



Issue Date: 15 August 2005

CASE NO.: 2005-CAA-00005

IN THE MATTER OF

**JOEL BROOK KING,
Complainant**

v.

**BP PRODUCTS NORTH AMERICA, INCORPORATED,
Respondent**

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

Before me is BP Products North America, Inc.'s (Respondent) Motion for Summary Decision. Joel Brook King (Complainant) opposes the motion. For the following reasons, Respondent's motion is granted.

Factual Background

Complainant was employed by Respondent as a driver at its Nashville, Tennessee distribution terminal. Complainant claims that on March 30, 2002, he observed a fellow employee intentionally allow fuel to bypass the additive pump, therefore allowing fuel to enter the fuel trucks without additive. Complainant reported the incident to two supervisors on March 31, 2002.

In June 2002, Complainant attended a meeting regarding an incident which had occurred, where he allegedly failed to follow pipeline procedure. Complainant alleges at no time during the meeting did he believe he was receiving a verbal warning or any other type of discipline, though Respondent asserts that a verbal warning was issued. In November 2002, Complainant and another employee failed to close a tank valve and Complainant was issued a written warning, though he

alleges his co-worker received no disciplinary action. On April 23, 2003, Complainant reported the March 2002 violation of EPA regulations to the EPA, and a few days later, he informed his supervisor, Brenda Hill, that he had contacted the EPA. In May 2003, Complainant was placed on "Decision-Making Leave" (DML), the final step in Respondent's disciplinary policy. Resp. Ex. F, p. 138. Complainant maintains he did nothing to warrant this discipline, though Respondent asserts that a DML was issued because a report had been received that Complainant was unloading gasoline at a BP station and took a break to smoke a cigarette. Finally, on April 8, 2004, Complainant was terminated for his involvement in an accident while driving a company vehicle.

The Parties' Contentions

Respondent asserts that it issued the DML in May 2003 as a result of Complainant's actions, including failing to follow proper job processes and safe work practices, and that Complainant was terminated because he was involved in a preventable accident while on DML. Respondent contends that Complainant's May 2004 claim to the Department of Labor regarding a disciplinary action imposed upon him in May 2003 is untimely. Further, Respondent asserts that Complainant cannot establish a nexus between his April 2003 report to the EPA and Respondent's decision, thirteen months later, to terminate Complainant's employment. Finally, even assuming Complainant can establish a *prima facie* case of discrimination, Respondent maintains that Complainant cannot establish that its reason for terminating him was pretextual, and as such, Respondent asserts that Complainant's claim should be dismissed.

In opposition, Complainant contends that Respondent did not properly follow its disciplinary policy, specifically, he claims he never received an initial verbal warning, which he alleges is the first level of discipline. Rather, Complainant maintains that he was immediately given a written warning and subsequently placed on DML. Complainant asserts that he was treated less favorably than other employees of Respondent.

Complainant further maintains that disciplinary action was taken against him in retaliation for engaging in protected activity. He claims that he made an initial whistleblower complaint to a co-worker on March 30, 2002, and reported the incident to his supervisors the next day, maintaining that disparate treatment began shortly thereafter when in November 2002 he was disciplined for the tank valve incident, but his co-worker was not. Complainant also claims that after making a formal complaint to the EPA in April 2003, he was disciplined by being placed on

DML in May 2003. He contends there is a proximity in time between his engaging in protected activity and being disciplined by Respondent.

Lastly, Complainant asserts he has established a *prima facie* case of discrimination in that he engaged in protected activity by reporting a violation of the Clean Air Act, and that action was subsequently taken against him for doing so. He maintains that Respondent's proffered reasons for discipline and terminating Complainant are pretextual, or that, at the least, illegal discriminatory motives played some part in the adverse actions taken against him.

Applicable Law and Discussion

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 decision is granted for either party when the administrative law judge finds that the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact. 29 C.F.R. § 18.40(d) (2004). The "party opposing the motion may not rest upon the mere allegations or denials of such pleading, but shall set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c) (2004). A fact is material and precludes a grant of summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The evidence and inferences are viewed in the light most favorable to the non-moving party. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999).

If the non-moving party fails to establish an element essential to his case, there can be "no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). 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).

Under the environmental whistleblower statutes, a complainant must file a complaint within thirty days of the alleged violation. See 33 U.S.C. § 1367(b); 42 U.S.C. § 300j-9(i)(2)(a)(1); 42 U.S.C. § 6871(b); 15 U.S.C. § 2622(b)(1); 42 U.S.C. § 9610(b); 42 U.S.C. § 7622(b)(1). The Administrative Review Board has clarified that the thirty-day limitations period begins to run on the date that a complainant receives "final, definitive and unequivocal notice of a discrete adverse

employment action.” *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 01-CER-1, slip op. at 6 (ARB Apr. 30, 2004). The Board has also applied the “discovery rule” and has held that “statutes of limitations in whistleblower cases begin to run on the date when facts which would support a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his rights.” *Kaufman v. United States Env’tl. Prot. Agency*, ALJ No. 02-CAA-22 (Sep. 30, 2002) (citing *Whitaker v. CTI-Alaska, Inc.*, ARB No. 98-036, ALJ No. 97-CAA-15 (ARB May 28, 1999)). The date an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation. *Id.* The Administrative Review Board explained that “discrete acts of discrimination are easy to identify. Examples are failure to promote, denial of transfer, termination and refusal to hire.” *Id.* (citing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)).

I agree with Respondent that the only discrete action falling within the thirty-day time period prior to Complainant’s filing a claim with OSHA on May 4, 2004 was his termination on April 8, 2004. Complainant has not produced any evidence establishing that any discrete alleged adverse action, namely, his being placed on DML, prior to the time of his termination was timely complained about.¹ Therefore, the only issue properly before me is whether Complainant’s termination was in retaliation for engaging in protected activity.

To establish a *prima facie* case of unlawful discrimination under the whistleblower protection provisions in the environmental statutes, a complainant must establish that he is an employee and that the respondent is an employer. *Demski v. Indiana Michigan Power Co.*, ARB No. 02-084, ALJ No. 01-ERA-36, slip op. at 4 (ARB Apr. 9, 2004). A complainant must also demonstrate that he engaged in protected activity of which the respondent was aware, that the complainant suffered an adverse employment action, and that the protected activity was the reason for the adverse employment action, *i.e.*, that a nexus existed between the protected activity and the adverse action. *Jenkins v. United States Environmental Protection Agency*, ARB no. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). Failure to establish any of these elements defeats a claim under applicable whistleblower statutes. *Id.* at 16.

¹ Complainant merely asserts that he engaged in protected activity and that “disparate treatment began shortly thereafter,” and that there was a “consistently a remarkable proximity in time” between his engaging in protected activity and receiving discipline from Respondent. Compl. Mem. in Opp’n., pp.6-7.

Respondent asserts that Complainant here cannot establish a *prima facie* case because he cannot show that a causal nexus existed between his engaging in protected activity and the alleged adverse action, as evidenced by the thirteen month period of time between his report to the EPA and his termination. Complainant, on the other hand, maintains his termination was in retaliation for filing a report with the EPA.

Assuming, for purposes of this motion that Complainant can establish a *prima facie* case, if Respondent produces evidence demonstrating that Complainant was subjected to an adverse employment action for legitimate, nondiscriminatory reasons, the relevant inquiry is whether Complainant can defeat summary decision by establishing that a genuine issue of material fact exists regarding Respondent's proffered reasons for Complainant's discipline and termination, specifically, that the reasons are pretextual. In this instance, I find that Complainant has not met that burden.

Complainant contends he never received a verbal warning, the first step in Respondent's disciplinary process. However, an email from Complainant to Larry Bucher, employed by Respondent as the Area Operations Manager for the Midwest Region, indicates that he did receive a verbal warning. The email from Complainant states, in relevant part: "I'm sure you are aware of my incident on November 14. I fully accept my responsibility and accept the disciplinary consequences...I realize that I was given a verbal warning about pipeline procedures in June." Resp. Ex. C, p. 181. Complainant then proceeded to express concern that the co-worker he was with was not disciplined for the incident.

Complainant next contends that he filed a report to the EPA in April 2003, and the following month, he was put on DML for "an incident for which he was given no opportunity to explain what actually occurred." Compl. Mem. in Opp'n., p. 7. (Complainant's supervisor, Ms. Powell, issued the Notice of DML on May 9, 2003. Resp. Ex. F, p. 185.) However, a retail manager reported seeing Complainant unloading his tanker station, standing several feet from his tanker, reading a book and smoking a cigarette. The letter indicates that Complainant told the manager he was not violating any regulation because he was farther than twenty five feet from the truck. Ms. Powell explained that regardless, Complainant violated Sections 177.840(p-q) of the DOT regulations because he was not within twenty-five feet of his unloading truck and reading a book prevented him from having an unobstructed view of his truck. Resp. Ex. F, p. 185. In his opposition to this motion, Complainant asserts he "did nothing to warrant this discipline," however, in his deposition he testified that he began unloading the fuel, emptied

two compartments, and then shut down the valves and “stepped back about 30, 40 feet and fired up a cigarette.” Compl. Depo., p. 77, ll. 14-21. Complainant also agreed that he was reading when he was “taking a break and smoking a cigarette,” but claimed he was “in a totally safe place.” *Id.*, p. 81, ll. 9-18.

Complainant also engaged in selling dog food at work. On December 12, 2003, Ms. Powell authored a letter to Complainant acknowledging that they had had conversations about his selling the food in past weeks, and informing him that he could not bring dog food onto Respondent’s trucks, nor could he sell the food on Respondent’s property during work time. Complainant was warned that if he violated the policy in the future, he would be subject to discipline. Resp. ex. F, p. 187.

Finally, on April 8, 2004, while on DML, Complainant was involved in an accident while driving one of Respondent’s vehicles. Complainant contends that the truck sustained damage when he “swerved to avoid a car that had run a stop sign.” Compl. Mem. in Opp’n., p.4. In his deposition, however, Complainant agreed that he was in a preventable accident which caused his termination, and stated he was aware that an independent investigation team determined that the accident was preventable. Compl. Depo., p. 97. In fact, the investigation determined that Complainant “exhibited inappropriate behavior and unsafe driving,” and found that the accident was avoidable and preventable, making discipline appropriate. Because Complainant was on DML, his employment was terminated effective April 16, 2004. Resp. Ex. D, p. 180.

Given the above facts, I cannot find that Complainant has established that an issue of material fact exists which suggest that Respondent’s proffered reasons for his termination are pretextual. Complainant had an extensive disciplinary history as indicated by the evidence submitted in this case. In order to survive Respondent’s motion, Complainant must show that an issue of material fact exists as to the reasons offered by Respondent for his discipline and ultimate termination, and he has not done so. All Complainant alleges is that he has satisfied the “light” burden that he show that illegal motives “played some part” in his disciplinary discharge by establishing a *prima facie* case. He has introduced no evidence to create an issue of material fact that the reasons offered by Respondent for his discharge were not the true reasons.

Conclusion

In sum, Complainant cannot rest upon the mere allegations or denials of a motion for summary decision, but must set forth specific facts showing that there is a genuine issue of fact for the hearing. Complainant has not shown that Respondent's proffered legitimate, non-discriminatory reasons were not the true reasons for his termination. On issues where the non-moving party bears the ultimate burden of proof, he must present definite, competent evidence to rebut the motion. Because Complainant has failed to establish an essential element of his case, there exists no genuine issue of material fact, and Respondent's motion is granted.

ORDER

It is hereby **ORDERED** that Respondent's Motion for Summary Decision is **GRANTED**. Complainant's complaint is **DISMISSED** and the formal hearing scheduled in this matter for September 13, 2005 is **CANCELLED**.

So ORDERED on this 15th day of August, 2005.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).