

U.S. Department of Labor

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Issue Date: 16 July 2009

CASE NO.: 2009-CAA-1

IN THE MATTER OF

BARRY HOWARD

Complainant

v.

GAF MATERIALS CORPORATION

Respondent

DECISION AND ORDER

BACKGROUND

This case arises under the employee protection provisions of Section 312 of the Clean Air Act 42 U.S.C 7622 (Act). Complainant appealed a ruling dated November 6, 2008, from the Occupational Safety and Health Administration (OSHA) that his initial complaint was untimely filed. The matter proceeded to formal hearing on April 15, 2009.¹

Prior to the hearing, Respondent (“GAF”) sought summary dismissal of Complainant’s complaint upon the grounds that Complainant had filed no timely written complaint. GAF’s motion was denied on February 2, 2009.

The findings and conclusions in this decision are based upon observations of the witnesses who testified, upon an analysis of the entire record, arguments of the parties, applicable regulations, statutes and case law precedent.

¹ At the outset of the hearing, Complainant withdrew his claim under the Toxic Substance Control Act.

EXHIBITS AND STIPULATIONS

The exhibits in this case consist of Administrative Exhibits, Complainant's Exhibits and Respondent's Exhibits. At the outset, the parties stipulated that (1) Respondent is subject to the Act, (2) Complainant was an employee under the Act, but Respondent denies Complainant engaged in protected activity and (3) That Complainant suffered an adverse action on May 15, 2009, when he was terminated, but Respondent denies Complainant was terminated in violation of the Act. (Tr. p. 6).

ISSUES

The issues in this case are as follows:

1. Whether Complainant engaged in protected behavior under the Act;
2. Whether Respondent knew of Complainant's alleged protected activity under the Act;
3. Whether Respondent discharged Complainant because of his alleged protected activity; and
4. What damages, if any, is Complainant entitled to if he is successful in proving his claim?

FINDINGS OF FACTS²

1. GAF hired Complainant on March 10, 2008 as a probationary Journeyman Millwright in the maintenance department at GAF's Dallas, Texas facility.

2. GAF is unionized, and the collective bargaining agreement allows GAF to treat all new employees as probationary employees for a period of 120 days after hire. Probationary employees are "at-will" employees, and their employment can be terminated at any time for any lawful reason. Complainant acknowledged his understanding he was an "at-will" employee. (RX-1).

3. To determine whether probationary employees have the requisite skill and work ethic to become permanent employees, GAF's supervisors evaluate every probationary employee on a weekly basis throughout the probationary period. Employees who fail to meet the Company's performance expectations, who do not work well with other employees, or who otherwise fail to demonstrate the level of skill

² The conclusions that follow are in part those proposed in post-hearing proposed findings of fact, conclusion of law and order for where I agreed with summations I adopted the statements rather than rephrasing the sentences.

required to be successful at GAF's facility in the position they have tested into during this probationary period are terminated. In the year in which Complainant was hired, approximately half of all probationary maintenance mechanics were terminated for failing to meet the Company's expectations before becoming permanent employees.

4. As with all probationary employees, Complainant was evaluated weekly by his supervisor, Don Garrett. Before each review, Mr. Garrett personally observed Complainant's work, reviewed his completed paperwork, and discussed Complainant's progress with other maintenance mechanics. (Tr. 354:17-355:18). Based on the information he gathered each week, Mr. Garrett would complete an evaluation form.

5. In the fifth week of Complainant's employment (April 7-11, 2008), Mr. Garrett began to notice some problems with Complainant's work, specifically the quantity of work Complainant was able to complete during a shift. (RX-4, p. 5 of 9). Mr. Garrett also noted that Complainant had been tardy to work that week.

6. In the sixth week of Complainant's employment (April 14-20, 2008), Mr. Garrett began to question Complainant's technical skills. (RX-4, pp. 6-7 of 9). Mr. Garrett noted three specific examples from that particular week that Mr. Garrett believed showed failures of very basic mechanical skills of which Journeymen Millwrights should have mastery.

7. In week seven (April 21-27, 2008) and week eight (April 28-May 4, 2008), Mr. Garrett informed Complainant that he had not shown enough improvement in his quality and quantity of work. (RX-4, pp. 8-9 of 9). Specifically, in week eight's evaluation, Mr. Garrett highlighted another specific performance issue related to Complainant's failure to adhere to the maintenance department's documentation policies and procedures, and reminded Complainant that he was responsible for identifying major maintenance issues that could cause the production line to break down and informing management in person of such issues.

8. In week nine of his employment (May 5-11, 2008), it came to Mr. Garrett's attention that Complainant had once again violated this procedure by failing to complete an assigned task and failing to inform anyone with the Company that the task had not been completed.

9. During a scheduled maintenance outage at the facility on April 27, 2009, Complainant had been assigned to inspect a baghouse, a pollution control device designed to prevent emissions of particulate matter to the atmosphere, attached to a limestone filler storage silo. (RX-6, pp. 1-5 of 5; RX-7, p. 1 of 1). If the limestone filler material builds up in the bottom of the baghouse, the baghouse will not function properly.

10. Upon inspecting the baghouse, Complainant determined that filler material had clogged the bottom of the baghouse, preventing it from functioning properly. Complainant advised lead mechanic Dennis Roach that the baghouse was clogged, and Mr. Roach told Complainant to clear the clog. Complainant failed to complete this assignment, but he did not inform his supervisor, Mr. Garrett, or anyone else that he did not complete the task. Rather, the evidence shows that Complainant signed off on the April 27, 2008 work order, signifying that he had completed the task. (RX-6, p. 4 of 5).

11. Weeks later when a supplier was attempting to unload filler material into the storage silo, the baghouse malfunctioned and could not pull air out of the storage silo. As a result of the malfunction, pressure built up in the storage silo activating the silo's pressure-release port, and the filler supplier had to stop its loading operation.

12. Mr. Garrett learned of the incident and learned that the baghouse had malfunctioned because the transition area between the storage silo and the baghouse was clogged with filler material. Upon investigation, Mr. Garrett also learned that Complainant had been assigned, two weeks earlier, to inspect and unclog the baghouse and had failed to do so, and also had failed to inform his supervisor that he had not cleared the clog.

13. Mr. Garrett approached his supervisor, Operations Manager David Vaught, and Human Resources Manager Corey Stewart and advised them of his determination that Complainant did not demonstrate the skill needed to succeed as a Journeyman Millwright, and he recommended that Complainant be terminated. Mr. Vaught and Mr. Stewart reviewed the situation and determined that terminating Complainant was the appropriate course of action.

14. Before Mr. Stewart and Mr. Garrett communicated the Company's decision to Complainant, Complainant approached Mr. Stewart and complained that one of his co-workers, Dennis Roach, was harassing him. Specifically, Complainant told Mr. Stewart that he had told Mr. Roach that he had been unable to clear the clog from the baghouse because he had not been provided with the fall protection harness and lanyard necessary to perform the job. However, Complainant admitted that he never asked Mr. Roach for a safety harness, and that he had been previously instructed by the safety instructor to ask whenever he needed specialized safety equipment to perform a job. (Tr. pp. 184, 188).

15. Mr. Stewart investigated Complainant's harassment complaint, interviewing Complainant, Mr. Roach and two other maintenance mechanics, Theresea Truesdell and Ian Peet, both of whom worked alongside Mr. Roach and Complainant. Mr. Stewart determined that Mr. Roach had not behaved inappropriately toward Complainant and that the Company's decision to terminate Complainant remained valid. Specifically, Mr. Stewart found no evidence that Mr. Roach had prevented Mr. Howard from obtaining fall protection and completing the assigned task.

16. Mr. Stewart advised Mr. Vaught of his findings, and the two agreed to proceed with Complainant's termination. Mr. Stewart and Mr. Garrett met with Complainant on May 15, 2008 and advised him of his termination. He was told that he was being terminated for failing to meet the Company's expectations for probationary maintenance mechanics.

17. On May 23, 2008, following his termination, Complainant contacted OSHA about lack of safety equipment, and his complaint was classified under §11(c) of the Occupational Safety and Health Act.

18. Subsequently on August 8, 2008, and with aid of Counsel, Complainant added to his 11(c) complaint that he had been improperly terminated because of protected activity under the Clean Air Act and the Toxic Substance Control Act.

19. On October 7, 2008, OSHA determined Complainant's termination was lawful and dismissed his 11(c) complaint. (RX-17). Complainant never appealed that decision.

20. On November 6, 2008, OSHA dismissed Complainant's Clean Air Act and Toxic Substance Control Act claims and Complainant appealed. The Toxic Substance Control Act claim was withdrawn at the outset of the formal hearing on April 15, 2009 (Tr. p. 18), and the case proceeded to trial under only the Clean Air Act.

21. As relief, Complainant does not seek reinstatement, rather Complainant prays for loss of wages, compensatory damages and attorney's fees.

CONCLUSION OF LAW

If a Complainant fails to establish an element of the prima facie case, the Complainant cannot meet his ultimate burden of proof.

To establish a prima facie case of retaliation under the whistleblower provisions of the Act, a complainant must show that: (1) the complainant was a covered employee; (2) the complainant was engaged in protected activity; (3) the employer was aware of that protected activity; and (4) the employer took some adverse action against the complainant because of such activity. The complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action.

In this instance the complainant has failed to make any showing that he engaged in protected activity under the Act and has thus failed to make a prima facie case, much less meet his ultimate burden of proof.

The Act prohibits employers from discriminating against an employee because the employee:

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan, (2) testified or is about to testify in any such proceeding, or (3) assisted or participated or is about to assist or participate in any matter in such a proceeding or in any other action to carry out the purposes of this chapter.

The unrefuted testimony of Mr. Garrett, both on direct and cross examination at trial, was that the overflow of the baghouse was not an incident that needed reporting to EPA or the city. (Tr. pp. 378, 414). Regardless, Complainant never did so nor did he commence any proceedings in regards to same nor did he testify or participate in any manner with any action to carry out the purpose of the Act. Complainant's only voiced concern was that he did not have a personal fall harness system to accomplish the task of "roding" out the baghouse. Whether a union grievance or an OSHA matter, it is not a protected activity under the Act which this complaint has been brought.³

Complainant never took the position he was not going to clean the baghouse because of any fear of environmental release. He failed because he did not believe he had been furnished the personal safety equipment to complete the task. However, rather than retrieving the gear as he had been told he could do, he signed off on "restart" and marked the work order as "done". (RX-6 & 11). That is the reason, along with his other deficiencies, that he was terminated. The termination had nothing to do with the Clean Air Act.⁴

Complainant seems to argue in this post-trial brief that because he noted on the work order form the baghouse was half full, this somehow amounted to protected activity under the Act. I do not agree. When the notation was made, Claimant had no environmental concerns, nor did he ever voice objection to completing the assignment. In fact, he gave the written appearance he had completed the task.

³ Even Complainant's Counsel acknowledged he should not have alleged in the complaint that Complainant complained about any air release. (Tr. p. 212).

⁴ Though unnecessary given my findings, I also find that GAF articulated a legitimate non-discriminatory reason for Complainant's termination and Complainant has offered no evidence that GAF's proffered reason (poor work performance) is pretextual.

While page one of the five page work order of April 27, 2008, found at Respondent's Exhibit 6, bears the notation "baghouse is about half full of filler", Complainant acknowledged he did not report the condition to his supervisor as required by line items 90 and 91 on the second page of the document (Tr. pp. 177-178). Rather, Complainant signed off on the order on page 4 under "restart sign off" with all boxes checked under "after work is complete". Likewise, on his own work order he noted the task was "done". (RX-11). Also, Complainant agreed when he was finished he "washed" his hands of the project. (Tr. pp. 203-204).

The evaluations over the few weeks Complainant was employed referenced a number of issues that concerned management. But there is not one scintilla of evidence that Claimant's termination had anything to do with protected conduct on Complainant's part. Complainant exhibited no environmental concerns nor did he voice any such concerns.

CONCLUSION

While he pled such in his complaint, Complainant did not notify GAF of any environmental violation, nor did he refuse to engage in the assigned task because he perceived an unlawful environmental practice. Complainant's testimony was that after seeing the filler in the baghouse, he "dogged" the door shut and told Mr. Roach, not that he had environmental concerns but rather he needed a full protection harness and lanyard so he could go over the cat walk and rod out the pipes. Complainant then returned to baghouse and beat on the funnel with a mallet, after which he "washed his hands" of the task and filled out the work forms as "restart" (RX-6) and work "done". (RX-11). He never reported the matter to his supervisor.

ORDER

It is my finding that Complainant's complaint under the Act should be **DISMISSED**.

So ORDERED this 16th day of July, 2009, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).