who believes that he or she has been discriminated against in violation of the Act may file a complaint within 30 days after the occurrence of the alleged violation.

On April 27, 1987, James C. Pillow, Jr., the Complainant in this case, filed a complaint of alleged discrimination. In his complaint, Complainant claims that he was discriminated against during his employment with the Respondent and that his employment was terminated on May 15, 1987, because he engaged in activities protected by the Act. Pursuant to the implementing regulations, the complaint was referred to the United States Department of Labor, Wage and Hour Division. Following investigation of the Complainant's allegation, the Division found that the Complainant was a protected employee engaging in a protected activity within the ambit of the Act and that his termination from employment was discrimination for his having raised issues under the Act. Subsequently, Respondent timely appealed the Notice of Determination of the Wage and Hour Division and requested the present hearing before an administrative law judge.

The hearing in this matter was held on February 18, 19, and March 10, 1988, at which time the parties were afforded full opportunity to present evidence and argument as provided for in the Act and Regulations. At the hearing, Respondent moved for summary judgment based upon Respondent's Exhibit 1, a National Labor Relations Board Charge Against Employer form filed by Complainant. Complainant reported on the form that "Employer Bechtel Construction, Inc. "terminated (Complainant), a laborer, because of his union and/or other protected concerted activties." Respondent contends that the statement constitutes an admission by Complainant that he was not terminated due to his protected activity under the Energy Reorganization Act. I reserved ruling on the motion until the present time. I now

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find that Respondent has not presented a valid argument because Complainant's statement on the NLRB application does not exclude the possibility that there may have been another factor which motivated Employer to terminate Complainant's employment. As will be explained further in this decision, Complainant need only establish that his protected conduct was one of the motivating factors in Employer's decision to terminate his employment. *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159 (9th Cir. 1984). Therefore, I hereby deny Respondent's motion for summary judgement.

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable statutes, regulations and case law.

FINDINGS OF FACT

On April 6, 1987, Complainant was hired as a laborer by Willie Murphy, the Laborer's General Foreman for Bechtel Construction, Inc. at Turkey Point. Complainant was hired for the 1987 refueling outage. He had previously worked for Bechtel during the 1985 and 1986 outages also.

Complainant was assigned to Foreman Charles Ferguson's crew on the night shift. On April 10, 1987, Complainant was instructed by his foreman, Charles Ferguson, to decontaminate a pipe located in Unit 4. Complainant's contention in his complaint and in his testimony is that Mr. Ferguson did not allow him the opportunity to read the Radiological Work Permit (RWP) before commencing his assignment. Complainant testified that he does not know the RWP under which he began working because Mr. Ferguson rushed him to sign the RWP. Nevertheless, Complainant alleges that Mr. Ferguson misinformed him of the correct RWP under which he should have been working. Complainant claims to have arrived at that conclusion when Robert Satterlee, an electrician assigned to

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remove the pipe Complainant was decontaminating, notified Complainant that the radiology samples he had taken produced readings of 30,000 DPM's. Pillow claims that he had been told by his foreman, Charles Ferguson, that the pipe was registering 5,000 DPM'S. The radiological readings are significant because the amount of the reading determines the type of RWP assigned to a work area.

The record contains a "Listing for APR" which specifies the dates and times that Complainant worked under different RWP'S. On April 10, 1987, at the commencement of the incident in question, Complainant began working under RWP #4011. After working continuously through April 11, 1987, at 00:54 hours Complainant's RWP was changed to #4714. On the same day at 01:15 hours his RWP became #4701. At 04:39 hours his RWP became #4011. The RWP then remained #4011 through the end of his April 11, 1987, workday at 01:56 hours.

Complainant alleges that not only was he working under the incorrect RWP but that his foreman also did not allow him to use a respirator which Complainant believed his RWP required. Complainant's foreman, Charles Ferguson, testified that he had been told by the HP (Health Physics) that the pipe which he assigned Complainant to decontaminate had a reading of 3,000 to 5,000 DPM'S. He stated that at some point Complainant informed him that he had taken a sample reading which reported 50,000 to 60,000 DPM'S. Mr.

Ferguson testified that he did not investigate this matter any further. Complainant's disagreement with his foreman centers around this reading because Complainant alleges that the assignment required the use of a respirator if the radiation level was above 20,000 DPM'S. The testimony of Robert Satterlee, the electrician, confirms complainant's allegation that sample readings taken by him produced values of 20,000 and 30,000 DPM'S.

I find that Complainant's testimony and allegations throughout the record do not contradict

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Respondent's evidence. Although Complainant's safety concerns may have been sincere, the record establishes that no Nuclear Regulatory Commission regulation was violated. Furthermore, I find that Complainant has failed to establish that Respondent was even partially motivated in its actions by Complainant's protected activity under the Act.

The most significant evidence regarding the decontamination incident is the testimony of Terry Kelley, Health Physics Coordinator for a consulting company at Turkey Point. Mr. Kelley has a Masters Degree in nuclear physics and was qualified as an expert witness. Mr. Kelley was the person responsible for determining the RWP appropriate for the decontamination assignment which is the crux of Complainant's allegations.

Mr. Kelley explained that before a job begins he inspects the area with superintendents and other health physics technicians. They evaluate the type of protection necessary and report this to the clear plant supervisor. Mr. Kelley testified that he personally completes the request forms for RWP's.

Mr. Kelley stated that the pipe that Complainant was assigned to decontaminate was not a highly contaminated area. The average sample readings or "smearable levels" were about 5,000 DPM for a hundred centimeter square. This corroborates the testimony given by Complainant and Mr. Ferguson. Mr. Kelley further testified that pursuant to the standardized policy, 50,000 DPM per hundred centimeters squared and above are considered. as highly contaminated areas which require respirators to be worn. Therefore, contrary to Complainant's allegation, Mr. Kelley found that a respirator was not required for the decontamination of the pipe.

Mr. Kelley explained that a smear survey is taken in order to determine the average radiation reading. A smear survey consists of between 10 will 12 "smears". A smear is a paper that is rubbed across the area and then read by a geiger counter. He stated that it is possible to obtain

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readings which are above and below the average smear reading. He claims that this procedure is set by Florida, Power and Light Company and that it is more restrictive that the Nuclear Regulatory Commission's guidelines.

In addition, only Senior Health Physics Technicians are qualified to take these smears. There is a specific procedure which must be followed in order to obtain accurate readings. Mr. Kelley testified that other personnel may take their own readings for their information but, they are not qualified to make judgments as to what the contamination levels are for the area.

Futhermore, Mr. Kelley testified that on the night in question, April 10, 1977, it came to his attention that there was concern regarding actual readings while the decontamination task was in progress. He stated that a Senior Health Physics Technician was sent to the area to take additional smears. He found that there were a few smears higher than what they had originally found, but the was still below the 50,000 DPM's level. average The average reading was approximately 20,000 DPM's per hundred centimeters squared. Mr. Kelley testified that a respirator would not be required at that level, contrary to Complainant's allegation.

Mr. Kelley's testimony also addresses Complainant's allegation that his foreman forced him to work under the incorrect RWP. Mr. Kelley explained that RWP 4701 was issued, prior to the actual start of the physical work, as an inspection RWP in order to gain access to areas that needed to be further inspected. At the commencement of the work, a Senior Health Physics Technician would determine what kind of work needed to be done and if the assigned RWP needed to be modified. He stated that it is common for various jobs to be performable under more than one RWP. RWP 4701, 4711 and 4714 are a generic type of RWP. In his opinion, it was not dangerous to Complainant's health to have been on 4011 as opposed to 4701 during the incident in question because there is no difference between those

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RWP'S.

The NRC conducted a special, unannounced inspection on April 28 through May 1, 1987, pursuant to Complainant's allegations. The NRC concluded in their report that the allegations were not substantiated and no violations or deviations were identified.

Mr. Kelley's testimony and the NRC report are significant also because those findings substantiate the response that Bechtel management took toward's Complainant's allegations. I find that Complainant has failed to establish that he was discriminated against as a result of his protected activity. Complainant alleged in his complaint that he was discriminated against by 1) his transfer to the day shift, 2) his assignment to the cask wash, 3) the threats against him over the public address system on the job site, and 4) by his lay-off from employment on May 15, 1987. I find that the record indicates that the

following individual employees of Bechtel investigated Complainant's allegations and safety concerns and determined that there was no problem. Furthermore, the evidence shows that Respondent's actions were justified and even helpful towards Complainant's situation. I find that Complainant's protected activity was not a factor in Respondent's management decisions that Complainant characterized as discriminatory.

Mr. George King, Night Lead Superintendent for Bechtel at Turkey Point, testified that on the night of April 13, 1987, he was approached by Complainant who proceeded to tell him about his disagreement with Mr. Ferguson regarding the decontamination incident. He stated that Mr. Ferguson had instructed him to do the assignment under the wrong RWP. Mr. King told Complainant that he would investigate this matter. Mr. King then questioned Health Physics Technicians, laborers and some of the other craft to discover if they had observed any problems. Mr. King also observed Mr. Ferguson at work and found nothing that substantiated Complainant's allegations regarding Mr. Ferguson's incompetence.

Mr. Kenneth Hampton, the night shift Senior Superintendent for Bechtel at Turkey Point, had a similar discussion with Complainant and Mr. Ferguson on the following night. Complainant approached Mr. Hampton and requested to speak to him about his problems with his foreman. Mr. Ferguson then joined the conversation. Mr. Hampton prepared a memorandum of the discussion on April 20, 1987. The memorandum describes Complainant's allegations regarding the decontamination incident. The memorandum further notes that he instructed Complainant that the RWP 4711 that he says he was working under was the correct RWP for that job and that job did not require a respirator to his knowledge. Mr. Hampton also advised Complainant that when he was assigned to a job that he felt required a respirator, then he should discuss it with his foreman and he could also verify the matter with a Health Physics Technician.

At the conclusion of Complainant's discussion with Mr. Hampton, he was told that he had to cooperate more with his foreman or his foreman might have cause to terminate Complainant's employment. Mr. Hampton also advised Complainant and Mr. Ferguson to speak to their Lead Superintendent, Mr. George King.

Mr. George King testified that at the same moment that Complainant and Mr. Ferguson came to speak to him on the night of April 14, 1987, the carpenter foreman of the night shift began to speak to Mr. King's about a problem he was having with a laborer. Mr. King's impression was that there was a personality conflict between Complainant and Mr. Ferguson, so he decided to transfer Complainant to the carpenter's crew and transfer the laborer in the carpenter's crew to Mr. Ferguson's crew. Mr. Hampton's testimony corroborates Mr. King's testimony regarding the reason for Complainant's transfer to the carpenter's crew.

Thereafter, on April 17, 1987, Mr. Robert Slover, Project Superintendent for Bechtel at

Turkey Point, made the decision to transfer Complainant to the day shift. He testified that his decision was based upon the incidents that Mr. Bill Loy informed him of. The incidents concerned the threats against Complainant which Mr. Loy heard over the plant's loud speaker system. Mr. Loy testified that when he asked other laborers on the night shift what the cause of the threats were, some laborers said that there were rumors that Complainant had reported some pipe fitters to the NRC.

Mr. Slover testified that he decided to transfer Complainant to the day shift for Complainant's safety. He stated that there was a lot more supervision during the daytime to prevent Complainant from being attacked. Also, he felt that since the threats occurred during the night shift, those personnel would not be around during the day shift to pose a threat to Complainant. Mr. Slover testified that it was his decision solely to transfer Complainant to the day shift. He informed Mr. Don Hamilton of his decision, the Project Field Superintendent for Day Shift. Mr. Hamilton's testimony corroborates Mr. Slover and Mr. Loy's testimony.

Mr. Don Hamilton's responsibility is to determine the size of the work force necessary on a daily basis. It is his decision, based upon a review of the daily work force reports, to hire more personnel or reduce the work force. More personnel are usually hired during outages and then layed-off when there is no further need for the additional personnel.

On May 15, 1987, Mr. Hamilton determined that a reduction in force was necessary. He communicated that to Gordon Stokes, the Lead Civil Superintendent. Mr. Stokes communicated the reduction in force to Mr. Willie Murphy, the Laborer's General Foreman. Mr. Hamilton testified that he does not determine specifically which individuals are to be laid-off. It is Mr. Murphy's decision to determine who will be laid-off due to the reduction in force.

Mr. Murphy explained that he determines who will be laid-off based upon the job performance of

the employee. There is no seniority at Bechtel. The last hired is not necessarily the first to be laid-off. He decided to lay-off Complainant because he felt that Complainant had the least acceptable job performance. One of the problems that Mr. Murphy had with Complainant was that the Safety Department had complained that Complainant was interfering with their operation. The transcript of the deposition of Mike Williams, a Safety Assistant for Bechtel during the 1987 outage, corroborates Mr. Murphy's testimony.

I hereby admit Exhibits 20 and 21 into the record over Complainant's objection. Exhibits 20 and 21 consist of the depositions of Randy Robarge and Mike Williams. I find that the depositions of these former employees of Bechtel are not improper character evidence because they testified regarding their personal working experience with Complainant.

Mr. Williams recounted the incident during the 1987 outage wherein Complainant approached Mr. Williams in the Bechtel Safety Office and requested to be on the Site Emergency Response Team. Mr. Williams explained to Complainant that there was no Site Emergency Response Team. He was told to speak to Mr. Elledge if he wanted to be a part of the Bechtel First Aid Team. Complainant was also informed that there were certain legal guidelines to comply with in order to render emergency care. Only the Bechtel First Aid Staff were authorized to provide such care. Mr. Williams stated in his deposition that he recommended that Complainant not be considered for the position because it was his experience with Complainant during previous outages, that he was interested only in the drama of the situation and he did not have the necessary qualifications for the position.

Inspite of the foregoing warning, Complainant gave unsolicited medical advice to a patient in the Bechtel First Aid Station in the presence of Mr. Williams. Mr. Elledge overheard this conversation and instructed Mr. Williams to not allow Complainant to participate in activities of the Bechtel Safety Office. Mr. Williams then spoke to Mr. Willie

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Murphy about this incident. Mr. Williams was concerned because Complainant had interfered with the Becthel Safety Department in the past.

In addition, Mr. Williams had further difficulty with Complainant after this incident. He stated that Complainant was often at the Bechtel First Aid Station for no reason at all. Complainant criticized First Aid staff member Leo Hawkins, an emergency medical technician, and stated that he was more qualified for the position than Leo Hawkins was. In summary, Mr. Williams considered Complianant to be a lot of trouble for the Safety Team.

Mr. Murphy was particularly concerned about Mr. Williams' complaints regarding Complainant's interference with the Safety Team because he had warned Complainant, when he hired him for this 1987 outage, not to engage in that sort of activity. Mr. Murphy testified that Complainant had caused similar concern with the Safety Department during previous outages. The testimony of Kenneth Elledge, Project Safety Supervisor, and the depositions of Larry Booth and Randy Robarge, substantiate Mr. Murphy's testimony regarding the Complainant's problem in getting along with co-workers and interfering with the work of the Safety Department. Complainant did not present evidence to rebut the testimony of these witnesses.

In addition, I hereby admit the testimony of Terry Kelley previously referred to in this decision and order. At the hearing in this matter, Complainant's counsel objected to the introduction of this testimony on the basis that it was cumulative. I find that the testimony is pertinent and not cumulative because Mr. Kelley was involved in the decontamination incident which Complainant alleges led to his termination of employment.

Finally, I find that Complainant's allegation that his assignment to the cask wash duty was a form of discrimination is without merit. The record reflects that another Bechtel employee, Chris Lee, had the same assignment for a period of two months. The assignment to cask wash is not

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significant when viewed in the whole context of Complainant's employment.

CONCLUSIONS OF LAW

In *N.L.R.B. v. Transportation Management Corp*., 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983), the United States Supreme Court approved the test enunciated in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), for application to dual motive discharge cases under the National Labor Relations Act. Under the *Mt. Healthy* test, the discharged employee must make a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once that is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Other Circuits have adopted this test for retaliatory-discharge cases under Section 210 of the Energy Reorganization Act. See *Dunham v. Brock,* 794 F.2d 1037 (5th Cir. 1986), *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 11 59 (9th Cir. 1984), *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983), *Consolidated Edison Co. of N.Y., Inc. v. Donovan*, 673 F.2d 61 (2d Cir. 1982).

Under the Act, jurisdiction lies in the U.S. Court of Appeals Circuit in which the violation allegedly occurred. In the instant case, the law of the Eleventh Circuit is controlling. The Eleventh Circuit has not yet ruled in this area. Therefore, I make the finding that the *Mt. Healthy* test adopted by the NLRB appropriately should be applied to this proceeding.

Based upon my foregoing findings of fact, I do find that Complainant's report to the Nuclear Regulatory Commission regarding the decontamination incident was protected activity under the Act. Nevertheless, I conclude that Complainant has failed to establish a *prima facie* showing that his protected activity was a motivating factor in the Respondent's decision to terminate his employment.

Complainant alleged that Respondent discriminated against him by transferring him to the day shift and assigning him to the cask wash duty. In support of his claim of discrimination, Complainant referred to the anonymous threats against him which were given over the public address system at Turkey Point.

I find that Respondent has sufficiently justified it's managerial decisions regarding Complainant's transfer to the day shift and his assignment to the cask wash. The record is replete with testimony regarding Complainant's problem in following orders and getting along with coworkers. Furthermore, Respondent did not terminate Complainant's employment for cause. Complainant was layed-off due to a well documented reduction in the work force.

Moreover, Respondent supplied Complainant with a favorable job reference that stated that Complainant was eligible for being rehired at Bechtel. In addition, although Respondent was not responsible for the threats made against Complainant over the public address system, Respondent investigated the incident and took measures immediately in order to protect Complainant from harm.

Assuming *arguendo* that Complainant's protected activity was a motivating factor in Respondent's decision to terminate Complainant's employment, I find that Respondent has adequately established that Complainant would have been terminated even in the absence of the protected activity.

In *Dunham v. Brock*, 794 F.2d 1037 (5th Cir. 1986), a former quality assurance inspector at a steam electric station brought suit alleging that his discharge was in retaliation for filing a complainant with the Nuclear Regulatory Commission. The Complainant, Dunham, filed a several complaints charging that his immediate supervisor restricted the ability of the inspectors to point out deficiencies and complete nonconformance reports. Complainant's demeanor during the conferences which followed was described as counterproductive and

argumentative. Employer then cautioned Complainant in a formal report to refrain from unprofessional behavior to prevent further disciplinary action. Complainant reacted by uttering an obscene expletive and inviting his discharge.

The U.S. Court of Appeals for the Fifth Circuit affirmed the decision of the Secretary of Labor which held that the employer could have had legitimately discharged Complainant for insubordination even if he had not participated in protected activity. The Court found that Complainant's discharge was in no way anticipated or predetermined, rather, the evidence supported the reasonable inference that Employer had cautioned

against drastic action, but became exasperated by Complainant's response and fired him on the spot.

Similarly, in the instant case Complainant had several of such altercations with his immediate supervisor, Mr. Ferguson. Complainant was also advised several times to cooperate with his supervisor if he wanted to remain employed. In addition, Complainant also disregarded Mr. Murphy's instructions to avoid involvement with the Bechtel Safety Department. Therefore, I find that Respondent's decision to discharge Complainant would be justifiable in the absence of Complainant's protected activity.

Accordingly, I hereby determine Respondent did not discriminate against Complainant for any protected activity under the Act. I recommend to the Secretary of Labor that the complaint herein be dismissed.