



Issue Date: 04 November 2004

Case No: 2004-ERA-0025

In the Matter of

RAFAEL SANTAMARIA,
Complainant,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

**RECOMMENDED DECISION AND ORDER GRANTING
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

On August 30, 2004, U.S. Environmental Protection Agency ("Respondent") filed a Motion for Summary Decision and accompanying brief, pursuant to 29 C.F.R. §§ 18.40 and 18.41(a). Employer argues that Rafael Santamaria ("Complainant") raises no genuine issues of material fact and cannot make a prima facie showing that he engaged in protected activities under the environmental protection acts. Respondent further argues that Complainant does not specify what conditions give rise to a hostile work environment, or that the Respondent has retaliated against Complainant for protected activity.

This case arises from a post-complaint retaliation complaint filed pursuant to several environmental whistleblower protection statutes. Complainant had filed a complaint on April 30, 2003 "pursuant to the environmental whistleblower laws" [apparently the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i); Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1367; Toxic Substances Control Act (TSCA), 15 U.S.C. §2622; Solid Waste Disposal Act (SWDA), 42 U.S.C. §6971; Clean Air Act (CAA), 42 U.S.C. §7622; Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9610; and Department of Labor implementing regulations. 29 C.F.R. Part 24 (2004).] The case was assigned to Judge Richard Huddleston for a formal hearing. Respondent then filed a motion for summary decision. On February 24, 2004, a Recommended Decision and Order was issued granting Respondent's summary decision because Complainant failed to establish that a genuine issue of material fact existed with regard to whether he engaged in protected activities. Judge Huddleston found that Complainant failed to establish that he engaged in any protected activity and thus his office lacked jurisdiction over the matter. Santamaria v. U.S. E.P.A., 04-EPA-6 (ALJ Feb. 24, 2004).

On March 29, 2004, Complainant filed this post-complainant retaliation complaint alleging changes in the workplace since the original complaint, which has created a hostile working environment. On August 30, 2004, Respondent filed a motion for summary decision with a supporting brief and exhibits. Complainant filed a response with exhibits on September 22, 2004. The Court granted Complainant additional time to further respond to the motion for summary decision. Complainant filed additional documents on October 4, 2004.

FACTS

The following facts are not disputed:

1. In 2000, Complainant filed an EEO complaint against Respondent. The case was recommended for dismissal by a U.S. Magistrate on April 22, 2003, and dismissed on May 23, 2003. (Respondent's exhibit ("RE") F).
2. On April 30, 2003, Complainant filed his first environmental whistleblower complaint. This complaint, while filed "pursuant to the environmental whistleblower laws," does not allege any violations of any environmental laws. In fact, none of the environmental whistleblower laws are even mentioned. (RE. E).
3. Judge Huddleston was assigned to hear Complainant's case. During Complainant's January 8, 2004 deposition, Complainant was repeatedly asked by counsel for Respondent as to what specific complaints he had made, to whom he made the complaints, when the complaints were made and on what specific environmental statutes he based his complaints. Complainant never provided the information. (Huddleston D&O at p. 9).
4. On February 24, 2004, Judge Huddleston issued a Recommended Decision and Order Granting Respondent's Motion for Summary Decision. In granting summary judgment, Judge Huddleston found that Complainant never articulated a specific safety or health concern that had or would potentially result from Respondent's alleged violations.
5. Judge Huddleston noted Complainant could have explained in more detail his alleged protected activities in his response to the motion for summary decision but failed to do so other than providing non responsive argument. Judge Huddleston found the allegations of protected activity as they stand, without further specificity, and without further evidence as to their connection to any health or safety concern stemming from the alleged violation of any of the environmental statutes that Complainant named are insufficient to afford Complainant any whistleblower protection. Judge Huddleston noted "The complaint in this case simply does not allege that he engaged in any activity

protected by the statutes under the jurisdiction of the U.S. Department of Labor.” (Huddleston D&O at p.11).

6. On March 13, 2004, the instant complaint was filed. In the complaint, Complainant does not identify any violations of health or safety regulations related to the various environmental protection statutes. None of the various environmental protection statutes are even mentioned.
7. In his response to the motion for summary decision, Complainant again does not identify any violations of health or safety regulations related to the various environmental protection statutes.
8. In his answers to interrogatories, despite being asked to identify the specific protected activity he engaged in or disclosure made, the date of these instances, to whom the disclosure was made and the environmental law violated, Complainant only referred to his vague response to the motion for summary judgment.
9. Complainant has not demonstrated that he engaged in any protected activity. The complaint and Complainant’s response to Respondent’s motion for summary decision only allege activities which, according to Complainant, illustrate a hostile working environment. This activity includes directing Complainant to appear in Washington, D.C., or delegating Complainant’s duties under the Minority Business Enterprise and Women-owned Enterprise. Complainant does not describe any of his own activity that may be classified as protected under any of the whistleblower provisions of the environmental statutes. The only activity that is arguably protected is the filing of the April 30, 2003 complaint.

ISSUE

Is the filing of a complaint “pursuant to the environmental whistleblower laws” which does not allege that the complainant engaged in any activity protected by the statutes under the jurisdiction of the U.S. Department of Labor, protected activity under the federal environmental whistleblower statutes?

Based on the facts of this case, the Court finds that it is not.

DISCUSSION OF LAW AND FACTS

Any party may move with or without supporting affidavits for summary decision on all or part of the proceeding. 29 C.F.R. § 18.40(a) (2004). Summary judgment is granted for either party if the administrative law judge finds “the pleadings, affidavits,

material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” Id. Thus, in order for a motion for summary decision to be granted, there must be no disputed material facts and the moving party must be entitled to prevail as a matter of law.

In deciding a motion for summary decision, the court must consider all the material submitted by both parties, drawing all reasonable inferences in a matter most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. Once the moving party has met its burden of production, the non-moving party must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. Lincoln v. Reksten Mgmt., 354 F.3d 262 (4th Cir. 2003); Green v. Ingalls Shipbuilding, Inc., 29 BRBS 81 (1995) (stating the purpose of summary decision is to promptly dispose of actions in which there is no genuine issue as to any material fact). However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). I find that summary decision is appropriate. Complainant has failed to establish that a genuine issue of material fact exists with regard to whether he engaged in any protected activities.

To establish a prima facie case of retaliatory or discriminatory action by an employer, a complainant must establish that the employer is subject to coverage under the environmental statutes, and that he is a covered employee under the acts. See Bechtel Constr. Co. v. Sec’y of Labor, 50 F.3d 926, 933-34 (11th Cir. 1995). The complainant must also show that he engaged in protected activity, that he was subject to adverse employment action, that his employer was aware of the protected activity, and that a causal link exists between the protected activity and the adverse employment action. Id.; Williams v. Lockheed Martin Corp., 98-ERA-40, at 4 (ARB Sept. 29, 2000); see also Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 252 (1981).

Complainant has alleged that Respondent retaliated against him in response to his April 30, 2003 complaint which was filed by Complainant’s counsel. Specifically, Complainant asserts Respondent had made changes subsequent to the 2003 complaint, which have created a hostile working environment in violation of these same environmental whistleblower protection statutes. I note the 2003 complaint, while filed “pursuant to the environmental whistleblower laws,” does not allege any violations of any environmental laws. In fact, none of the environmental whistleblower laws is even mentioned.

Generally, these environmental whistleblower protection statutes prohibit an employer from discriminating against an employee for commencing, causing to be commenced, or preparing to commence a proceeding under the chapters of the respective acts. 29 C.F.R. § 24.2 provides:

(b) Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has

(1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in § 24.1(a) or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute.

While a literal reading of the environmental whistleblower statutes and 29 C.F.R. § 24.2 would lead to the conclusion that the filing of a complaint with the Department of Labor is, as a matter of law, protected activity under the federal environmental whistleblower statutes, the Court finds that, under the unique facts of this case, Complainant's filing of his April 30, 2003 complaint was not protected activity.

In whistleblower cases, subject matter jurisdiction exists only if complainant is alleging that the employer illegally retaliated against him for engaging in activities protected by the environmental statutes' whistleblower provisions. The Secretary and the Board have repeatedly held that the raising of employee safety and health complaints constitutes activity protected by the environmental acts when such complaints touch on the concerns for the environment and public health and safety that are addressed by those statutes. Melendez v. Exxon Chems. Ams., 93-ERA-6, at 15 (ARB July 14, 2000) and cases cited therein. Activities that are protected under the environmental acts are those that further the purposes of those acts or relate to their administration and enforcement. See Culligan v. Am. Heavy Lifting Shipping Co., 00-CAA-20 (ARB June 30, 2004); see also 20 C.F.R. § 24.2(a)-(b) (2004). The protected activity must relate to a safety and/or health concern resulting from the reasonably perceived violation of an environmental statute. Kesterson v. Y-12 Nuclear Weapons Plant, 95-CAA-12, at 3 (ARB Apr. 8, 1997).

Pursuant to case law developed under the environmental acts, activities that qualify as furthering a statutory purpose are those that express concerns which "touch on" the environment. See Dodd v. Polysar Latex, 88-SWD-4 (Sec'y Sept. 22, 1994). For instance, the purpose of the CAA "is to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1); see Natural Resources Defense Council, Inc. v. EPA, 725 F.2d 761, 764 (D.C. Cir. 1984) (stating the purpose of the CAA is to protect the public health by controlling air pollution); Culligan v. American

Heavy Lifting Shipping Co., 00-CAA-20 (ARB June 30, 2004). Similarly, the SDWA's purpose is "to promote the safety of the nation's public water systems through the regulation of contaminants so as to provide water fit for human consumption." Culligan, 00-CAA-20, at 9; see 42 U.S.C. § 300f(1). The TSCA or the SWDA are interpreted as representing "efforts by Congress to protect the health and safety of persons and the environment by regulating the manufacture and distribution of hazardous substances, and the release of hazardous materials into the environment." Jones v. EG&G Defense Materials, Inc., 95-CAA-3, at 2 (ARB Nov. 24, 1998). The purposes of CERCLA are defined as the "prompt cleanup of hazardous waste sites and the imposition of all cleanup costs on the responsible party." Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990).

Throughout the original case and this case Complainant has never articulated a specific safety or health concern that had or would potentially result from Respondent's alleged violations. Complainant's allegations are clearly more relevant to the jurisdiction of agencies dealing with personnel matters, than the protection and safety of the nation's air or water.

While it is true that neither the Administrative Review Board nor the Secretary has imposed a requirement that a complaint pass any threshold examination of its underlying merit in order to receive protected status, there is also no precedent classifying as protected activity the filing of a complaint which does not even *allege* a violation of any environmental law. While the Board in Tyndall v. EPA, 1995-CAA-5 (ARB June 14, 1996) held the filing of a complaint under the CAA "clearly constituted protected activity," the original complaint *alleged* a violation of the CAA. See Bassett v. Niagara Mohawk Power Co., 1986-ERA-2 (Sec'y September 28, 1993) for similar result under the Energy Reorganization Act. The Secretary has consistently held that in order to constitute protected whistleblowing the underlying "disclosure" must be grounded in conditions constituting reasonably perceived violations of the environmental acts." Greene v. Biro, 02-SWD-1 (ALJ Feb. 10, 2003) (citing Minard v. Nerco Delamar Co., 92-SWD-1 (Sec'y Jan. 25, 1994) and Melendez v. Exxon Chems. Ams., 93-ERA-6 (ARB July 14, 2000)). In contrast, Complainant's argument is analogous to a cook at a fast food restaurant who files a frivolous complaint with DOL alleging the restaurant has violated nuclear safety regulatory requirements by putting too much pepper in their burgers. The frivolous complaint would be dismissed because the case has nothing to do with nuclear safety. But (as Complainant would have it) is this fast food cook now entitled to nuclear whistleblower protection? This Court has found no precedent classifying the filing of a complaint which does not even *allege* reasonably perceived violations of the environmental acts as protected activity.

Judge Huddleston dismissed Complainant's allegations because Complainant had not *alleged* any safety or health concern that had or would result from Respondent's alleged violations. Complainant (and the restaurant cook) does not fall within the protection of the whistleblower statutes merely by bringing a claim which is dismissed because it does not allege any safety or health concern that had or would result from Respondent's alleged violations.

Complainant has not identified any applicable environmental statute that was violated. Nothing he has submitted, including his complaint, response to the motion for summary judgment, and responses to interrogatories make reference to activity that is protected. Throughout the litigation before Judge Huddleston and this Court, Complainant has never articulated a specific safety or health concern that had or would potentially result from Respondent's alleged violations. As Complainant has failed to establish that he engaged in any protected activity, I find that this court does not have jurisdiction over this matter. Therefore, it is proper to grant Respondent's Motion for Summary Decision.

RECOMMENDED ORDER

For these reasons, Respondent's Motion for Summary Decision is GRANTED, and Complainant's claim against U.S. Environmental Protection Agency is DISMISSED.

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LARRY W. PRICE
Administrative Law Judge

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