



Issue Date: 21 November 2017

CASE NO. 2017-ERA-00002

In the Matter of

JOSE A. SOLIS,
Complainant,

v.

**CH2M HILL PLATEAU REMEDIATION
COMPANY, BABCOCK SERVICES, INC.,
AND WATTS CONSTRUCTION, INC.**
Respondents.

**ORDER DENYING BABCOCK'S AND WATTS'
MOTION FOR SUMMARY DECISION**

This case arises under the whistleblower protection provision of the Energy Reorganization Act, 42 U.S.C. § 5851, and its implementing regulations, 29 C.F.R. § 24. Respondents Babcock Services and Watts Construction both move for summary decision. I find genuinely disputed issues of material fact as to each Respondent and therefore deny the motion.

Analytical framework for summary decision. On summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. §18.72 (2015); Fed. R. Civ. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed. R. Civ. P. 50 and 56).

Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 29 C.F.R. §18.40(c). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

Applicable law.

To establish a prima facie case of retaliation under the Act, an employee must show that “(1) he engaged in a protected activity; (2) the respondent knew or suspected ... that the employee engaged in the protected activity; (3) [t]he employee suffered an adverse action; and (4) [t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.” “Under the [Act’s] burden-shifting approach to retaliation claims, if an employee shows that his participation in protected activity ‘was a contributing factor in the unfavorable personnel action alleged,’ the burden shifts to the employer.” *Id.* (quoting 42 U.S.C. § 5851(b)(3)(C)). An employer can rebut the employee’s prima facie case under the Act if it introduces “clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [the employee’s participation in] such behavior.” 42 U.S.C. § 5851(b)(3)(D).

Sanders v Energy Northwest, 812 F.3d 1193, 1197 (9th Cir. 2016) (citations omitted).¹ The Act is interpreted broadly because it “serves a “broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality.” *Id.*

The statute specifically prohibits employers from discharging or otherwise discriminating against employees for several enumerated acts, including notifying an employer of a violation, initiating an enforcement proceeding, or *testifying in a safety or enforcement proceeding*. See 42 U.S.C. § 5851(a)(1)(A-E). The statute also includes a catch-all provision protecting employees “*in any other action to carry out the purposes of this chapter....*” *Id.* at § 5851(a)(1)(F).

Sanders, 812 F.3d at 1197 (emphasis added). I emphasize the language concerning the testifying in an enforcement proceeding and the catch-all provision because both are relevant here.

As to the catch-all provision, the Act does not define “any other action to carry out the purposes of this chapter.” “Consequently, the courts construed the phrase as requiring, in light of the ERA’s overarching purpose of protecting acts implicating nuclear safety, that an employee’s actions implicate safety “definitively and specifically” to constitute whistleblower protected activity under subsection (F). *Sylvester v. Parexel Int’l, LLC*, ARB No. 05-132 (May 25, 2011), slip op. at 17, 2011 WL 2165854 at *14.

Undisputed facts. Viewing the facts in the light most favorable to the Complainant (who is the non-moving party), drawing all reasonable inferences in his favor, and not scrutinizing the credibility of his evidence, I make the following findings for purposes of this motion only.

The Hanford Site in eastern Washington is the largest nuclear cleanup site in the United States. The Department of Energy contracts, among others, with CH2M Hill Plateau Remediation Company in the clean-up. Without opposition from Complainant, I dismissed CH2M Hill

¹ The Ninth Circuit is controlling in this Washington-based case.

Plateau Remediation Company because there was no evidence it was involved in the events that are the focus of Complainant's complaint.

Babcock Services, Inc. is a subcontractor, that at relevant times worked under a contract with CH2M Hill Plateau Remediation Company, including at the 100K AB site, which is where the events relevant here occurred. Watts Construction, Inc. performs services under a contract with Babcock Services, Inc.

Complainant Solis has been a manual laborer for over 30 years and a union member. Between 2005 and 2008, he reported safety concerns while working for a Bechtel subcontractor. He testified about those concerns at a deposition. He included in his testimony complaints about Ric Moore. At the times relevant to the present action, Moore was Babcock's Site Superintendent at the 100K AB site.

In 2015, Complainant complained to CH2M Hill Plateau Remediation Company subcontractor's safety manager Susan Mowbray about sensing a metallic taste and odor while installing a barricade at a Hanford Site waste complex. At the times relevant here, Mowbray was the industrial hygienist on the Babcock-Watts work at the 100K AB site.

On February 5, 2016, Complainant's union selected Complainant to work at the 100K AB site. Neither Babcock nor Watts had selected Complainant for the work: The union selected him when Watts requested a laborer.

The remediation work at the 100K AB site was managed by a joint Babcock and Watts team. It included Ric Moore for Babcock, the Babcock Project Manager Ron Morris, and Watts Project Manager Jarod Janosky. When Moore discovered that Complainant was the new laborer, he told Morris that he was disappointed and that Complainant had been involved in the lawsuit. Similarly, Mowbray told Morris that Complainant was "stringent" and going to be "trouble" and that "we don't want him on the job."

On February 10, 2016, Watts cancelled the request for a laborer, stating that it turned out there wasn't a need. Hanson manager wrote in a "Termination Report": "Rumors around this guy are not what we would like to have in an employee." A foreman was told that the decision not to hire a laborer was because of "past dealings" between Moore and Complainant.

Soon, however, Watts again requested that the union send a laborer, but this time not Complainant. The union rejected the exclusion of Complainant and dispatched him to the work site. Complainant started on February 16, 2016. Moore's response was that Complainant had arrived, and the Company had to make the best of it. Mowbray personally warned Complainant that, if he raised safety concerns, the Company would let him go.

As site superintendent, Babcock manager Moore directed the work of the laborers.

Work at the 100K AB site was performed under "Earthwork Plan #57990." Babcock published this plan to describe "the method for excavation and removal of contaminated and non-contaminated soils and debris" The Plan warns that "radiologically contaminated material

may be encountered during all work activities.” Babcock requested daily radiation surveys of the AB site. Babcock project manager Morris admitted that it was “a good safety practice to have dosimeters for the employees.” The dosimeters measure the dosage of exposure to radiation.

Complainant observed that both the managers and the laborers on the AB site were wearing dosimeters. Complainant repeatedly asked Moore and Morris for a dosimeter. He made the requests approximately daily. There is documentation of only one request that management made for a dosimeter; that is dated February 16, 2016, the date Complainant started work. Complainant did not receive a dosimeter under March 3, 2016, two weeks after he started.

Complainant also complained that he was being asked to clean bathrooms without safety training or personal protective equipment.

Complainant’s employment was terminated on March 10, 2016, three weeks after he started. The stated explanation was that Complainant could not complete his assigned tasks acceptably, did not follow his foreman’s direction, and that his co-workers did not want to work with him because he didn’t do his share of the work.

Watts has a progressive discipline policy. It includes a “friendly” warning, a written warning, and a 3-day suspension prior to a termination. It does state, however, that while discipline generally is progressive, it “may begin with any one of the above actions based on the Company’s determination of the seriousness of the offense.”

Conclusions on summary decision. For purposes of the present motion, I conclude that Complainant’s prior testimony involving Ric Moore was protected activity. Whether Complainant initiated the safety-related case or only testified in it, both are protected. Although Complainant’s initial request for a dosimeter might not be protected, I construe his continued, daily, repeating requests as a complaint that he needed a dosimeter and had not received it. Both Complainant and Babcock and Watts management knew that the dosimeters were needed for safety reasons to be certain that people were not being exposed to dangerous doses of radiation. The complaint thus either relates to violations of the Atomic Energy Act or comes within the Energy Reorganization Act’s catch-all language: “any other action to carry out the purposes of this chapter.” The complaint was specifically and definitively related to nuclear safety.

Management opposition to the union’s dispatching Complainant for the job because he had previously made safety-related complaints or had testified in a safety-related investigation is a basis to infer that both Watts and Babcock management had a retaliatory animus toward Complainant before he began work on the project. Respondents offered no evidence that it generally takes two weeks to obtain a dosimeter for a starting employee, nor have they offered evidence or argument to suggest that it was unreasonable for Complainant to expect the dosimeter would be available from the day he started. The fact that Respondents eventually supplied Complainant with a dosimeter is insufficient to rebut an inference that their complicity in the apparent delay in providing the dosimeter was intimidation in violation of the Act’s implementing regulations. *See* 29 C.F.R. § 24.102(b).

Watts directly employed Complainant. It terminated the employment. Babcock directed Complainant's work. Viewing the evidence in the light most favorable to Complainant, Babcock managers' expressed views on Complainant were involved in the intimidation of Complainant and the termination of his employment. For purposes of the motion, I reject Babcock's argument that it had no involvement in the alleged retaliation.

Respondents offer only conclusory statements to support their reasons for terminating the employment. *See* Hanson Decl., ¶ 9 and Exh. A. Respondents offer no explanation for the peremptory manner in which they applied the Watts progressive discipline policy. This does not begin to approach clear and convincing evidence that Respondents would have terminated the employment even if Complainant had not engaged in protected activity.

Accordingly, based on a review of the undisputed evidence viewed in the light most favorable to Complainant (as the non-moving party), Complainant has raised a genuine disputed of material fact as to whether he engaged in protected activity that was a contributing factor in adverse actions both Watts and Babcock took against him. Respondents have failed to meet their burden to rebut by clear and convincing evidence Complainant's *prima facie* case.

Order

Watts Construction's and Babcock Services' motion for summary decision is DENIED.

This Order will be served on Complainant's counsel and counsel for Respondents Babcock and Watts by facsimile or email. All other service is by U.S. mail.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge