



Issue Date: 30 June 2006

CASE NOS. 2005-TSC-00001
2005-ERA-00015

In the Matter of:

Maurice Rosen,
Complainant,

vs.

Fluor Hanford, Inc.,
Respondent.

**Recommended Decision and Order Granting Summary
Decision of Dismissal on Reconsideration**

I. Introduction

Fluor Hanford, Inc. (the Respondent) moved for a summary decision dismissing this complaint, challenging the claim of Maurice Rosen (the Complainant) that he had been suspended and later terminated from his position as an electrician because he reported environmental hazards and unsafe work conditions to his supervisors and to external government agencies. I denied the motion, but narrowed the Complainant's claim from six alleged protected activities to two. The Respondent moved for reconsideration of the denial of summary disposition. I assume the reader is familiar with the earlier decision. Having reviewed those arguments, I grant the Respondent's motion for reconsideration and dismiss the claim.

Grounds for reconsideration include "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 369 & n. 5 (9th Cir. 1989). The Respondent urges on reconsideration that the Complainant's stop-work order regarding valve wiring and his reports to the Washington Department of Ecology regarding discharges of chromated, contaminated water under Bechtel Corporation – the entity that controlled the Complainant's place of employment before Fluor Hanford – should not qualify as protected activities. The Respondent also reiterates that the time between the protected activities and the Complainant's termination was too attenuated to give rise to an inference of causation, and that those who fired the Complainant had no knowledge of any protected activities.

A. *The stop work order as a protected activity*

Complaints that encompass both occupational safety and environmental concerns can trigger the employee protection provisions of the environmental statutes, when the employee subjectively believes that the employer violated one of the environmental statutes, and the belief is objectively reasonable. *Melendez v. Exxon Chemicals Americas*, ARB No. 1996-051, ALJ No. 1993-ERA-6, slip. op. at 11, 20 (ARB July 17, 2000). The Complainant used his stop-work authority to resist a directive to cut 75% of the strands from a new wire so that it could be installed in an existing lug terminal. He believed modifying the wire could actuate a valve that regulated chromated water. There was no manual override mechanism for this particular valve, should it malfunction, and he observed workers with Radiological Work Permits and dressed in anti-contamination gear in the valve's vicinity. The Respondent counters with the argument that 1) the Complainant would have proceeded with the directive had the engineers obtained a variance from the requirements of the electric code, which undermines his subjective belief that this was an environmental hazard; and 2) there could be no harm to the environment unless a series of unlikely events followed the technical failure of the valve, which renders his concern objectively unreasonable. See *Kester v. Carolina Power and Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003).

The Complainant's admission that he would go forward with cutting the strands if it met the electrical code shows a subjective concern about an occupational safety hazard, and is evidence that he believed the occupational hazard was intertwined with the environmental risk.¹ The connection between a possible electrical failure and contamination of the Columbia River with chromated water certainly is indirect. Yet it is objectively reasonable to believe that improper wiring could lead to environmental damage not only because a series of events could send water the valve controlled to the Columbia River, but also because the valve was in an area that required workers to have a Radiological Work Permit and dress in anti-contamination gear. The evidence must be viewed in light most favorable to the non-moving party at summary judgment. The Complainant has presented a triable issue about whether cutting the wire presented a potential violation of water quality standards.

B. *Report to the state DOE² as protected activity*

The Respondent insists that it was not objectively reasonable for the Complainant to believe that it violated environmental laws by illegally discharging chromium-tainted water between 1999 and 2001³ because all these alleged discharges occurred under Bechtel's management of the work site.⁴ Although the Complainant was aware that the Respondent did

¹ The Complainant's subjective belief that faulty wiring could lead to greater environmental harm is supported by the type of motorized valve involved and the risks that required employees to wear anti-contamination gear.

² The Complainant alleged that he reported environmental safety hazards to the Washington Department of Ecology, and to the federal Environmental Protection Agency.

³ The Complainant's First Complaint spoke of discharges between 1999 and 2002, but his First Amended Complaint reported discharges between 1999 and 2001.

⁴ The Complainant testified that he heard all of the releases happened under Bechtel.

not control the work site until 2002, he argued that the managers who ordered the releases under Bechtel kept their positions under the Respondent. The Respondent urges reconsideration because the potential liability of these individual managers could be imputed only to Bechtel, not to it, again undermining the reasonableness of any subjective or objective belief that the Respondent was responsible for a violation of law.

I need not determine whether Bechtel or the Respondent ultimately could be held responsible for actual violations of environmental standards. The central question for the Secretary of Labor is whether the Respondent suspended and terminated the Complainant out of retaliatory animus. The Respondent was his employer. It is reasonable to believe that managers who worked for Bechtel during the time of the alleged releases of pollution, and continued in their jobs under the Respondent, would have an incentive to rid themselves of an employee who showed a propensity to expose misdeeds. This inference is enough to overcome the motion for summary judgment, although the Respondent's position might prevail at trial.

C. Temporal Proximity

A temporal nexus between the protected activity and the adverse action raises an inference that the protected activity caused or contributed to the adverse action. The time between the protected activity and adverse action must be "very close" in cases where the Complainant relies only on temporal proximity to establish a prima facie case. *Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001). The Respondent insists that *Breeden* controls, therefore seven months – the time between the Complainant's stop work order and his termination – is too great to support the causation inference. In *Breeden*, however, time was the employee's only causal link between her protected activity and the adverse action. Because the Complainant relies on more than mere time, *Breeden* does not dictate this outcome.

The Complainant offered evidence of minor hostilities directed toward him that bridge the gap between his protected activity and his suspension and termination. Although the Respondent argues that evidence tending to show a contentious work environment is immaterial because the Complainant presented no hostile work environment claim, this evidence need not be used only as proof of retaliation. Events or interactions implying hostility support causation by linking the protected activity and adverse action. See *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996) (explaining that temporal proximity is only one factor in deciding whether a complainant has proved intentional discrimination/retaliation); *Varnadore v. Oak Ridge National Laboratory*, 92-CAA-2 and 5 and 93-CAA-1, slip op. at 85-86 (Sec'y Jan. 26, 1996) (noting that periods of up to twelve months between an incident of protected activity and adverse action were short enough to give rise to an inference that the protected activity was the likely cause of the adverse action). The adverse actions were not so temporally remote from the protected activities that it would be logically or legally impossible to infer the necessary causation.

D. Knowledge

The individuals responsible for the Complainant's termination were James Hanna, Frank Blowe, and Marilyn Strankman. The Respondent argues that the Complainant's proof provides no bias to impute knowledge of protected activities to these managers. No one with actual knowledge of the Complainant's protected activity influenced their decision to fire him for the rude way he dealt with other employees. *See Sayre v. VECO Alaska, Inc.*, ARB No. 03-069, ALJ No. 00-CAA07, 2005 WL 1359124 & n. 6 (ARB May 31, 2005) (finding that constructive knowledge is enough where a prejudiced participant in the decision-making process manipulates an unwitting decision maker into the adverse action); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31 (ARB Sept. 30, 2003) (imputing knowledge where an individual aware of the protected activity wrote a misleading report that the party who fired the complainant relied upon).

The lack of direct evidence that those who terminated the Complainant knew of his stop-work order or of his reports to the Washington DOE is not necessarily fatal to his claim. Only circumstantial evidence showing that they knew is required. But Complainant's proof provides an insufficient basis to infer the necessary knowledge. The Complainant claims he informed Nancy Conrad and Hans Showalter of his intent to report the chromium release to the DOE, but they were not the ones who disciplined him. In her Retaliation Analysis report, Nancy Conrad found that Marilyn Strankman was at least vaguely aware of the Complainant's safety concerns. Yet she also explained that Marilyn Strankman did not know that the Complainant raised a complaint with the Washington DOE. Additionally, Cheryl Brasker knew that the Complainant had raised a number of safety issues. In August 2004, when the Complainant was investigated for improper use of a cell-phone, he told Curtis Fabre, Manager of Operations Management, that there were severe safety issues. A memorandum of this conversation was sent to Brian Von Barga, the Field Manager, and to Dorman Blankenship, the GRP Manager. Marilyn Strankman was also aware that the Complainant's immediate supervisors were reluctant to find work for him when he returned from his injury. Finally, by November 3, 2004, many others within the management were notified that the DOE began investigations at Fluor Hanford due to a phone call from an unidentified individual of possible liquid leakage into the ground.

As the Respondent argues, this is not enough to impute knowledge of the Complainant's protected activities to the executives who disciplined him, because it is not specific to the Complainant's stop work orders and/or reports to the Washington DOE. Indulging reasonable inferences from the Complainant's evidence implies that they knew he had raised general safety concerns. That is not enough. *Shirani v. Comed/Exelon Corp.*, ARB No. 03-100, ALJ No. 2002-ERA-28 slip op. at 9-10 (ARB Sept. 30, 2005) (affirming finding that complainant lacked supervisory and financial auditing qualifications for the position he sought after a corporate restructuring, and that the manager responsible for hiring after the restructuring never knew of his earlier complaints about safety deficiencies in nuclear operations). *See also Weil v. Planet Airways, Inc.*, ARB No. 04-074, 2003-AIR-18, slip op. at 2 (ARB Oct. 31, 2005); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 14 (ARB Jan. 30, 2004).

There is no evidence that a prejudiced participant (for example, an individual responsible for discharges or chromated water under the Bechtel administration) influenced the decisions of the Fluor executives who suspended or terminated him for the way he treated other employees. All these executives knew that Fluor Hanford was being investigated because someone called an external agency and complained, and they were aware that the Complainant had raised general workplace safety issues. They also knew that his return to work after his slip-and-fall was not necessarily welcome news to his co-workers. Nonetheless, the Complainant has not shown that they were directly or constructively aware of the specific incidents of protected conduct. On this point the earlier denial of summary decision was an error in application of the law. There is no basis to impute that the executives who took the adverse actions knew of the Complainant's stop-work order or of his report to the Washington DOE, or had a reason to suspect he was the source. Neither is there proof to show or to infer that the suspension or termination decisions were influenced by some other person who knew or suspected the Complainant was the source of the report to the state regulator. If this were the state of the record after trial, I would have no choice but to rule in the Employer's favor. There is a difference between making an inference from other evidence and overlooking a failure of proof. On the essential issue of knowledge, the Complainant's proof fails.

II. Conclusion

On reconsideration of the December 6, 2005 Decision and Order denying summary decision, I find that there was clear error in imputing knowledge to the Respondent. Those who terminated the Complainant were unaware of his stop work order or of his report to the Washington DOE. The Complainant has failed to present evidence that would support an inference that there was a causal nexus between his protected activities and the adverse actions of suspension and termination.

The Respondent is entitled to judgment as a matter of law because the Complainant failed to meet the elements of a *prima facie* case. The Complainant's claim is hereby dismissed.

So ordered.

A

William Dorsey
Administrative Law Judge

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).