



Issue Date: 01 May 2017

In the Matter of
ANDREW DE SALVO
Complainant

v.

CASE NO: **2016 ERA 00008**

**WATERFRONT PROPERTY SERVICES,
LLC, DBA GATOR DREDGING**
Respondent

DECISION AND ORDER
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case was set for hearing March 27, 2017, in Tampa, Florida under the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. 5851, and the implementing regulations found at 29 C.F.R. Part 24. However, I cancelled the hearing based on certain representations set forth in Respondent's Motion for Summary Decision and in two affidavits. After the parties briefed the Respondent's motion, on February 9, 2017, I issued an Order for Better Briefs relating to Respondent's Motion for Summary Decision. I cancelled the hearing, denied Complainant's procedural objections, and granted the parties to March 15, 2017, to provide better briefs regarding the pending Motion for Summary Decision. The parties have submitted responses.

This case was initially docketed in May, 2016 and assigned to Judge Christopher Larson, who set a hearing for November 8, 2016, in Fresno, California. A telephonic pre-hearing conference was scheduled for October 19, 2016. The Complainant filed a Motion for a Continuance, and eventually the case was rescheduled for March 1, 2017. Complainant filed a plethora of motions, including a request for recusal of Judge Larsen. These were denied in an order dated December 7, 2017.¹ After the Complainant requested that the case be referred to national headquarters, the case was referred to me on December 13, 2016, and I immediately rescheduled the hearing.

Complainant filed a request to set aside Judge Larsen's orders. Thereafter I received a FAX from Complainant requesting a prehearing conference.

¹ Complainant filed Motion for a mistrial and recusal of the Presiding ALJ for Failure to Notice Motion For Remand, Motion for Continuance, and Response to Declaration and Motion to Transfer Location of Hearing and Motion for an Order Compelling Disclosure or Discovery. These were denied by Judge Larsen.

On December 28, 2016, Respondent filed a Motion for Summary Decision, alleging that Complainant was hired as a Survey Crew Chief on August 22, 2015. Respondent alleged that Complainant performed work-related travel from August 22, 2015 through August 31, 2015 and that his first day on the jobsite working for Respondent was September 2, 2015. Respondent alleges that Complainant lasted about one hour and was terminated for insubordination.

Complainant filed a response January 25 objecting to the Motion for Summary Decision. As stated above, mu Order for better briefs was signed on February 9. He has also filed Motions to produce documents, to permit inspection of premises and has requested several subpoenas. None of these relate to the insubordination issue. He also filed a Motion for Mistrial and a motion for disqualification, which I denied in an Order dated February 21, 2017. The order stated:

...the Motions for a Mistrial and Disqualification of Daniel F. Solomon presiding Administrative Law Judge, and Motion to Produce Documents, Information or Objects or to Permit Inspection of Premises are denied.

In response to the Order for better briefs, Complainant did not directly address whether or not he was insubordinate on September 2, 2015. He did state that he objects to affidavits from Lawrence Naeder and William Coughlin, which document the allegation, which state in pertinent part:

1. I am the Assistant Operation Engineer for RESPONDENT WATERFRONT PROPERTY SERVICES, LLC ("WPS"). I have personal knowledge of the facts stated herein, except as to those matters which are stated on information and belief, and as to those matters I believe them to be true, and, if called to testify thereto, I could and would do so competently. I have been the Assistant Operation Engineer for two (2) years.
2. On the morning of September 2, 2015, Andrew Desalvo arrived to the Turkey Point Jobsite in Homestead, Florida, where he was to assume the role of Survey Crew Chief.
3. That same day, I met with Mr. Desalvo around 8 a.m. in our office trailer to give him a brief explanation of what we were doing and how we were going to survey the job. I spent approximately thirty (30) minutes trying to explain to Mr. Desalvo our survey process. As I did so, Mr. Desalvo repeatedly cut me off and was argumentative.
4. At this time, the company's Chief Operating Officer, William Coughlin, entered the room to sit with us and try to explain Mr. Desalvo's job duties with the company. Mr. Desalvo continued to speak over Mr. Coughlin and would not allow Mr. Coughlin to say anything. Due to Mr. Desalvo's inappropriate conduct, Mr. Coughlin had to explain to him that Mr. Coughlin was the company's Chief Operating Officer.
5. Mr. Desalvo stood up and started to walk towards the back of the trailer stating that he needed to speak with Mr. Coughlin in Mr. Coughlin's office (which is located in the trailer). Mr. Coughlin stated that the meeting needed to stay in the current section of the trailer so that I could also hear what was being said.
6. Despite Mr. Coughlin's directive, Mr. Desalvo continued to walk out of the trailer office. Mr. Coughlin told him he could either sit down and listen or he could grab his stuff and leave. Mr. Desalvo responded that he would leave then.

7. Mr. Coughlin walked out of the front office towards his office at the back end of the trailer as Mr. Desalvo grabbed his belongings. While opening the exit door to the trailer, Mr. Desalvo turned around and walked towards Mr. Coughlin's office in an irritated manner demanding to use the phone.

8. Mr. Desalvo demanded to speak with someone at the Clearwater office about hiring and firing. Once again, Mr. Coughlin told Mr. Desalvo to exit the trailer. Rather than complying with Mr. Coughlin's directive, Mr. Desalvo commanded to speak with the owner of the company. Mr. Coughlin then informed Mr. Desalvo that he was the owner of the company and that Mr. Desalvo needed to grab his belongings and leave.

9. Finally, Mr. Desalvo walked out of the trailer, entered his vehicle and drove off of the jobsite.

Declaration of Lawrence Naeder, in Support of Respondent's Motion for Summary Decision.

Respondent set forth further that:

...Naeder met with Desalvo around 8 a.m. in the office trailer to give Desalvo a brief explanation of what the company was doing and how the company was going to survey the job. Naeder spent approximately thirty (30) minutes trying to explain to Desalvo the company's survey process. However, Desalvo repeatedly cut Naeder off and was argumentative.

Coughlin entered the room to sit with Desalvo and Naeder and explain Desalvo's job duties with the company. Desalvo continued to speak over Coughlin and would not allow Coughlin to say anything. Due to Desalvo's inappropriate conduct, Coughlin had to explain to Desalvo that he was the company's Chief Operating Officer. (Naeder Decl., at paragraph "¶" "4.)

Desalvo continued to interrupt Naeder and Coughlin as they tried to explain Desalvo's job duties with the company. Desalvo tried to get up and leave the meeting. Coughlin requested that Desalvo remain in the meeting and informed Desalvo that he was going to provide Coughlin's duties/responsibilities with the company as well as Desalvo's. Desalvo declined to remain in the meeting. Instead, he stood up and started to walk toward the trailer door.

Declaration of William Coughlin in Support of Respondent's Motion for Summary Decision:

Coughlin instructed Desalvo to return to the meeting. Desalvo did not. Coughlin offered Desalvo a last option to return to the meeting or be terminated. Desalvo did not return to the meeting. (Coughlin Decl., ¶ 4.) Coughlin informed Desalvo that he was terminated. Coughlin directed Desalvo to call the office for termination procedures/documents. Desalvo became irritated and instructed Coughlin to call the office to discuss the situation with other staff. Coughlin informed Desalvo that he holds a Partner/Chief Operation Officer position with the company and was fully authorized to terminate Desalvo's employment without cause (although in this case there was cause because he was subordinate). Coughlin instructed Desalvo to leave the premises. (Coughlin Decl., ¶ 5.)

Desalvo walked out of the trailer and left the jobsite.

Coughlin at paragraph 6; Naeder at paragraph 9.

Complainant also argues that there was no company policy in force that would have permitted Respondent to fire him for insubordination.

Respondent alleges that it maintained various policies during the relevant period including a Disciplinary Action Policy which was included in the Employee Handbook that Mr. Desalvo signed on September 1, 2015. (See Supplemental Declaration of William Coughlin in Support of Supplemental Brief to Respondent Waterfront Property Services, LLC's Motion for Summary Decision ("Coughlin Decl."), ¶ 3; a true and correct copy of the Acknowledgement of Receipt signed by Mr. Desalvo is attached as Exhibit A to the Coughlin Decl.; also see Declaration of Christy L. Vanderpool in Support of Supplemental Brief to Respondent Waterfront Property Services, LLC's Motion for Summary Decision ("Vanderpool Decl."), ¶ 6; a true and correct copy of the Acknowledgement of Receipt signed by Mr. Desalvo is attached as Exhibit A to the Vanderpool Decl.)

I am directed to page 6 of the Employee Handbook, WPS' Disciplinary Action Policy. This policy states, among other things, that the company "has the right to terminate employment at-will, with or without cause or advance notice. GATOR DREDGING may use this discipline policy at its discretion. The policy further states "violation of any of the following rules, or any other actions deemed extremely serious by management, may be considered adequate justification for discharge for the first offense: f) Insubordination to supervisor, refusal to perform supervisor's assignments, or directing abusive or threatening language at any supervisor, employee, or representative of GATOR DREDGING. (Coughlin Decl., ¶ 4; a true and correct copy of WPS' Disciplinary Action Policy is attached as Exhibit B to the Coughlin Decl.; Vanderpool Decl., ¶ 4; a true and correct copy of WPS' Disciplinary Action Policy is attached as Exhibit B to the Vanderpool Decl.)

I am also directed to page 3 of the Employee Handbook are the following policies: Code of Ethics and Conduct; Employment Relationship; and Introductory Period. The Code of Ethics policy requires employees to act ethically in all of their duties and to help create an environment that is free of discrimination and harassment. (Coughlin Decl., ¶ 5; a true and correct copy of page 3 of WPS' Employee Handbook including the Code of Ethics and Conduct policy is attached as Exhibit C to the Coughlin Decl.; Vanderpool Decl., ¶ 4; a true and correct copy of page 3 of WPS' Employee Handbook including the Code of Ethics and Conduct policy is attached as Exhibit C to the Vanderpool Decl.)

Respondent argues that the Employment Relationship policy establishes that employment is at-will and employees may be terminated at any time for any reason, with or without notice:

Notwithstanding Mr. Desalvo's at-will status, he was terminated for cause as he demonstrated insubordination by blatantly refusing to comply with Mr. Coughlin's directives on the day of his termination. (Coughlin Decl., ¶ 6; see Exhibit C to Coughlin Decl., Employment Relationship policy; Vanderpool Decl., ¶ 4; see Exhibit C to Vanderpool Decl., Employment Relationship policy.)

The Introductory Period policy states that the first 90 days of employment for all employees is an introductory period. This is a trial period designed to determine whether the employee is suited for the job and capable of performing the essential job functions. Employment during the introductory period is at-will. (Coughlin Decl., ¶ 7; see Exhibit C to Coughlin Decl., Introductory Period policy; Vanderpool Decl., ¶ 4; see Exhibit C to Vanderpool Decl., Introductory Period policy.)

On page 31 of the Employee Handbook is WPS' Workplace Violence policy. This policy defines workplace violence as "any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties." (Coughlin Decl., ¶ 8; a true and correct copy of WPS' Workplace Violence policy is attached as Exhibit D to the Coughlin Decl.; Vanderpool Decl., ¶ 4; a true and correct copy of WPS' Workplace Violence policy is attached as Exhibit D to the Vanderpool Decl.)

This material was filed in my office on March 15 and since then Complainant has filed a Second Supplemental Response to Order Better Briefs on April 9, 2017, consisting of 81 pages. He does not refute the company policy. Among those allegations are denials that the Respondent witness stated the following:

- 1.) William Coughlin, 2.) Mr. Coughlin, 3.) explain the job, 4.) continuously cutting me off, 5.) cut 4 me off, 6.) insubordination, 7.) time card, 8.) Gator Dredging Employee Handbook, 9.) signed 5 Employee Handbook Acknowledgement, 10.) Gator Dredging Handbook Outline for "Introductory 6 Period", 11.) Gator Dredging Handbook Outline for "Disciplinary Action Policy" (Highlighted 1. F. 7 reasons for termination as indicated in Handbook), 12.) specific direction, 13.) disorderly conduct, 8 14.) confrontational, 15.) insubordinate, 16.) performing duties, 17.) disruption to jobsite, 18.) 9 interrupted workflow, 19.) loud, 10.) argumentative, 11.) responsibility to the job, 12.) refusal to 10 listen, 13.) standard conduct in a workplace 14.) you do not yell be unruly, 15.) argue with your boss, 11 16.) cohesive work environment, 17.) behavior not acceptable, 18.) warning, 19.) argumentative, 20.) 12 aggressive, 21.) disruptive to entire jobsite, 22.) duties/responsibilities with the company, 23.) return 13 to meeting or be terminated, 24.) terminated, 25.) partner/chief operating officer position with the 14 company, 26.) fully authorized to terminate without cause, 27.) cause, 28.) leave the premises, 29.) 15 know who I am, 30.) your position at this site, 31.) what my abilities are in hiring and firing people, 16 32.) speak to the owner of the company.

In several places in his filings, Complainant offered the following:

COMPLAINANT believes there is no evidence of unprofessional conduct or insubordinate conduct that is unrelated to his protected activity; any insubordinate acts that COMPLAINANT may have even committed that day were inextricably intertwined with protected activity; and, RESPONDENT overly broad work rule that prohibits all insubordination is impermissible.

This response constitutes a tacit admission that Complainant was insubordinate. Complainant's modifiers, "that is unrelated to his protected activity" and "any insubordinate acts that COMPLAINANT may have even committed that day were inextricably intertwined with protected activity" are examples of the pregnant negative.² I find that Complainant admits that he was insubordinate.³

In several other places in the last response, after I had asked for better briefs, he insists that the Respondent witnesses were lying.⁴

Complainant has also filled several documents relating to a FOIA request at the Nuclear Regulatory Commission. I have no jurisdiction regarding these requests.

Once a prima facie case is established, the burden of proof is on Respondent to prove the insubordination defense by "clear and convincing evidence" that it "would have" taken the same adverse action in the "absence of" protected activity. When that is shown, a respondent can avoid liability by demonstrating "by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity." Among the factors:

- (1) how "clear" and "convincing" the independent significance is of the non-protected activity;
- (2) the evidence that proves or disproves whether the employer "would have" taken the same adverse action; and
- (3) the facts that would change in the "absence of" the protected activity.

See *Speegle v. Stone & Webster Construction, Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-6 (ARB Apr. 25, 2014).

² A negative pregnant (sometimes called a pregnant denial) refers to a denial which implies its affirmative opposite by seeming to deny only a qualification of the allegation and not the allegation itself. 71 C.J.S. Pleading § 190 (March 2017 Update). A negative pregnant is such a form of a negative expression as may carry with it an affirmative. It is a form of denial that implies or expresses an admission of a substantial fact which purportedly is controverted. *Id.*

³ Complainant argues that insubordinate conduct is not deliberate misconduct, defined in Code of Federal Regulations Title 10 – Energy Chapter I – "NUCLEAR REGULATORY COMMISSION 5 Part 50 - DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES;... COMPLAINANT believes Deliberate misconduct is construed to diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee...."

Although the cited section is not applicable in this case, I find that the Complainant admits misconduct and that this substantiates the admission to insubordination.

⁴ "RESPONDENT is lying and lacks credibility and relies on assertion of insubordination, and prior inconsistent statements pertaining to a discussion of job description not entered in record by RESPONDENT in 2016-ERA-00008, the instant case, or in previously noticed judicial proceedings; ...RESPONDENT relies on prior inconsistent statements in previously noticed judicial proceedings when COMPLAINANT testimony (the "back history") is omitted on appeal, and COMPLAINANT testimony (the "back history") and evidence (the "voluminous exhibits") are omitted on adjudication."

I find that this response is intended to justify Claimant's insubordinate conduct but substantiates the fact that he was insubordinate.

Respondent argues that the introduction of these policies into evidence here clearly distinguishes the present case from *Speegle*, where, there was no clear evidence of a policy regarding insubordination.

I agree. For purposes of this motion, I assume that the Complainant was in protected activity and that Respondent was aware of it. However, I find that the Complainant has admitted that he was insubordinate and I find that Respondent has shown by clear and convincing evidence that Respondent would have taken the same adverse action; and no facts would change in the absence of the protected activity.

ORDER

Accordingly, I enter the following:

1. Complainant's procedural objections are **DENIED**.
2. There are no material facts in dispute.
3. Respondent's Motion for Summary Decision is **GRANTED**.
4. All of Complainant's outstanding discovery motions, including his request for appointment of an expert, motions to produce documents, information, or objects or to permit inspection of premises, and any other request related to this case are moot and therefore **DENIED**.
5. All subpoenas that I issued in this case are hereby **QUASHED**.

DANIEL F. SOLOMON
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 Board's address is:

Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing 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 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.

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 filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the

petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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.