

**U.S. Department of Labor**

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**Issue Date: 06 March 2007**

Case No.: 2006-ERA-00035

In the Matter of

**JAMES CARPENTER**  
Complainant

v.

**BISHOP WELL SERVICES CORP.**  
Respondent

Appearances:

Richard R. Renner, Esquire  
For Complainant

Susan E. Baker, Esquire  
For Employer and Carrier

Before: RALPH A. ROMANO  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

This matter arises under the employee protection provisions of several federal whistleblower protection statutes and the regulations promulgated thereunder, which can be found at 29 C.F.R. § 24 (2006).<sup>1</sup> The regulatory provisions, in part, prohibit an employer from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or federal government information relating to any violation or alleged violation of any provision of one of these federal statutes by complaining, testifying, or commencing or causing to commence proceedings against the employer. 29 C.F.R. § 24.2(a).

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<sup>1</sup> The various statutes at issue in this case include: The Energy Reorganization Act of 1974 (“ERA”), 42 U.S.C. § 5851; The Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2622; The Safe Drinking Water Act (“SDWA”), 42 U.S.C. § 300j-9(i); The Clean Air Act (“CAA”), 42 U.S.C. § 7622; The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9610. This claim is also brought under The Pipeline Safety Improvement Act (“PSIA”), 49 U.S.C. § 60129, which is not covered under 29 C.F.R. § 24 (2006).

## PROCEDURAL HISTORY

On June 20, 2006 James Carpenter (“Complainant”) filed a complaint with the United States Department of Labor’s Occupational Health and Safety Administration (“OSHA”), alleging that Bishop Well Services (“Respondent”) had unlawfully discharged him in violation of employee protection provisions of several federal whistleblower protection statutes.<sup>2</sup> On September 8, 2006, after an investigation of the complaint, the Area Director for OSHA issued a determination that the investigation disclosed no violation of the federal statutes’ employee protection provisions. Complainant objected to the findings on September 15, 2006 and requested an administrative hearing.

The case was referred to the Office of Administrative Law Judges (“OALJ”) on September 8, 2006 and was assigned to me on September 22, 2006. On September 25, 2006, I issued a Notice of Hearing scheduling trial for October 31, 2006 in Cleveland, Ohio. Complainant filed a Motion to Continue on October 27, 2006, which was opposed by Respondent on October 30, 2006.

The formal hearing in this matter was held in Cleveland, Ohio on October 31 and November 1, 2006.<sup>3</sup> At that time, the parties were given the opportunity to examine witnesses and submit other evidence.<sup>4</sup> Following the formal hearing, the record was left open for sixty days for Complainant to submit three additional depositions.<sup>5</sup> On January 23, 2007, I issued an Order closing the record and for submission of briefs on or before January 31, 2007. Respondent’s brief was filed on January 31, 2007, and a brief for the Complainant was filed on February 1, 2007.<sup>6</sup>

This decision is rendered after careful consideration of the record as a whole, the arguments of the parties, and the applicable law.

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<sup>2</sup> See *supra* note 1.

<sup>3</sup> The transcript of the hearing consists of 298 pages and will be cited as “Tr. at --.”

<sup>4</sup> I received twelve ALJ exhibits as “ALJX1-ALJX12.” (Tr. at 1, 5-6, 25, 29). Complainant submitted sixteen exhibits which I marked and received as “CX1-CX3” and “CX5-CX16,” rejecting exhibit 4. (Tr. at 46-47, 54, 71, 87, 119, 133, 135, 139, 142, 180, 237, 272). Respondent submitted ten exhibits which I marked and received as “RX1-RX10.” (Tr. at 71, 168, 212, 217, 221-222, 225, 255, 258, 263).

<sup>5</sup> (Tr. at 21). On December 29, 2006, Complainant submitted an additional exhibit which I have marked and received as “CX17.” On January 18, 2007, Respondent filed a motion to submit the depositions of Msters. Barnhart and Foster. Complainant filed a Motion to Strike those depositions on January 12, 2007. By Order dated January 23, 2007, I granted Complainant’s Motion to Strike as Complainant was not required to submit the depositions into evidence and Respondent was not given leave to re-open the record to submit evidence post-hearing.

<sup>6</sup> Complainant’s brief will be cited as “CB at --.” Respondent’s brief will be cited as “RB at --.”

## ISSUES

The issues presented for resolution include:

1. Whether Complainant engaged in activity protected under the Act(s).
2. If Complainant engaged in protected activity, whether Respondent had knowledge of this protected activity.
3. If Respondent was aware of the protected activity, whether this knowledge motivated Respondent's decision to terminate Complainant's employment.
4. If Complainant establishes his *prima facie* case, whether Respondent established that it had a legitimate, non-discriminatory reason to terminate Complainant's employment.

## SUMMARY OF THE EVIDENCE

Complainant currently lives in New Philadelphia, Ohio and was forty-five years old at the time of the hearing. He has been married to his wife, Sandy Carpenter, for thirteen years. (Tr. at 49). He is a high school graduate and has worked in the oil fields since his graduation. (Tr. at 144). Complainant began working with Dave Bishop at Well Works, Inc. (Tr. at 95, 98, 144). Mr. Bishop subsequently started his own business, Bishop Well Services, originally known as Comely Well Services. (Tr. at 99). He hired Complainant in April of 1992 to work for him as a rig operator. (Tr. at 100, 144-145).

Respondent is in the business of providing service rigs for new and existing oil and gas wells. It is also under contract with the State of Ohio to plug oil and gas wells within the state. (Tr. at 95). Mr. Bishop testified that Respondent and its employees do not handle nuclear devices or nuclear energy. Furthermore, he explained that his employees are not exposed to equipment which emits radioactive material. (Tr. at 265). Mr. Bishop also stated that Respondent's employees do not handle toxic substances and the services they offer do not involve gathering gas or oil. (Tr. at 267, 270).

Respondent has five rigs, four of which are manned by one operator and two rig hands. The remaining rig is manned by one operator and one rig hand. (Tr. at 95-96). A rig operator controls running the tube and rod, swabbing, and watching the rig hands to ensure the rig is run safely. He reports directly to Mr. Bishop. (Tr. at 96, 145).

In addition to the position of rig operator, Complainant also served as a tool pusher, which is a supervisory position, starting August 3, 2000. The duties of this position consisted of reviewing and overseeing the rig sites. Mr. Bishop terminated this position because he could no longer afford to pay the salary. Complainant returned to the position of a rig operator on approximately November 15, 2000. (Tr. at 97-98, 137).

Mr. Bishop testified that he does not have any formal discipline procedures in place regarding reprimands, suspensions, or discharges. He explained that since Respondent is a small company he tries to work things out with his employees without discipline. Mr. Bishop stated that he did fire two rig operators in one week because one, Danny Cox, lost tools, caused a truck to get frozen in the mud, and had legal troubles. The second employee was fired for misrepresenting himself as a quality operator. Mr. Bishop explained that both employees were short-term, meaning they had only worked for a couple of months before they were terminated. In addition, Mr. Bishop stated that he did not specifically discipline Complainant during the thirteen years he worked for him; however he did have discussions with him "regarding situations." (Tr. at 101-104). When Complainant needed time off work he was required to inform Bishop. Furthermore, Complainant had a good attendance history, except for a time during 2001 and 2002 when he was experiencing medical issues. (Tr. at 105-107).

On May 20, 2005, Complainant was working on Rig #8 when a utility hose broke and struck him in the back. (RX4; Tr. at 148, 245-246). He worked a full forty hour week between May 31, 2005 and June 3, 2005 with light duty restrictions. Complainant did not return to work again until June 16, 2005. He worked full duty until July 8, 2005, at which time he informed Mr. Bishop that he could not work due to his back pain. Mr. Bishop received a fax from Complainant's physician, Dr. Belknap, releasing Complainant to return to work on August 26, 2005. Mr. Bishop contacted Complainant at that time to offer him light duty work. However, Complainant informed him that he did not feel that he was capable of returning to work at that time. Mr. Bishop continued to pay Complainant's full salary until October 6, 2005. (Tr. at 149, 246-248).

Mr. Bishop contacted his Human Resources consultant, Kelly Sigler, to discuss his options regarding the Complainant. Ms. Sigler informed Mr. Bishop that he could put Complainant on a transitional work program. (Tr. at 248). The transitional work program consisted of driving to job sites, sitting in a truck and observing the site. Complainant would be allowed to stand as required by his restrictions. Complainant would also be paid for a full eight hour work day even if he did not work the full day. (CX11; CX13; Tr. at 134, 139, 200, 250). Mr. Bishop testified that he would save approximately \$20,000 in workers' compensation premiums by participating in the transitional work program. (Tr. at 250).

The wages under the transitional work program are paid by the employer instead of benefit payments through the worker's compensation program. (Tr. at 140-141). Barbara Knapic, a worker's compensation attorney, testified that it is in the employer's best interest to continue employment on light duty instead of increasing their insurance premiums. (Tr. at 214). In addition, Ms. Knapic explained that the employer determines the length the transitional employment and it is its sole decision when to terminate the program. (Tr. at 234). The transitional work program is a voluntary option available for employers. (Tr. at 242).

After notifying Complainant by letter, Mr. Bishop contacted Complainant and asked him to work in this capacity. (CX15; Tr. at 249). Complainant agreed to this arrangement and returned to work on October 10, 2005 in a light duty capacity. (CX14; Tr. at 140-141, 149, 200, 250). Respondent did not bill its customers for Complainant's wages, which were \$20.61 per hour. (CX7; Tr. at 57, 78).

In February of 2006, Mr. Bishop received a physician's report that Complainant had reached his maximum medical improvement and his restrictions had expired. Within one hour of discussing this with Complainant, Mr. Bishop received a fax from Complainant's physician renewing his restrictions. (RX4; Tr. at 252-235). Mr. Bishop testified that he had decided to terminate Complainant's light duty position in March of 2006. However, he decided to postpone his decision after Complainant informed him on March 27, 2006 that he would be having non-work related surgery in April of 2006. Mr. Bishop explained that he decided to wait to terminate the position until Complainant's surgical non-work-related restrictions expired on May 29, 2006. (RX10; Tr. at 117-118, 254, 263).

Complainant contacted Mr. Bishop in April of 2006 and left him a voicemail message informing him of a mechanical problem on Rig 8. (Tr. at 151). Mr. Bishop did not return Complainant's message, however he notified an operator and a mechanic to look into it the next morning. (Tr. at 107). In addition, Mr. Bishop testified that Complainant mentioned Rig 8 to him the previous year in passing, but he did not think it was a major concern. (Tr. at 114). In the beginning of May of 2006, Mr. Bishop notified Complainant that his workers' compensation restrictions had again expired. (CX12; Tr. at 107, 120). Mr. Bishop then received a fax from Complainant's physician within one hour again renewing his restrictions until June 5, 2006 (CX12; Tr. at 119-120).

Several state workers' compensation hearings were held contesting Complainant's request for additional work-related conditions relating to his back injury. (RX1-RX2; RX5-RX7; Tr. at 168, 254). Both Complainant and Mr. Bishop testified that the tone was contentious during these hearings. (Tr. at 116, 153). Complainant's claim for worker's compensation was denied after a hearing on May 16, 2006 by order issued May 23, 2006.<sup>7</sup> (RX1, Tr. at 169, 172).

On May 16, 2006, Complainant contacted OSHA to report that the rigs had no guard rails and that there was a problem with the hoses. (Tr. at 161-162). He testified that he had seen no changes in safety procedures since informing Mr. Bishop of the problems regarding Rig 8, so he decided to contact OSHA instead. (Tr. at 152). Complainant also testified at the trial that he reported safety harnesses and environmental concerns, however in his testimony at deposition he testified that he only reported the guard rails and hoses and nothing else. (ALJX12 at 47; Tr. at 162, 209). As a result of that complaint, OSHA investigator, Henry Cleveland, made a surprise visit to Respondent's sites on May 23, 2006. (RX8; Tr. at 107-108, 256). Respondent received two citations after the investigation, neither of which was related to the complaints made.<sup>8</sup> (Tr. at 114-115, 257-258). Mr. Bishop agreed to an informal settlement with OSHA and was not required to pay any fines. (RX9; Tr. at 259). Mr. Bishop testified that, as any business owner would, he had been "dreading" a visit from OSHA. (Tr. at 108-109). However, he then explained that although he was not looking forward to it, the investigation was beneficial to his business because he now knows how to remain in compliance. (Tr. at 259).

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<sup>7</sup> Although Complainant's workers' compensation claim was denied, it is still subject to appeal and ongoing. (RX2).

<sup>8</sup> Respondent was cited for not providing employees with fire extinguisher training and hazardous conditions training. (Tr. at 115, 257-258).

During his investigation, Mr. Cleveland asked Mr. Bishop if he had received any threatening or unusual phone calls. Mr. Bishop informed Mr. Cleveland that he had received a vulgar voicemail message the previous night at approximately 8:00 p.m. and he played the message for him. Although he was unsure who left the message, Mr. Bishop suspected that it was Complainant; especially since Complainant was the only person he had experienced trouble with in the previous months. (Tr. at 110-111, 116). However, Complainant testified that he had not left Mr. Bishop any vulgar voicemail messages. (Tr. at 154). Mr. Bishop explained that he no longer has the voicemail message as his phone company automatically deletes them after seven days. (Tr. at 112). In addition, Mr. Bishop suspected Complainant of being the one to report a complaint to OSHA. (Tr. at 109). However, he explained that he never discovered the content of Complainant's report to OSHA. (Tr. at 268).

Mr. Bishop informed his employees of the OSHA inspection and instructed them to comply with OSHA regarding the training issues. He posted the citations for all of the employees to see. Mr. Bishop testified that he told his employee, Mr. Barnhart, that "things are really getting dirty." He explained that he was referring to everything that had been going on and the comment was not directed towards Complainant. (Tr. at 114-116, 154).

Mr. Bishop explained that by the end of May of 2006 he felt it was time to do something about Complainant. Since his workers' compensation premiums would no longer be affected, it was time to terminate Complainant's position. (Tr. at 261-262). On May 26, 2006, Mr. Bishop included surprise pay raises for his employees in their paycheck. (Tr. at 116-117, 154). Mr. Bishop explained that he did not include the raise in Complainant's paycheck since he had decided it was time to let him go. (Tr. at 117, 125). Complainant testified that he was given no explanation as to why he did not receive the raise along with his colleagues. (Tr. at 154).

Mike Leech is field superintendent for Respondent's biggest client, Great Lakes Energy Partners ("Great Lakes"). (Tr. at 72-73). Prior to his injury on May 20, 2005, Mr. Leech would specifically request that Complainant lead the crews that serviced his wells. (Tr. at 74, 101). However, Mr. Leech contacted Mr. Bishop in March of 2006 and informed him that Complainant had come to him and asked for a job with their company. In addition to filling out a job application for Great Lakes, Complainant asked Mr. Leech if Great Lakes would use his services if he purchased a rig of his own. (Tr. at 13, 127, 252).

Respondent entered into a master service agreement with Great Lakes at the beginning of May of 2006. (Tr. at 114). Dave Cumberledge, another Great Lakes employee, contacted Mr. Bishop to discuss some concerns he was having on his sites. Mr. Leech, Mr. Bishop and Mr. Cumberledge met on May 30, 2006 at a restaurant and Mr. Leech informed Mr. Bishop that he had concerns regarding Complainant's presence and attitude on his sites. (Tr. at 88, 264). Mr. Leech told Mr. Bishop that he was dissatisfied and felt Complainant was serving no necessary function on his sites. Mr. Leech explained that he noticed this "sour" atmosphere and attitudes building for several months. He further explained that he never discussed this with other employees, but he could just feel the tension and dissatisfaction among his employees. (Tr. at 78, 80, 87-88, 90). After meeting with Mr. Bishop, Mr. Leech wrote a letter informing Mr. Bishop that Complainant or any other light duty employee is no longer necessary on Great Lake's

locations. (CX9; Tr. at 81-82). Complainant testified that neither Mr. Leech nor Mr. Bishop discussed issues or concerns regarding his attitude with him. (Tr. at 150-151).

On May 31, 2006 Mr. Bishop approached Complainant and informed him that he could “no further accommodate [his] light duty restrictions and he would have to let [him] go.” (Tr. at 126, 155, 263, 276). Mr. Bishop testified that he could no longer afford to pay Complainant to “sit in a pickup truck and do nothing” as he had been doing for over seven months. (Tr. at 117, 126). Furthermore, Mr. Bishop explained that a good rig operator is hard to find and he would invite Complainant back to work when he was able to return to full duty if he had an available rig. (Tr. at 124-125, 245). In addition, Mr. Bishop explained that he did not allow Complainant to stay employed as a supervisor/tool pusher because he could not afford to pay the salary of a full time supervisor. He explained that it was his choice to terminate Complainant instead of finding another position to put him in. (Tr. at 138).

Complainant testified that approximately one week before he had been fired, another injured employee, Dan Porter, was allowed to work with light duty restrictions. (Tr. at 156-157). Mr. Porter was employed with Respondent from September of 2005 until August of 2006. (CX17 at 5). However, Mr. Porter was a rig hand, not a rig operator, which has different job duties. (Tr. at 176-177). Mr. Porter testified that he returned to work on light duty a couple of days after his injury. (CX17 at 9). He explained that while on light duty he had a limited use of his left hand, so he had to perform duties with his right hand. (CX17 at 9). Furthermore, he testified that he was still able to perform his job, he just required help for a few days. (CX17 at 16-17).

Complainant testified that since his termination he has trouble sleeping and concentrating. In addition, he spends time crying because it has been “really hard losing that job.” (Tr. at 155-156). Complainant’s wife, Sandy Carpenter, testified that he has been depressed, sleeps little, has little appetite, and has no interest doing “things.” She also stated that he cries and is disappointed. Mrs. Carpenter testified that since he was terminated it has negatively affected their marriage as they have lost closeness and do not engage in marital relations. (Tr. at 51-52).

Complainant believes that he was terminated because he made the complaint to OSHA. (Tr. at 157). Mr. Bishop explained that his decision to terminate was made before the OSHA investigation and had nothing to do with that matter. (Tr. at 262). In addition, Mr. Bishop explained that Complainant did not at any time communicate environmental or safety concerns to him. (Tr. at 250-251, 265). Furthermore, Complainant testified that he never made any environmental complaints to Mr. Bishop or any other agency. (Tr. at 158-160, 166-167, 198, 201, 250-251).

Complainant began new employment with Whipstock Natural Gas Services on September 7, 2006, making \$13.00 per hour. (Tr. at 57). Before his new employment, Complainant had been receiving unemployment benefit wages after he was terminated by Respondent. (Tr. at 62).

## ANALYSIS

### A. Standard of Proof

*Carroll v. USDOL*, 78 F.3d 352 (8<sup>th</sup> Cir. 1996), sets forth a burden-shifting framework similar to that adopted in the Title VII context in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). “A complainant in a whistleblower case may satisfy his initial burden of establishing a *prima facie* case of retaliatory discharge” by showing: (1) complainant engaged in protected activity; (2) respondent had knowledge of the protected activity; (3) a retaliatory employment action; and (4) the retaliation was motivated, in part, by the protected activity. *Carroll v. USDOL*, 78 F.3d 352, 356 (8<sup>th</sup> Cir. 1996); *See also St. Mary’s Honor Center v. Hicks*, 113 S.Ct. 2742 (1993); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9<sup>th</sup> Cir. 1984). If the complainant establishes a *prima facie* case, the burden then shifts to the employer to demonstrate a “legitimate, nondiscriminatory reason for discharging the complainant.” *Carroll*, 78 F.3d at 356. Once the employer meets this burden of production, the complainant must then prove that the proffered legitimate reason is pretextual. *Id.*

### B. Protected Activity

At this point, what must be decided is whether the complaints made by Complainant are protected or covered under either some or all of the jurisdictional bases under which his claim has been filed.<sup>9</sup> The alleged protected activity in respect of which Complainant brings this complaint takes the form of a complaint made to OSHA on May 16, 2006. Complainant’s complaint consisted of reports that the rigs had no guard rails and that there was a problem with the pressure hoses. (Tr. at 162).

Pursuant to 29 C.F.R. §24, employee complaints under the statutes implemented therein provide that no employer “may discharge any employee or otherwise discriminate against any employee” who has:

- (1) Commenced or cause 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;
- (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 manner in such a proceeding or in any other action to carry out the purposes of such Federal statute.

29 C.F.R. §§24.2(b)(1)-(3).

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<sup>9</sup> The jurisdictional basis for the claim filed includes the CAA, the CERCLA, the ERA, the PSIA, the SDWA, and the TSCA. *See supra* note 1.

In *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 2001-SWD-00003 (ARB, March 31, 2005), the ALJ had held that the complainants had not engaged in protected activity under the whistleblower provisions of the TSCA, SWDA and CERCLA because the complaints related only to safety in the workplace and not environmental concerns. The ARB agreed with the ALJ that the environmental statutes "generally do not protect complaints restricted solely to occupational safety and health, unless the complaints also encompass public safety and health or the environment." *Devers*, slip op. at 10, quoting *Post v. Hensel Phelps Constr. Co.*, 1994-CAA-00013, slip op. at 2 (Sec'y, August 9, 1995). I find that Complainant's complaints to OSHA were not related to the environment. The record establishes that Complainant's complaints were related to only the guard rails and the pressure hoses. Complainant testified that he never made any complaint regarding unsafe substances, the disposal of water, or contamination of drinking water. (Tr. at 191-194). Although Complainant testified at trial that he did report "environmental concerns," I find this testimony to be inconsistent and not credible because he testified during his deposition that he only reported the guard rails and pressure hoses and nothing else. (ALJX12 at 47; Tr. at 162, 209).

Therefore, I find Complainant has not established that he engaged in protected activity pursuant to the TSCA, the SWDA, and the CERCLA.

I also find that Complainant's OSHA complaint is not protected activity under the ERA. The purpose of the ERA is to encourage the reporting of matters involving or relating to nuclear safety. In order to establish a *prima facie* case of discrimination under the ERA, a complainant's charge must relate to some aspect of nuclear safety. *Decresci v. Lukens*, 1987-ERA-00013 (Sec'y, December 16, 1993). In *Decresci*, the complainant reported failure to follow proper procedures in the construction of sonarspheres. These complaints were not related to nuclear or radiation safety. The ALJ concluded that because the respondent was licensed by the NRC, all of its employment actions were covered by the ERA's whistleblower provision. The Secretary rejected this interpretation, holding that complainant's safety-related activity must relate to nuclear safety to be protected under 42 U.S.C. § 5851.

I find that Complainant's OSHA complaint was not related to nuclear safety. The record establishes that Complainant did not complain that he and his fellow colleagues were exposed to nuclear material, devices, or energy. In addition, Mr. Bishop credibly testified that his employees do not handle and are not exposed to nuclear devices or nuclear energy. (Tr. at 188-191, 265). As such, Complainant has not established that he engaged in protected activity pursuant to the ERA.

In addition, Complainant's complaints can not possibly be interpreted to involve the release of toxins into ambient air, which is an essential element for invocation of coverage under the CAA. 42 U.S.C. 1857(b)(1), 7602(g), 40 C.F.R. 50.1(e), *Kemp v. Volunteers of America*, ARB No. 00-069 (ARB, December 18, 2000). A careful review of Complainant's testimony discloses a focus not upon the fouling of the ambient air, but upon the safety ramifications regarding faulty hand rails and pressure hoses. Complainant's testimony clearly suggests that the basis for Complainant's anxiety regarding the guard rails and the pressure hoses was not a perceived danger to people from contamination of the air, but danger from the work-place safety hazards, a danger not covered under the CAA. (Tr. at 195-196). I find that these complaints are not protected under the CAA.

The PSIA has similar provisions protecting employees who engage in:

- (1) providing information or causing information to be provided to the employer or the Federal Government which relates to a violation or alleged violation of Federal law relating to pipeline safety, including the PSIA;
- (2) refusing to engage in a practice made unlawful by the PSIA;
- (3) providing testimony before Congress;
- (4) commencing, causing the commencement of or anticipating commencing or causing the commencement of a proceeding under the PSIA; or
- (5) assisting or participating in or anticipating assisting or participating in a proceeding under the PSIA.

49 U.S.C.S. § 60129(a)(1)(A)-(F).

Complainant testified that he never made a complaint to an agency or his employer regarding pipeline safety. (Tr. at 197). Therefore, I find that Complainant did not engage in protected activity pursuant to the PSIA.

Accordingly, I find that Complainant did not engage in protected activity under the provisions of the Act(s) at issue in this claim.

C. Knowledge of Protected Activity

Assuming, *arguendo*, that Complainant established that he had engaged in protected activity, he would still have to establish that Respondent was aware of that protected activity. Knowledge of a protected activity is an essential element of the *prima facie* case. *Morris v. The American Inspection Co.*, 1992-ERA-00005 (Sec'y, December 15, 1992), slip op. at 6-7. A manager's suspicions that the complainant filed complaints with government agencies may be sufficient to show respondent's knowledge. *See Pillow v. Bechtel Construction, Inc.*, 1987-ERA-00311 (Sec'y, July 19, 1993), *citing Williams v. TIW Fabrication Machining, Inc.*, 1988-SWD-00003 (Sec'y, June 23, 1992), slip op. at 6.

I find that Mr. Bishop was aware that Complainant made the report to OSHA on May 16, 2006 when he terminated his employment on May 31, 2006. (Tr. at 109, 162). However, where an employer makes a decision to take adverse employment action against an employee prior to learning of the employee's protected activity, the employee's discrimination complaint is "doomed." *See Varnadore v. Oak Ridge National Laboratory*, 1992-CAA-0002, 1992-CAA-00005 and 1993-CAA-00001 (Sec'y, January 26, 1996) (citing *Hasan v. Reich*, Case No. 92-5170 (5th Cir. May 4, 1993) (unpublished decision; *see* 1 F.3d 1136); *Batts v. NLT Corp.*, 844 F.2d 331, 334 (6th Cir. 1988)). Mr. Bishop credibly testified that he initially made the decision to terminate Complainant's position in March of 2006. However, he chose to postpone the termination until Complainant's non-work related restrictions had expired on May 29, 2006. (Tr. at 117-118, 254). Accordingly, I find that Mr. Bishop made the decision to take adverse employment action against Complainant prior to the time Complainant made the OSHA

complaint. Therefore, Respondent was not aware of the alleged protected activity when the decision to terminate his employment was made.

D. Adverse Employment Action

To establish an adverse employment action, there must be a tangible employment action," for example "a significant change in employment status, such as...firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Material adverse actions include discharge, demotion, loss of benefits and compensation, stripping an employee of job duties, or altering the quality of an employee's duties, if they have tangible effects. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

The adverse action allegedly taken by Respondent is the termination of Complainant's light duty position on May 31, 2006. (Tr. at 126, 155, 263, 276). It is undisputed that Respondent terminated Complainant's employment. Therefore, I find that Complainant has established that Respondent took an adverse employment action against him.

E. Adverse Employment Action motivated by the Protected Activity

Complainant argues that his alleged protected activity, the complaint made to OSHA, caused Respondent to discharge him. I find that the evidence establishes that Complainant's discharge by Respondent had nothing to do with his complaint to OSHA.

"[A] determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor" in the adverse action taken against the complainant. 63 Fed Reg. 6614, 6623 (Feb. 9, 1998), to be codified at 29 C.F.R. §24.7(b); *Dobreuenaski v. Associated Universities, Inc.*, 1996-ERA-00044, slip op. at 10-11 (ARB, June 18, 1998); *Trimmer v. Los Alamos National Laboratory*, 1993-CAA-00009 and 1993-ERA-00055 (ARB, May 8, 1997). In *Jones v. EG & G Defense Materials, Inc.*, 1995-CAA-00003 (ARB, September 29, 1998), the ARB held that "[t]he finding that there is an illegitimate motive requires direct evidence 'showing a specific link between an improper motive and the challenged employment decision.'" Slip op. at 15, quoting *Carroll v. USDOL*, 78 F.3d 352, 357 (8th Cir. 1996).

The record establishes that when Respondent was notified of the OSHA complaint, he took the investigation seriously. After receiving two citations from Mr. Cleveland, the OSHA investigator, Mr. Bishop informed his employees and posted the citations for them to see. In addition, Mr. Bishop explained that although as a business owner he had been "dreading" a visit from OSHA, the result of the investigation was beneficial because he now is informed on how to remain in compliance. (Tr. at 114-115, 257-259).

Complainant argues that Mr. Bishop's comment to Mr. Barnhart that "things are getting dirty" is direct evidence of Respondent's discriminatory motive. (CB at 19, 22-23). However, Mr. Bishop credibly explained that he was referring to the entire situation surrounding the OSHA investigation and was in no way referring to Complainant. (Tr. at 115-116, 154). I find this

evidence does not establish that Respondent responded in a negative manner against Complainant for making a complaint to OSHA. In addition, Complainant argues that the failure of Respondent to give Complainant a pay raise along with his colleagues on May 26, 2006 is evidence of a discriminatory motive. (CB at 19). However, I find this is not evidence of a discriminatory motive because Mr. Bishop had already determined for legitimate reasons, discussed below, to terminate Complainant's position before he gave the raises.

I conclude that the weight of the evidence does not support Complainant's allegation that his complaint to OSHA on May 16, 2006 motivated Respondent to discharge him on May 31, 2006.

#### F. Nondiscriminatory Reason for Adverse Action

Even if the complainant had established a *prima facie* case of retaliatory discharge, the respondent is allowed the opportunity to come forward with evidence that it discharged the complainant for legitimate reasons. *Morris v. The American Inspection Co.*, 1992-ERA-00011 (Sec'y, December 15, 1992), slip op. at 8-9 (citing *Dartey v. Zack Company of Chicago*, 1982-ERA-00002 (Sec'y, April 25, 1983), slip op. at 8). When the burden shifts to the respondent to articulate a legitimate nondiscriminatory reason for discharging a complainant, the employer need not persuade the court, the burden is only that of production. *Bausemer v. TU Electric*, 1991-ERA-00020 (Sec'y, October 31, 1995), citing *Kahn v. United States Secretary of Labor*, 64 F.3d 271, 278 (7th Cir. 1995). Furthermore, in *Adjiri v. Emory University*, 1997-ERA-00036 (ARB, July 14, 1998), complainant was found to have failed to carry her burden of persuasion of unlawful discrimination where respondent presented convincing evidence that it had legitimate, nondiscriminatory reasons for terminating complainant's employment, including insubordination, lack of co-operation with co-workers, and job abandonment. Moreover, complainant failed to present any evidence to establish a link between her purported protected activity and her discharge.

If the respondent successfully rebuts the complainant's *prima facie* case, the complainant bears the ultimate burden of persuading that the legitimate reason articulated by the respondent was a pretext for discrimination, either by showing that the unlawful reason more likely motivated it or by showing that the proffered explanation is unworthy of credence. At all times, the complainant has the burden of showing that the real reason for the adverse action was discriminatory. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993). In *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-00038 (ARB, July 31, 2002), the ARB held that "it is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible . . . [rather] he must show that the explanation is a 'phony reason.'" quoting *Kahn v. U.S. Secretary of Labor*, 64 F.3d 271, 277 (7th Cir. 1995), citing *Pignato v. Am. Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994). In addition, "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *St. Mary's Honor Center*, 113 S.Ct. at 2749, 125 L.Ed. 2d at 424.

In the instant case, Mr. Bishop credibly denied that Complainant's termination was based upon his complaint to OSHA. (Tr. at 262). I find that Respondent terminated Complainant for reasons other than the complaint to OSHA. Mr. Bishop explained that he had made the decision

to terminate Complainant's position in March, two months prior to the OSHA complaint. (Tr. at 117, 254). He rationally and credibly explained that he made this decision because he could no longer afford to pay Complainant to "do nothing" and he did not anticipate Complainant's returning to work in a full duty position. (Tr. at 117, 124). Furthermore, he explained that he then decided to wait until after Complainant's surgical, non-work restrictions expired on May 29, 2006 to terminate his position.

During the time Mr. Bishop was waiting for Complainant's surgical restrictions to expire, additional events happened that solidified his decision to terminate Complainant's light duty position. Mr. Bishop explained that he was notified on May 23, 2006 that Complainant's claim for workers' compensation benefits was denied. (Tr. at 169, 172). As a result, Mr. Bishop's worker's compensation insurance premiums would no longer be affected if he let Complainant go. He had explained that the primary reason he had initially created the light duty position was to reduce the cost of his insurance premiums. Furthermore, I note that under the transitional work program, Mr. Bishop has sole discretion regarding the length of time to keep this position available and may choose when to terminate the position. (Tr. at 234).

Mr. Bishop testified that now that his worker's compensation premiums were not affected, to provide Complainant's light duty position, essentially doing nothing, was no longer necessary. (Tr. at 261-262). Complainant argues that this is not a legitimate reason for terminating Complainant's position because it is unlawful for an employer to discharge an employee for filing a worker's compensation claim. (CB at 21). However, I find that Mr. Bishop's testimony establishes that he did not terminate the position due to Complainant filing a worker's compensation claim. Instead, after learning that he was no longer responsible for paying the additional worker's compensation premiums, this strengthened, in addition to the other reasons, Mr. Bishop's belief that it was the appropriate time to terminate Complainant's position.

In addition, Mr. Bishop received a complaint from Mr. Leech at Great Lakes, regarding Complainant's attitude and the "sour" atmosphere it was creating on the well sites. Mr. Leech informed Mr. Bishop that he no longer felt it was necessary to have Complainant or other light duty positions on Great Lakes sites. (Tr. at 78, 80, 87-88, 264). Complainant argues that Mr. Leech's request not to have Complainant at his well sites is not a legitimate reason for terminating his position because the court does not "permit employers to discriminate based on customer preference." (CB at 20). However, in *Jopson v. Omega Nuclear Diagnostics*, 1993-ERA-00054 (Sec'y, August 21, 1995), the Secretary found there was ample evidence that the respondent properly terminated the complainant's employment because of poor attitude, abuse of overtime, and complaints from clients and that the complainant failed to establish that the protected activity led to the respondent's decision to discharge the complainant. Therefore, I find a complaint from Respondent's biggest client, Great Lakes, regarding Complainant's attitude and his presence on their well sites, to be another valid reason for terminating Complainant's position.

Complainant also argues that Mr. Leech's dissatisfaction with Complainant could not have been a valid reason for terminating him since Mr. Bishop explained that he had already made the decision to terminate Complainant's position. (CB at 20). Although I find that Mr.

Bishop had decided to terminate Complainant prior to his discussion with Mr. Leech, I find that Mr. Leech's request was just an additional factor that led Mr. Bishop to terminate Complainant's position on May 31, 2006. In addition, Complainant argues that this was not a valid reason to terminate Complainant's light duty position because Respondent allowed another employee, Dan Porter, to continue working in a light duty capacity after terminating Complainant. (CB at 20). However, I find that Mr. Porter's position was not similar to that of Complainant's. Mr. Porter operated as a rig hand, not a rig operator, and had different job duties. Furthermore, Mr. Porter's light duty position only lasted a few days and he was still able to perform limited duties with his right hand, whereas Complainant was in a "do nothing" status and there was no evidence of Complainant being able to return to his full duty position in the foreseeable future.

Accordingly, I find no illegal motive in Complainant's discharge. His position was justifiably terminated for the aforementioned reasons, which I find are legitimate and non-discriminatory.

### CONCLUSION

To summarize, Complainant has failed to establish a claim under the environmental Acts here invoked, i.e., that Respondent terminated his light duty position due to his complaint to OSHA. Based upon the evidence as a whole, Complainant failed to prove that he engaged in protected activity or that his protected activity led to his discharge. In the absence of such proof, Complainant's complaint must be dismissed.

### RECOMMENDED ORDER

It is hereby ORDERED:

The Complaint of James Carpenter against Bishop Wells Services, Inc. under the environmental whistleblower Acts is hereby DISMISSED.

A

RALPH A. ROMANO  
Administrative Law Judge

Cherry Hill, New Jersey

**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).