



Issue Date: 16 August 2006

CASE NO. 2004-ERA-00011

In the Matter of:

RICHARD C. CECIL,
Complainant,

v.

FLOUR HANFORD, INC.,
Respondent.

RECOMMENDED DECISION AND ORDER

Richard Cecil, Jr. (the Complainant) alleged that his employer, Fluor Hanford, Inc. (the Respondent) laid him off in May 2003 and did not rehire him throughout the second half of 2003 in retaliation for raising safety concerns. On November 9, 2003, the Complainant filed a claim seeking relief under the employee protection provision of the Energy Reorganization Act of 1974, as amended (“ERA” or “the Act”), codified at 42 U.S.C. A. § 5851 (West, 2003) and the implementing regulations contained at 29 C.F.R. §§ 18 and 24.

A complaint must be filed within 180 days of the alleged violation to be timely. 42 USC § 5851(b)(1) (2001); 29 CFR § 24.3(b)(2) (2004). On January 20, 2004, OSHA’s Regional Administrator dismissed this complaint on the grounds that it was untimely. The Complainant was granted leave to amend the complaint. The amended complaint alleged two separate adverse actions – the layoff on May 22, 2003, and Fluor’s failure to rehire the Complainant in September of 2003.¹ On June 14, 2004, the Respondent’s motion for summary decision was denied because the amended complaint ameliorated the issue of timeliness.² Both of the adverse actions the Complainant alleged occurred within six months of the date that he filed his claim.

¹ The Complainant’s pre-trial statement included a third adverse action, a transfer to a less desirable position before the lay off. The Complainant’s post-trial proposed findings of fact lists only two, which are the only two considered in this decision for purposes of liability.

² Under the environmental statutes, the time for filing a complaint begins to run from the date of the adverse action, not the date the employee engaged in the protected activity. *Erickson v. U.S. Environmental Protection Agency*, ARB No. 99-095, ALJ No. 1999-CAA-2 (ARB July 31, 2001) (citing 29 C.F.R. § 24.3(b)).

A hearing was held on July 8, 2004, in Kennewick, Washington. The following exhibits were admitted into evidence: Complainant's exhibits (CX) 1, 2, 4, 5, 11, 12, 15, 55, 57-59, 130, 137, 194, 210, 238, 259, 313 and 314; and Respondent's exhibits (RX) 1 through 6. The Complainant, Bruce Eubanks, Walter Ford, Michael Dickinson, Colleen Angel, James McClusky, Kenneth Leliefeld, Tammy Harrison, William Baker, James Klos, Harry Fox, Thomas Ruane, Keith Banta, Jacqueline Slonecker, Riney Wilbert, and Jeff Larkin appeared as witnesses.

On July 14, 2005, the Respondent moved to reopen the record to allow evidence of the termination of Mr. Ford, one of the Complainant's witnesses. An arbitration decision finding that Fluor had just cause to discharge Mr. Ford was issued on July 8, 2005, one year after the hearing. The Respondent offered this evidence to show that Mr. Ford's dishonesty in arbitration should discredit his testimony given during the hearing. Specifically, it sought to impeach Mr. Ford's statement that the Claimant had been transferred to the 300 Area because "[h]e didn't know how to keep his mouth shut." TR 227. The Complainant argues that this new evidence should be excluded because the Respondent had the opportunity to impeach Mr. Ford's honesty during the hearing by cross-examination.

Regulations at 29 C.F.R. § 18.54(c) provide that the record may be reopened upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record. The arbitration decision bears on Mr. Ford's credibility, and it was not available at the time of the hearing. The motion is granted. Even after considering this evidence of another adjudicator's doubts about Mr. Ford's believability, I have found his testimony in this matter credible.

Stipulations

The parties stipulate and I find:

1. The Respondent is a covered employer within the meaning of the Act.
2. From 1999 to May 22, 2003, the Respondent employed the Complainant. He was hired for a temporary position in a bargaining unit in September 2003, and became a regular employee as a millwright in October 2003.
3. The Hanford Spent Nuclear Fuel (SNF) Project moves spent fuel from what is known as the 105 K East and the 105 K West Basins in the 100 K area of Hanford. The SNF Project removes spent fuel from the basins, dries the fuel, and places it in special canisters, know as the Multiple Canister Overpack system, for storage at the Canister Storage Building in the 200 area of Hanford.
4. The Tri-Party Agreement is a cleanup agreement the U.S. Department of Energy (DOE), the U.S. Environmental Protection Agency (EPA) and the State of Washington have negotiated. Under it the DOE monitors cleanup progress through events known as "milestones."

5. Hanford was scheduled to begin moving spent fuel in Fall-Winter 2000. To do so the Fuel Retrieval System (FRS) and Integrated Water Treatment System (IWTS) had to be functionally tested and placed into successful operation.
6. The Complainant performed work-package review.
7. The identified and documented problems with the work packages.
8. During the summer of 2001, the FRS and IWTS were problematic.
9. In February 2003, the Crane Operator for the K East Fuel Transfer System Annex Crane reported an unusual noise. The crane lifts and moves the Transfer Cask Assembly that contains the spent nuclear fuel. The Respondent removed the crane from service, and the Complainant, along with others, began a check on the crane. The Complainant supervised the efforts of two millwrights, Walt Ford and Bruce Eubanks. With the crane out of service or unreliable, Respondent could not move any spent nuclear fuel from K East to K West.
10. On February 20, 2003, the Chief Engineer at SNF, James K. McClusky, issued a letter authorizing the return of the crane into operation.
11. The following month, March 2003, Harry Fox reassigned the Complainant to the 300 Area. The Complainant was informed that he would be supervising a millwright and a pipefitter.
12. In April 2003, Mr. Fox completed a layoff review form and ranked the Complainant lowest among a pool of four candidates. This ranking effectively selected the Complainant for layoff in May 2003.
13. On May 23, 2003, the Complainant was laid off permanently. He was informed of his termination by letter and in a May 12, 2003 meeting with Richard Redekopp (who had replaced Harry Fox), Colleen Angel (who represented the Human Resources department), and John Kimbrough, one of the Complainant's supervisors.
14. The Respondent interviewed the Complainant for the Maintenance Supervisor opening in T Plant in July 2003.

Findings of Fact

The U. S. Department of Energy (DOE) owns the Hanford site, located some 35 miles north of Richland, Washington. Fluor manages the Hanford site as a contractor to the DOE. TR at 553-54. Fluor processes spent nuclear fuel as a significant part of the Hanford site clean up. TR at 437, 553-54. The Hanford Spent Nuclear Fuel (SNF) project moves fuel from the 105 K East and the 105 K West Basins in the 100 K area of Hanford. *See Stipulated Facts*, ¶ 3. Using

two large cranes (one in K East and one in K West), the spent fuel rods at the K East site are placed in a cask, raised out of the water and set on a trolley that conveys it to a crane. TR at 14. A crane picks up the cask, places it onto a truck which transports the cask some forty feet to K West, where the spent nuclear fuel is removed from the cask, cleaned, sorted and processed. TR at 15, 25. Finally, the spent fuel is removed from the basins, dried out, and placed in special canisters for storage in the 200 area of Hanford. TR at 290. The lifting fixtures that move spent fuel from the K East to K West basins are designed so that the cask that holds the nuclear fuel would resist tipping over and very little liquid would splash out if the crane should fail. TR at 444.

The Complainant had worked at the Hanford site since 1988 for other employers; Fluor employed him in 1999 at its (SNF) project in southeastern Washington state as an Operations Specialist with supervisory responsibilities. TR at 108, 628. While “Field Work Supervisor” is not a job title used by Fluor’s human resources department, the Complainant was the person responsible for the safe and productive performance of the K East crane and its maintenance. TR at 466.

In October and November of 2002, Fluor’s management determined that a projected \$40,000,000 shortfall required a reduction in force. Company-wide 400 employees would be laid off in fiscal year 2003, 98 of them from the SNF at Hanford. TR at 556-557, 565-568. On November 12, 2002, the Complainant received a superior performance rating from his supervisor, William Barker. TR at 356, CX 4. The Complainant learned of the impending lay offs in late 2002. TR at 116.

From October 2002 to May 2003, the Complainant worked as a field-work supervisor, or PIC³ in the Hanford SNF maintenance group. As with all the PICs in that group, his direct supervisor was Ken Liefeld. TR at 10, 14, 119-120. Mr. Liefeld reported to Harry Fox, Fluor’s manager for the SNF maintenance division. TR at 303, 379. That division supported two primary activities: the movement of fuel and repair of necessary equipment. TR at 381.

On about February 11, 2003, a crane operator heard an unusual noise in the K East Fuel Transfer System Annex Crane that lifted and moved the transfer cask assembly containing spent nuclear fuel. Stipulated Facts, ¶ 9. The operator reported the noise to Jeff Larkin, who was the engineer responsible for the operation of the crane. TR at 448, 489. Mr. Larkin listened to the noise and ordered a maintenance inspection. TR at 26, 121, 441. The crane was taken out of service, and the Complainant and his crew inspected the crane under Mr. Larkin’s direction. TR at 29, 39-40, 441.

On February 12, 2003, the Complainant’s crew removed the gear-case drum for one of the crane’s brakes to inspect the brake for oil. CX 1 at 1; TR at 494. No oil was found on the brake, and no fragments were found in the oil, but the crew determined that the oil well in the gear box was overfilled, which they corrected by draining a quart of oil. TR at 41, 493. They determined the noise came from the northeast hoist. TR at 41-42, 494. They removed the cover

³ The term “Person In Charge” applied to someone in charge of a particular task, it did not imply supervision of employees. TR at 14, 252.

of the northeast brake housing, but left the brake intact. TR 495. When Mr. Larkin asked the Complainant to take the brake off the crane, he declined to do so because he “didn’t feel comfortable going further” without receiving authorization from the crane’s manufacturer. TR at 420, 495. At the end of the shift on February 12, 2003, the Complainant suggested that Mr. Larkin check with the manufacturer before removing the brake because the crane was still under warranty. TR at 519.

The next day, Mr. Larkin obtained the crane manufacturer’s approval to remove the brake. TR at 496, 520. The Complainant’s team removed and inspected the crane’s east hoist brakes and Mr. Larkin noticed that the brake hub was pressed against the encoder, which had caused some scoring. TR at 496. The crane’s manufacturer directed an adjustment to a set screw that eliminated the rubbing. TR at 497.

When the crew operated the crane with the brake removed, however, the noise continued. The Complainant’s crew concluded that the brake did not cause the noise, but the brakes exhibited “hot spots” or “hard spots,” where the metal had heated and hardened; and the crew also saw signs of uneven wear. TR at 42-43, 46, 183. The Complainant became concerned that the uneven brake wear could tilt the cask that could release irradiated water and expose workers and the environment to radiation. TR at 24, 45.

Mr. Larkin disagreed with the Complainant’s assessment. He believed the brake showed no unusual wear and suggested that the brake be reinstalled and the noise monitored. TR at 42-45. The Complainant reiterated his concerns about the brake wear to Mr. Larkin, and asked whether they could get new brake pads and fix the hoist’s alignment. TR at 42. Mr. Larkin replied that replacement parts were not immediately available, and no replacement parts were ordered. TR at 70.

On February 19, 2003, Mr. Larkin asked the Complainant to take measurements of the brake discs. TR at 126. The measurements were within manufacturer’s tolerances. TR at 137. Around noon that day, the Complainant discussed the status of the crane inspection at a meeting with Mr. Leliefeld and John Kimbrough, who as Scheduling and Planning Manager supervised the preparation and issuance of work orders. TR at 50, 121. The Complainant told them he did not know whether the crane was safe to operate. TR at 48, 50. He insisted that engineering certify that the crane was safe before he would sign the work order returning the crane to service. TR at 50.

Mr. Leliefeld directed the Complainant to call two millwrights to work overtime that evening to reinstall the crane’s brake. TR at 132. The Complainant asked Bruce Eubanks and Walt Ford. TR at 130, 198. They measured the brake discs and found that they were wearing unevenly. TR at 183. Sometime after 4:00 p.m. that afternoon, Mr. Leliefeld summoned the Complainant and his crew to a meeting to discuss the crane’s status. TR at 48. Also attending were Mr. Fox, Tom Ruane, facility manager for K East, and Michael Dickinson from Fluor’s human resources. TR at 53. The Complainant, Mr. Ford and Mr. Eubanks advised that the brakes should be replaced rather than reinstalled, and that a 100% load test should be done before the crane was returned to operation. TR at 56-58. The managers pushed to restore the crane quickly and expressed displeasure with those who slowed this progress. TR at 201, 239

479, 482, 525. While the crane was down, all fuel transfers from K East to K West stopped, making it impossible to meet production goals. TR at 57, 287, 461. Falling short on these goals caused Fluor's profits to suffer. TR at 389. Mr. Eubanks testified that he "could tell that management wanted this crane back together no matter what." TR at 187. He characterized the meeting as "a witch hunt" where "tempers had elevated." TR at 187, 190.

Mr. Larkin told the group that it was safe to reinstall the brakes. TR at 140. He disagreed with Mr. Ford and Mr. Eubanks that their measurements showed the brake discs were out of tolerance. TR at 211. After Mr. Larkin addressed the group, Mr. Eubanks and Mr. Ford briefly excused themselves from the meeting. TR at 188-89. After conferring, the two returned to the meeting and Mr. Eubanks announced that he would reassemble the brake. TR at 190. Mr. Ford refused to participate in reassembling the brake and suggested that another millwright replace him. TR at 248. The Complainant testified that at the close of this meeting Mr. Liefeld turned to Mr. Dickinson and asked whether he could fire Mr. Ford. TR at 71. Both dispute this version of events, but Mr. Ruane confirmed that possible disciplinary actions against Mr. Ford were discussed. TR at 479-80.

The Complainant testified that Mr. Dickinson's presence at the meeting was unusual because he usually attended disciplinary actions. TR at 54. Mr. Dickenson could not remember why he was at the meeting; he testified that he knew nothing of the technical issues discussed, and that he simply stayed late that day so he thought to observe the meeting. TR at 258-259. Both Mr. Eubanks and Mr. Ford testified that Dickinson's presence at the meeting led them to believe that their jobs were in jeopardy. TR at 187, 214.

The brakes were reinstalled under Complainant's supervision and a load test was successfully performed on February 20, 2003. TR at 447-48; CX 12. The Complainant received a copy of a letter confirming that the crane was safe for service on February 20 or 21, 2003. TR at 69. He testified that he found parts of the letter "bogus" but he signed off on the work package because he thought it was the "politically correct thing to do." TR at 74.

On February 21, 2003, the crane was returned to service. TR at 292. The parties dispute whether the noise remained. TR at 166, 206, 445. Two or three weeks later the Complainant was transferred to the 300 Area of Hanford at the behest of Mr. Fox and Mr. Liefeld. TR at 76, 327. Mr. Fox testified that the reason for the transfer was the declining health of Rick Southam, who was missing two to three days of work per week. TR at 341, 407. Mr. Southam, an Operations Specialist whose duties included field work supervision, oversaw the assembly of shield plugs in the 300 Area. TR at 407. After his transfer to this less responsible position, the Complainant had little work to do. TR at 79. The new assignment was a form of exile.

On April 10, 2003, Mr. Fox completed and submitted a lay-off review form, ranking the Complainant lowest of four individuals in his work group. *See*, Stipulated Facts, ¶ 2; CX 2. Mr. Fox had rated the Complainant in December 2002, using the same form. CX 2, 314. As compared to that December 2002 rating, Mr. Fox reduced Complainant's rating from a 3 (competent) to a 1 (needs improvement) in three categories. *Id.* On May 12, 2003, Mr. Kimbrough, Rich Redekopp, and Colleen Angel notified the Complainant that he was laid off. TR at 81. Mr. Kimbrough explained that the Complainant had been chosen for lay off because

of his ranking and the lack of available work. TR at 81-82. Mr. Leliefeld told Mr. Eubanks that the Complainant was laid off because “he couldn’t keep his mouth shut.” TR at 192, 195. Mr. Leliefeld denies this statement (TR at 543), but I believe Mr. Eubanks. The lay off is a continuation of the retaliation that began with the reduction in the Complainant’s duties when he was reassigned to the dead end work in the 300 Area.

From May to September 2003, the Complainant applied for a position as a Maintenance Engineer, a Craft Superintendent, a Maintenance Field Work Supervisor, and a Maintenance Supervisor. Fluor did not hire him for any of them. When he applied for this last position, he was one of two final candidates. TR at 103.⁴ Both applicants were interviewed by Riney Wilbert and two field work supervisors who reported to him, Dan Osher and Tim Larkin. TR at 161.

During the interview, the Complainant discussed the crane incident with Mr. Wilbert as an example of a difficult project that he resolved. TR at 160. Mr. Wilbert and Mr. Fox maintain that they did not discuss the crane incident. TR at 429, 618. The Complainant testified that after the interview, Mr. Wilbert informed him that he was willing to hire him as soon as the paperwork went through. TR at 102. Nonetheless, the Complainant was not chosen for the position. On September 29, 2003, however, the Complainant secured a job with Fluor as a temporary millwright journeyman at an hourly wage of \$27.66. TR at 587-88; EX 2. On October 20, 2003, Fluor hired him to a regular position at the same hourly wage, and at the time of trial held a bargaining-unit millwright position. Stipulated Facts ¶ 2.

Discussion

To prove his whistleblower claim, the Complaint must provide either direct or circumstantial evidence that Fluor knew he engaged in protected activity, and that the protected activity was a likely reason Fluor took adverse action against him. 29 C.F.R. § 24.5(b). *See, Kormoczy v. Secretary of Dep’t of H.U.D.*, 53 F.3d 821, 824 (7th Cir. 1995) (recognizing that the direct evidence approach and the *McDonnell Douglas* burden shifting framework are “distinct evidentiary paths.”); *Lowe v. City of Monrovia*, 775 F.2d 998, 1006 (9th Cir. 1985) (“[A] plaintiff can establish a prima facie case of disparate treatment without satisfying the *McDonnell Douglas* test.”).

Direct evidence is proof sufficient for the fact finder to conclude that an illegitimate reason was a motivating factor for the challenged action. *Tyler v. Bethlehem Steel*, 958 F2d 1176, 1183 (2nd Cir. 1992); *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999) (concluding that direct evidence means proof from which a trier of fact could conclude, more probably than not, that a protected characteristic such as age or protected activity contributed to the contested employment decision); *see also Costa v. Desert Palace*, 299 F3d 838, 853 (9th Cir. 2002) (en banc) *aff’d sub nom. Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (accepting that direct evidence includes inferences).

⁴ The Stipulated Facts title this position as Maintenance Supervisor, but the transcript lists the job as a Senior Operations Specialist.

Oblique or ambiguous statements that require context to appreciate have qualified as direct evidence. In an action under the banking whistleblower statute, 12 U.S.C. § 1831j(a), an officer/employee of a savings and loan association was ousted after bringing irregularities to the attention of regulators. Before she suffered any adverse actions the association's president wrote to criticize her disclosures and make a record of her actions that would serve as "the basis from which future management decisions will be made." This ominous but vague letter was found to be direct evidence of discriminatory animus. *Frobose v. American Savings and Loan Ass'n of Danville*, 152 F.3d 602, 607 (7th Cir. 1998). In an age discrimination case the court of appeals considered the statement: "Think of it like this. In a forest you have to cut down the old, big trees so that the little trees underneath can grow." This was no stray remark. The manager who fired the plaintiff offered it in a conversation about the termination to explain the firing not long after it took place. It too qualified as direct evidence of discrimination. *Wichmann v. Board of Trustees of Southern Illinois University*, 180 F.3d 791, 795 (7th Cir.1999), *vacated and remanded on other grounds*, 528 U.S. 1111 (2000).

The difficulty in obtaining evidence that suggests discrimination spawned the ubiquitous *McDonnell Douglas*⁵ burden-shifting framework that "is designed to give the plaintiff a boost when he has no actual evidence of discrimination (or retaliation) but just some suspicious circumstances." *Stone v. City of Indianapolis Public Utilities Division*, 281 F.3d 640, 643 (7th Cir. 2002). That framework requires the worker to prove, among other things, that the reason offered for the adverse action was pretextual. *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 96-STA-35, slip op. at 5-6 (ARB June 28, 2002).

The relevant inquiry is whether the complainant has proven the ultimate question of retaliatory animus by a preponderance of the evidence. *See, U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 372 & n. 2 (3d Cir.1987) ("Once a case has been fully litigated, however, it is unnecessary for the appellate court to decide whether a prima facie case had, in fact, been established"); *Pickett v. Tennessee Valley Auth.*, ARB Nos. 02-056 and 02-059, ALJ No. 2001-CAA-18 (ARB Nov. 28, 2003), slip op. at 5 & n. 10; *Paynes v. Gulf States Utilities Co.*, ARB No. 98-045, ALJ No. 1993-ERA-47 (ARB Aug. 31, 1999).

The Complainant has proven discrimination by the intimidating nature of Mr. Dickenson's presence during the crane meeting, the transfer of the Complainant within weeks of the crane incident to the 300 area where his reduced responsibilities made him more vulnerable to a reduction-in-force, the reduction of his communication-skill scores on the evaluation form used to determine lay offs, and through the testimony by two of his co-workers that managers stated he was laid off because he did not "keep his mouth shut." The manager's statements can be interpreted as "acknowledgment of the defendant's discriminatory intent." *Ezell v. Potter*, 400 F.3d 1041, 1051 (7th Cir. 2005). It is direct evidence of discrimination.

Protected Activity

⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

An employee's internal complaint about potential environmental violations is protected under the Act because it allows an employee to express his environmental concern to the employer first, giving the employer the opportunity to correct the violation without government intervention. 42 U.S.C.A. § 5851(a)(1)(A) (part of the amendments to the ERA made in the Energy Policy Act of 1992); H.R. No. 102-474 (VIII) at 78, *reprinted in* 1992 U.S.C.C.A.N. 1953, 2282, 2296 (demonstrating that Congress had always intended to protect employees who notify their employer of an alleged violation as well as those who notify a federal regulator); *Doyle v. U.S. Sec'y of Labor*, 285 F.3d 243, 249 & n. 8 (3d Cir. 2002); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984). A complainant need not prove an actual violation of law but must subjectively believe that the employer violated one of the environmental statutes, and that belief must be objectively reasonable. *Melendez v. Exxon Chemicals Americas*, ARB No. 1996-051, ALJ No. 1993-ERA-6, slip. op. at 11, 20 (ARB July 17, 2000); *see also, American Nuclear Resources, Inc., v. United States Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998) (making the point that the Act does not protect "every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern").

The Complainant argues that his stated reluctance to return the crane to work without complete replacement of the brakes and a load test, and his request for confirmation from engineering that the crane was safe qualified as protected activities. He subjectively believed that working a compromised crane could release irradiated water and expose workers and the environment to radiation. It is objectively reasonable to find that this situation constituted an environmental concern because there was an unexplained noise, uneven wear and hot spots on the brake, and others agreed to a load test before the crane returned to service. CX 1; TR 532-33. I agree and find that he engaged in protected activity under the Act.

Knowledge

On the way to Mr. Leliefeld's office, the Complainant told Mr. Larkin, "[w]e didn't find the source of the noise, so I wouldn't put the crane back together." TR at 504. Members of Fluor's management team, who were involved in ranking the Complainant for purposes of a reduction in force, attended the crane meeting where Mr. Eubanks, Mr. Ford, and the Complainant maintained their concerns about the crane. Fluor presented confused, inconsistent testimony about this pivotal crane meeting. Mr. Dickinson (from human resources) testified that he did not know why he had been there or how he happened to attend a meeting that took place late in the day, after he ordinarily would have left work. Mr. Leliefeld gave deposition testimony that he invited Mr. Dickinson. TR at 316. During the hearing, Mr. Leliefeld thought that Mr. Fox invited him. *Id.* Mr. Fox could not remember whether he or Mr. Leliefeld called the meeting. TR at 386. Mr. Ruane finally testified, "actually, I got a call, I think, from Harry Fox." TR at 448.

I find Mr. Dickinson's inability to articulate a meaningful reason for his presence at a meeting that occurred after his regular working hours not credible. I find that his presence was a deliberate management strategy to pressure the millwrights to get the crane back in operation as soon as possible, regardless of their misgivings. Mr. Leliefeld considered Mr. Ford a "very difficult person" who "liked to shut work down." TR at 319. He anticipated that Mr.

Dickinson's presence would be necessary if safety concerns were raised. *Id.* It is probable that Mr. Dickinson attended the meeting not as an observer, but as an enforcer. The Complainant, Mr. Eubanks and Mr. Ford all got the message. The Complainant has shown that those who laid him off knew about his protected activity.

Adverse Action

Inclusion in a layoff constitutes adverse action. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, (9th Cir. 1984); *Emory v. North Bros. Co.*, 86-ERA-7 (Sec'y May 14, 1987), slip op. at 10. The Complainant satisfies this element because he was laid off due to a reduction in force.

Refusal to hire is an adverse action where 1) the complainant applied and qualified for a job for which the employer was seeking applicants; 2) despite his qualifications, he was rejected; and 3) after his or rejection, the position remained open. *McDonnell Douglas Corp.*, 411 U.S at 802; *Hasan v. Commonwealth Edison Co.*, ARB No. 00-028, ALJ No. 2000-ERA-1 (ARB Dec. 29, 2000), slip op. at 3. The Complainant alleges that he was "constructively rejected" as soon as he applied for positions with the Respondent because Mr. Fox and Mr. Liefeld, who knew of his protected activity, selected the maintenance supervisor candidates. The Complainant alleges that Fluor wrongfully failed to hire him to four different positions, for which he applied and was qualified.

After his lay off, a Fluor representative called the Complainant and notified him about open positions within the company. TR at 604. The Complainant first applied for an Operations Supervisor position. The Complainant provided his application, but did not show that he was rejected despite his qualifications, and that after his rejection the position stayed open. There was more than one vacancy for the second position (Maintenance Supervisor). One of these positions was cancelled. CX 210. The Complainant supplied e-mails that allude to open positions and resumes collected to fill these positions. See CX 214, 215. The fact that these positions existed is not enough to show that Fluor wrongfully failed to hire the Complainant, even where Mr. Liefeld, Mr. Fox, and/or Mr. Redekopp influenced who could be hired. There is insufficient evidence that the Complainant was qualified for these specific jobs and that they stayed open after he was rejected. The third position (Craft Superintendent) was within the Waste Management Organization and was filled by an internal applicant. CX 187, 313. Fluor has a policy of considering internal before external applicants. TR at 569. The Complainant, as either an external applicant or one who was recently laid off, was less qualified than the internal candidate who got the job.⁶ Finally, the Complainant presented evidence that he was qualified for the fourth position (Maintenance Supervisor), and that management who knew of the crane incident potentially interfered with the hiring process. Although he had more experience than another applicant, Mr. Grindstaff, he scored lower in areas of communication and interpersonal skills. TR at 613-614; 623. This position did not remain open because Mr. Grindstaff was selected on July 24, 2003. Therefore, Fluor's choice to reject the Complainant for all four of these positions does not constitute adverse action.

⁶ Fluor contends that there is no proof that the Complainant applied for this job.

Causal Nexus

The Complainant has the burden to show that his safety concerns about the crane contributed to Fluor's decision to lay him off. *See Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-36 (ARB Mar. 30, 2001), slip op. at 6. Temporal proximity raises an inference of causation, but it is only part of the evidence of retaliatory animus. *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-34 (ARB Mar. 30, 2001). "The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific." *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 280-81 (3d Cir.2000). Just two to three weeks after the Complainant voiced his safety concerns, Mr. Fox and Mr. Liefeld transferred the Complainant to a less responsible job. The transfer, though not an adverse action for purposes of liability, functioned as a demotion that made the Complainant more vulnerable to lay off.

Before the crane incident, Mr. Fox used a reduction-in-force form to rate the Complainant's ability to communicate with customers and management, written communication, and proficiency in SNF Project practices, at an acceptable level. CX 314. Two months after the crane incident, and only four months after his last review, Mr. Fox rated the Complainant's performance of the same skills at the lowest level – needs improvement. CX 2. In addition to this inconsistency, Mr. Eubanks and Mr. Ford testified that the Complainant's communication skills, technical knowledge, and attention to safety in the work environment were among the very best. TR at 181, 189, 229, 231.

I infer from the decrease in the Complainant's performance ratings that management harbored resentment toward him for slowing down the crane's production with his safety concerns. It defies belief that all of the Complainant's communication skills would have dipped below the competent level for any legitimate reason, within a span of four months. He communicated a problem with the crane, which slowed production. Thereafter he was exiled to the 300 area to a position that kept him quiet, rather than called for communication skills. Mr. Fox testified that "the crane job" was a factor that influenced the decline in the Complainant's performance ratings. TR at 652. Therefore, the Complainant has shown that his protected activity contributed to his lay off.

Affirmative Defense

Fluor may still avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the Complainant's protected activity. 42 U.S.C. § 5851 (b)(3)(D). If it does not make the requisite demonstration by clear and convincing evidence, then the Complainant is entitled to damages. *See* 42 U.S.C. § 5851(b)(2)(B); *Duprey v. Florida Power & Light Co.*, 2000-ERA-5 (ARB Feb. 27, 2003), slip op. at 4 & n. 22; *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at n. 15 (ARB Sept. 30, 2003)..

Fluor presents evidence of the ranking process it used to select candidates for reductions in force. That subjective process placed the Complainant in jeopardy of losing his job before the crane incident. In December of 2002, Mr. Fox ranked six operations specialists in order to lay

off two with the lowest scores. The Complainant tied with another employee for the second lowest score of demonstrated job skills. Overall, he ranked third from the bottom because a previous, high performance evaluation broke the tie. This final ranking was just enough to avoid the lay off in December. Nonetheless, if Mr. Fox had not reduced the Complainant's communication scores – if the Complainant had kept the same scores that he had been given in December – he would not have been cut in April.⁷

Using his December scores, the Complainant would have ranked second from the bottom in April; the actual, decreased scores ranked him last. The Respondent argues that the April communication scores were influenced by a pre-job briefing presentation in which the Complainant performed poorly. If this incident actually influenced the Complainant's performance rankings, then its adversity should be reflected in the December scores because the presentation preceded that round of lay offs. TR at 650. Moreover, the April reduction in force called for two lay offs, but only one operations specialist, the Complainant, lost his job. TR at 281. After the Complainant lost his job, two or three additional PICs were hired. TR at 343.

Fluor fails to demonstrate by clear and convincing evidence that the Complainant would have been ranked last, and therefore subject to the only cut in operations specialists had he not voiced his concerns about the crane's brakes. Neither does it present evidence that had the Complainant been second to last, that it would have laid off two employees, rather than one.

Even if I were to disregard Mr. Ford's testimony that the Complainant was laid off for failing to "keep his mouth shut," Mr. Eubank's testimony to the same effect remains damning evidence about Fluor's motivation. It is quite believable when it two witnesses heard it. Although Mr. Leliefeld denies this statement, he confirmed that Complainant was transferred to a remote area – in effect constructively silenced – soon after the crane meeting.

Fluor did not show by clear and convincing evidence that it would have taken the same unfavorable personnel action had the Complainant not slowed production by voicing his concerns about the crane. Fluor managers attempted to intimidate the millwrights by inviting Mr. Dickinson to the meeting. Then they silenced the Complainant by transferring him to the 300 area. Finally, they chose him for a reduction in force in subjective process in which his performance ratings were manipulated. Therefore, the Complainant is entitled to damages.

Damages

The Complainant has shown that Fluor retaliated against him for whistleblowing. Therefore he may obtain relief necessary to make him whole, including reinstatement to his former position, back pay, and other actions necessary to abate the violation. 42 U.S.C. § 5851(b)(2)(A). He is also entitled to terms, conditions, and privileges of that employment, and when appropriate, to compensatory damages. *See* 29 C.F.R § 24.7 (c)(1). The Complainant bears the burden of proving what the employer owes, but uncertainties in computing are resolved

⁷ The change in ranking also begs the question whether the Complainant's scores would have improved enough to insulate him from the reduction in force had he not been transferred to the 300 area.

against the employer. *Lederhaus v. Paschen*, 1991-ERA-13 (Sec'y Oct. 26, 1992). The Complainant prays for the following relief:

- 1) An order reinstating him to his former position as Operations Specialist or if no longer available, then to a substantially equivalent position.
- 2) Back pay totaling \$13,390.88
- 3) Other benefits he would have earned had he not been laid off, including:
 - a. \$7,960.72 in overtime, based on 330 hours of overtime calculated from an average of ten months in 2002 (four months at the rate of \$27.39 and six months at a rate of \$30.13).
 - b. \$6,000 in stipend pay.
 - c. \$3,070.57 for a pay raise that he would have received in October 2003.
 - d. \$6,155.19 in vacation time lost.
 - e. \$835.98 in medical expenses for 6 months.
 - f. \$1,289.80 in union dues.
 - g. \$960.35 in pension benefits ($\$213.41 * 4.5$)
 - h. \$2,794.56 in severance pay.
 - i. Short term disability as well as time off for exempt employees.
- 4) Interest on the back pay at the rate specified in 26 U.S.C. § 6621 through the date of compliance with this order.
- 5) Requiring Fluor to expunge from the Complainant's personnel records all derogatory or negative information relating to his employment.
- 6) \$25,000 in compensatory damages.
- 7) Requiring Fluor to post a finding of violation of the employee protection provision on all bulletin boards at Hanford, where Fluor's official documents are posted for 60 days ensuring that it is not altered, defaced, or covered by other material.

Reinstatement

The Complainant is entitled to reinstatement to his previous position or to a substantially equivalent position. His current position meets that requirement.

Back Pay

The base wage of the Complainant's position at the time of his lay-off was \$1,095.92 per week. CX 59. The time between the Complainant's lay off from and rehire to Fluor is 18 weeks (May 22, 2003 to October 1, 2003). During that time, he worked temporary positions for two

employers, earning wages that must be subtracted from his back-pay award. No offset is made for any unemployment benefits the Complainant may have received. *Keene v. Ebasco Constructors, Inc.*, 1995-ERA-4 (ARB Feb. 19, 1997). Based on the calculations below, the Complainant is entitled to \$13,390.88 in back pay.

18 weeks * \$1,095.92	\$19,726.56
R.W. Rhine wages	(\$5,361.23)
Pavement Surface Control	(\$1,074.45)
Total	\$13,390.88

Other lost benefits

Fluor must restore any benefits to which the Complainant would have been entitled, including out of pocket medical expenses that would have been covered by health insurance available to him as a Fluor employee. *Doyle v. Hydro Nuclear Services*, 89-ERA-22 (ARB Sept. 6, 1996). The Complainant provided no evidence to prove up additional losses, however. His request for overtime is based on an average of ten months in 2002 (according to his pre-trial statement that consists of four months at the rate of \$27.39 and six months at a rate of \$30.13). It is understandable that he did not choose the last three months of his employment because he had been transferred and had little opportunity for overtime, but he fails to explain why he chose ten months, rather than twelve (or any other number for that matter) and why he excluded the first two months of 2003. I find insufficient proof of lost overtime to support a damage award for it. The Complainant's pre-trial statement requests \$6,000 in stipend pay, based on \$1,500 per quarter for 3 quarters; the math is incorrect ($3 * 1,500 = 4,500$), and there is no documentation provided to prove this stipend, however.

Likewise, there was no evidence of vacation benefits, medical expenses, union dues, pension benefits, or the specific amounts of short term disability and time off due. The Complainant's request for reimbursement for a missed pay raise is simply too speculative. He offered no evidence that Fluor gave automatic pay increases. The Complainant provided evidence that he was given a severance of \$15,890.84, but does not explain why he believes he was shorted \$2,794.56 in severance pay. *See CX 55.*

Without sufficient evidence of these additional benefits, I cannot order that Fluor reimburse the Complainant for them.

Interest

Interest is due on back pay, at the rate set for underpayment of federal taxes. 26 U.S.C. § 6621(a)(2).

Complainant's personnel records

The reduced ranking that caused the Complainant's lay off must be expunged from his personnel file. The Complainant provided no other evidence of a negative or derogative comment or mark that is part of his personnel record.

Compensatory damages

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. The testimony of medical or psychiatric experts is not necessary, but a complainant needs to show that he or she experienced mental pain and suffering and that the unlawful discharge caused the pain and suffering. *Thomas v. Arizona Public Service Co.*, 89- ERA-19 (Sec'y Sept. 17, 1993); *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992). The Complainant presented insufficient evidence to support an award for his claims of emotional distress. He testified that his wife suffered, and therefore he suffered by needing to take care of her. The Complainant did not seek medical assistance for himself, and evidence suggests that the Complainant's wife struggled with emotional instability before the lay off. He cannot be awarded damages for her medical condition. His testimony that he had to take care of her because of her condition is not enough to establish that he suffered from emotional distress due to his lay off.

Notice

Fluor must post a finding of violation of the employee protection provision on all bulletin boards at Hanford, where Fluor's official documents are posted for 60 days ensuring that it is not altered, defaced, or covered by other material.

Effect

This decision is immediately effective as interim relief as it pertains to reinstatement, back pay, and other actions necessary to abate the violation, but not as to compensatory damages (which have not been awarded). *See*, 42 U.S.C.A. § 5851(b)(2)(A) and 29 C.F.R. § 24.7(c)(2) (2005).

Order

It is hereby Ordered:

- 1) Fluor is ordered to reinstate the Complainant to his former position, or if no longer available, then to a substantially equivalent position. This order is immediately effective
- 2) Fluor is ordered to pay the Complainant back pay totaling \$13,390.88.
- 3) Fluor is ordered to pay interest on the back pay at the rate specified in 26 U.S.C. § 6621.
- 4) Fluor must expunge the Complainant's April 2003 rankings that caused his lay off.

- 5) Fluor must post a finding of violation of the employee protection provision on all bulletin boards at Hanford, where Fluor's official documents are posted for 60 days ensuring that it is not altered, defaced, or covered by other material.
- 6) Fluor is entitled to a credit for all compensation and wages heretofore paid with the exception of any unemployment benefits that may have been received.
- 7) The Complainant has 20 days from receipt of the Decision & Order in which to file and serve an application for costs and expenses including attorney fees.

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WILLIAM DORSEY
Administrative Law Judge

WD

NOTICE OF APPEAL RIGHTS: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.7(d) and 24.8.