

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 December 2011

CASE NO.: 2008-TSC-1

IN THE MATTER OF

JOHN F. WILLIAMS, JR.

Complainant

v.

DALLAS INDEPENDENT SCHOOL DISTRICT

Respondent

APPEARANCES:

**MICHAEL E. COLES
DUSTIN A. PASCHAL
PAUL W. SIMON**

For the Complainant

**DIANNA D. BOWEN
LYNN ROSSI SCOTT,**

For the Respondent

**BEFORE: C. RICHARD AVERY
Administrative Law Judge**

**DECISION AND ORDER GRANTING RESPONDENT'S SECOND MOTION
FOR SUMMARY DECISION AND
CANCELLATION OF HEARING**

This matter is before the undersigned upon Respondents' Second Motion for Summary Decision. This proceeding arises under the employee protection provisions of the Toxic Substances Control Act of 1986 ("TSCA"), 15 U.S.C.A. § 2622; the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C.A. § 9610; and their implementing regulations, 29 C.F.R. Part 24. Complainant, John F. Williams, Jr., filed a retaliation complaint on September 14, 2007, alleging that his former employer, the Dallas Independent School District (DISD), violated the TSCA and CERCLA whistleblower protection provisions when it terminated his employment and did not select him for a position to which he applied because he filed a complaint with the Occupational Safety and Health Administration (OSHA) and requested health and safety information regarding his place of employment.

BACKGROUND

From 2001 to 2007, Complainant served as Projects Director in the Buildings Improvement Division ("BID") of the Dallas Independent School District ("DISD" or "Respondent"). In 2002, DISD relocated Complainant's office to the William H. Cotton Service Center building ("Service Center II"). Complainant alleges he became concerned for the safety of this workplace due to its previous history as a manufacturing center for Proctor & Gamble. He began seeking the assistance of the Occupational Safety and Health Administration in investigating the hazards possibly present in Service Center II. Between 2002 and 2007, Complainant made complaints with OSHA and several requests for environmental assessment reports related to Service Center II.

Complainant's employment contract terminated in August 2007 and was not renewed, as his position was eliminated. DISD placed Complainant in an applicant pool for employees who lost their job due to the DISD's 2007 delayering process. Complainant applied and interviewed for a position as Director of the Environmental Department, but was not selected.

On September 14, 2007, Complainant filed a complaint with the DOL, alleging that Respondent violated the TSCA and CERCLA when it terminated him for requesting information relating to an unsafe workplace. Thereafter, he amended his complaint to include the allegation that he was terminated for filing a complaint with OSHA in October 2002 and requesting environmental and safety-related information from his employer.

After investigation, OSHA found that the preponderance of the evidence showed that Complainant's alleged protected activity was not a contributing factor in DISD's rationale for not selecting him for the position for which he applied. Therefore, OSHA dismissed the complaint. Complainant filed his objections to OSHA's ruling and requested a hearing before an ALJ.

On April 30, 2008, Respondent filed a motion for summary decision, which was subsequently granted. The June 10, 2008 decision recommended that Complainant's complaint be dismissed on summary decision because Complainant failed to show a causal connection between his not being re-hired and any alleged prior protected activity on his part. That decision was made based on the belief that Complainant had not responded to Respondent's Requests For Admission, which had been served upon Complainant on March 17, 2008. Complainant had, however, served his answers on Respondent but had not filed them with the DOL. As a result, the record mistakenly showed that Complainant admitted that DISD's refusal to re-hire him was not an act of retaliation. On September 30, 2010, that decision was appealed and ultimately remanded by the Administrative Review Board for consideration of Complainant's previously unfiled responses to Respondent's requests for admission.

On October 6, 2011, Respondent filed a Second Motion for Summary Decision. Complainant submitted a Response in opposition to the Respondent's motion on November 3, 2011. Respondent submitted a Response to Complainant's Response on November 18, 2011. Both parties attached exhibits to their motions and memos.

DISCUSSION AND FINDINGS

An administrative law judge may grant a summary decision for either party if the pleadings, affidavits, discovery materials, or matters officially noted show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 29 C.F.R. § 18.40(d); 29 C.F.R. § 18.41. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). When considering a motion for summary decision, the administrative law judge must view the evidence and inferences in the light most favorable to the non-moving party. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999).

Here, Complainant brings his claim under TSCA and CERCLA. TSCA provides for the testing of chemical substances and mixtures that "may present an unreasonable risk of injury to health or the environment" through their manufacture, distribution in commerce, processing, use, or disposal, or a combination of such activities. 15 U.S.C.A. § 2603(a). CERCLA regulates the release of hazardous substances into the environment. 42 U.S.C.A. § 9602(a). TSCA and CERCLA prohibit an employer from discharging or

otherwise discriminating against an employee with respect to compensation, terms, conditions or privileges of employment, because the employee notified the employer of an alleged violation of the Acts, has commenced any proceeding under the Acts, has testified in any such proceeding, or has assisted or participated in any such proceeding. 15 U.S.C.A. § 2622(a), 42 U.S.C.A. § 9610(a)

Respondent argues that Complainant is not protected under the retaliation provisions of the above Acts because he cannot establish a *prima facie* case of whistleblower retaliation. To establish a cause of action, Complainant must establish the following elements: (1) he engaged in protected activity under TSCA and CERCLA; (2) Respondent was aware of the protected activity; (3) Complainant suffered an adverse employment action; (4) the protected activity was a motivating factor for the adverse action. *Devers v. Kaiser-Hill, Co.*, ARB No. 03-113, ALJ No. 01-SWD-3 (ARB Feb. 28, 2003), citing *Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 17-18 (ARB Feb. 28, 2003); *Abdur-Rahman v. DeKalb County*, ARB Nos. 08-003, 10-074, ALJ Nos. 2006-WPC-002, -003, slip op. at 7 (ARB May 18, 2010). Specifically, Respondent argues that Complainant in this case cannot establish the first, second, or fourth elements.

Regarding the first element, Respondent urges Complainant's argument is deficient because Complainant's complaints and inquiries centered on occupational health and safety concerns rather than protected activity regarding environmental hazards. Complaints regarding "purely occupational hazards" are not protected under employee protection provisions found in the environmental whistleblower acts under which Complainant filed his complaint. See *McKoy v. N. Fork Serv. Joint Venture*, ARB No. 04-176, ALJ No. 2004-CAA-2 (ARB April 30, 2007); see also *Bucalo v. United Parcel Serv.*, ARB No. 08-087, ALJ No. 2006-TSC-2 (ARB July 30, 2010) (holding that where Complainant "never verbally expressed a concern for the environment or those outside the building," such concerns did not fall under the TSCA whistleblower provisions); see also *Devers*, ARB No. 03-113.

After reviewing the evidence and arguments offered by both parties, I agree with Respondent that the first element cannot be met by Complainant. In other words, no genuine issue of material fact exists in this case precluding the granting of summary decision on the basis that Complainant was not engaged in protected activity under the Acts.

When asked to identify each complaint he made for which he is claiming retaliation, Complainant listed seven actions in his response to Respondent's Interrogatories; this list of actions was verified as complete by Complainant in his deposition. (Resp. App., pp. 133-134, 257). All are clearly related to Complainant's own occupational health concerns related to Service Center II:

- 1.) **October 23, 2002 – Letter to OSHA:** Complainant requested advice regarding his rights to request an environmental assessment of Service Center II. (Resp. App., p. 261). Complainant expressed concern that the facility “could be hazardous to my health” and “could pose a health threat to any occupant.” He noted that “hazardous substances were spilled in this facility.”
- 2.) **October 31, 2002 – Letter to Paul Hiser:** Complainant sent a letter to his then- supervisor requesting “access to all environmental assessment records” of Service Center II. (Resp. App., p. 262). This letter expressed concern for the “safety/health information” contained in that report, which may reveal that he and his fellow employees have been exposed to toxic chemicals.
- 3.) **November 5, 2002 – Letter to Miguel Ramos:** Complainant sent a letter to Mr. Ramos identical to the letter sent to Mr. Hiser. (Resp. App., p. 263).
- 4.) **November 12, 2002 – Letter to OSHA:** Complainant thanked Ms. Delaney for her reply “regarding employee potential exposure and employee rights to a ‘safe work place.’” (Resp. App., p. 264).
- 5.) **January 16, 2004 – Phone Call to OSHA:** Complainant spoke with OSHA and requested data regarding Service Center II. (Compl. App., p. 4; Resp. App., pp. 140-141).
- 6.) **February 24, 2004 – Letter to OSHA:** In this letter, Complainant referenced his previous request for “information relating to the health and safety issues of [Service Center II].” (Resp. App., p. 265). He explained he is determined “to seek the truth on the health and safety impacts to employees residing at [Service Center II].”
- 7.) **January 8, 2007 – DISD Grievance:** The form requested that Complainant describe what his grievance entailed. (Compl. App., p. 16). He wrote the following: “DG (LEGAL)-P, Whistleblower complaint – Service Center II; environmental, safety, health FOIA request denial by DISD.” Respondent urges that the District’s records do not show that the grievance was ever formally filed.

None of these actions express concern by Complainant that the environment or public health has been impacted. In his deposition, Complainant stated that in seeking the reports he was concerned for himself “as well as all the employees that were housed in that facility.” (Resp. App., p. 130). He reiterated that his concern extended only to his own health and safety and the health of “all of the other employees that were housed in that facility.” (Resp. App., p. 138). Complainant noted he “saw some discharge coming out of some pipes. I saw some unidentified residue that was located in the basement floor

areas.” (Resp. App., p. 132). However, Complainant never expressed that these events may have indicated a potential hazard for the environment external to Service Center II. He has repeatedly articulated concerns related only to the health and safety of himself and the workers inside of the facility. These complaints were purely occupational in nature and contain no general public environmental concerns.

In light of the foregoing evidence, Respondent has successfully shown there is no genuine issue of material fact with respect to Complainant’s alleged protected activity. As a result, I find Complainant cannot establish a *prima facie* case of whistleblower retaliation under TSCA or CERCLA as this element cannot be met. Therefore, summary decision is appropriate in this case, and the claim shall be dismissed.¹

ORDER

Respondent’s Second Motion for Summary Decision is hereby **GRANTED**, and the formal hearing scheduled in this matter for January 18, 2012, is hereby **CANCELED**.

So ORDERED this 5th day of December, 2011, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

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

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

¹ Having found summary decision and dismissal appropriate on this ground, I need not reach a decision regarding the remaining elements of Complainant’s *prima facie* case.

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.

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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 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.