



**Issue Date: 28 October 2016**

**CASE NO.: 2016-WPC-00003**

**IN THE MATTER OF**

**BRYAN POWELL**

**Complainant**

**v.**

**SOUTHERN LIGHT, LLC**

**Respondent**

**ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION**

This proceeding arises under the employment protection provision of the Federal Water Pollution Control Act ("WPC"), 33 U.S.C. § 1367, and the regulations promulgated thereunder at 29 C.F.R. Part 24, *et seq.* The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees who are allegedly discharged or otherwise discriminated against by Employers with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the Act.

**FACTUAL BACKGROUND**

Southern Light, LLC ("Respondent") is a fiber optic company that provides fiber optic cable installation and maintenance services throughout the Gulf South. (Resp. Mtn. for Summary Decision, EX-1-2). In late 2015 and early 2016, Respondent was involved in a project that consisted of placing communications wiring under the Tchefuncte River, a navigable waterway, using directional drilling techniques and digging equipment. (Resp. Mtn. for Summary Decision, p. 5). Complainant was a construction manager on the Tchefuncte River project. (Resp. Mtn. for Summary Decision, p. 4). According to Complainant, the project involved the digging of holes on the banks of the river, which created bore pits on the river's banks. (Resp. Mtn. for Summary Decision, p. 4; EX 3-4; Comp. Resp., p. 2). In his complaint, Complainant alleges that chemical drilling mud pumped into the borehole as well as the materials removed from the borehole were pollutants. (OALJ Compl., p. 3). Complainant also alleges a permit from the Army Corps of Engineers ("Army Corps") was required since the project crossed a navigable waterway. However, in order to receive a permit from the Army Corps, permits from the Coastal Conservation Office were needed. (Comp. Resp., pp. 1-2).

In January 2016, Complainant asked Donald Cooper, his supervisor, why Respondent had not obtained a permit for the Tchefuncte River project and told Cooper that he believed an Army

Corps permit was necessary. (Comp., pp. 1-2, Resp. Mtn. for Summary Decision, p. 5). Complainant did not give his supervisor any reasons why believed a permit was necessary. (Resp. Mtn. for Summary Decision, p. 5; EX-3-4). Complainant alleges Cooper told him that “the permit process would take too long” to meet the project deadline and that the Army Corps of Engineers would not “catch them” if they did not obtain a permit. *Id.*

On February 1, 2016, Complainant met with Respondent’s contractor and informed the contractor that Respondent did not have a permit from the Army Corps for the Tchefuncte River project. (Resp. Mtn. for Summary Decision, p. 6). One week later, on February 10, 2016, the contractor spoke to Complainant’s supervisor regarding the Tchefuncte River project and asked for a written guarantee of payment due to the lack of proper permits. *Id.* As a result of this request, Respondent cancelled the contractor’s contract and hired another contractor to complete the project. (Resp. Mtn. for Summary Decision, pp. 7-8). After completion of the Tchefuncte River project, Respondent submitted an after-the-fact permit application with the Army Corps of Engineers, which issued a judicial determination that the project did not invoke the protections of the WPC unless Respondent proposed to deposit dredged or fill materials into the Tchefuncte River. However, the Army Corps did determine that a permit under the Rivers and Harbor Act was required for the project. (Resp. Mtn. for Summary Decision, pp. 8-9).

Complainant alleges he was terminated on February 18, 2016 as a result of his claimed reports that permits were necessary for the Tchefuncte River project. (OALJ Compl., p. 2). However, Complainant admits he was told the decision to terminate his employment was supported by an email sent by Complainant regarding Respondent’s decision to move its office from New Orleans to Hammond, Louisiana. (Comp. Resp., p. 4). Respondent also stated Complainant was terminated due to his lack of leadership and failure to develop into the leader Respondent “needed him to be.” (Resp. Mtn. for Summary Decision, p. 14).

## **PROCEDURAL BACKGROUND**

On March 18, 2016, Complainant filed a complaint with the Occupational Safety and Health Administration (“OSHA”), alleging he was discharged in retaliation for alleged protected activity under the WPC. On March 29, 2016, OSHA issued its findings and stated Complainant failed to make a *prima facie* showing. In accordance with the regulations, Complainant timely objected to OSHA’s findings and requested a hearing before an administrative law judge. The matter was assigned to the undersigned, and a Pre-Hearing Order was issued on May 31, 2016, scheduling a formal hearing in this matter on November 7-9, 2016.

On June 17, 2016, Complainant filed a complaint with the undersigned which outlined his allegations in detail and the nature of each and every violation by Respondent as well as the relief sought for each such alleged violation. On July 1, 2016, Respondent timely filed an answer to Complainant’s complaint.

Respondent also filed a Motion to Dismiss on July 1, 2016 seeking dismissal under Federal Rule of Civil Procedure 12(b)(6) due to Complainant’s failure to show he engaged in protected activity as required by the WPC. On July 11, 2016, Complainant filed a response in opposition to Respondent’s Motion to Dismiss arguing that if there is a legitimate question about

whether Complainant's conduct was protected, then the matter cannot be decided in a Motion to Dismiss. On July 18, 2016, Respondent filed a Reply Memorandum in Support of its Motion to Dismiss contending Complainant's unexpressed thoughts that the statute was being violated and his alleged expression that a permit was required do not constitute protected activity.

On August 8, 2016, the undersigned issued an Order Denying Respondent's Motion to Dismiss. Specifically, the undersigned found that Complainant presented enough facts to provide Respondent with fair notice of his claim pursuant to the ARB's holdings in *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39,-42 (ARB May 25, 2011) and *Evans v. United States Environmental Protection Agency*, ARB No. 08-059, ALJ No. 2008-CAA-3 (ARB July 31, 2012).

On September 27, 2016, the undersigned issued an Order Extending Deadlines, extending the parties' deadline to file dispositive motions until October 5, 2016 and to file any opposition to a dispositive motion until October 17, 2016.

In accordance with the September 27, 2016 Order, Respondent timely filed a Motion for Summary Decision with supporting documentation including (1) sworn affidavits of employees Michael McCarty, Andru Bramblett, and Donald Cooper; (2) the depositions of Complainant and Donald Cooper; (3) copies of Complainant's OSHA complaint, objections to OSHA's findings and request for an administrative hearing, and OALJ complaint; and (4) an Incorporated Memorandum in Support. (Resp. Mtn. for Summary Decision, pp. 1-33; EX 1-9).

In its Motion, Respondent contends that summary decision in its favor as a matter of law pursuant to 29 C.F.R. § 18.72 is proper and that Complainant's claim against Respondent should be dismissed. Specifically, in its Memorandum of Law, Respondent contends the following:

1. Complainant did not engage in protected activity because he did not report any potential violations of the WPC.
2. Complainant did not have a reasonable belief that Respondent's lack of permit violated the WPC.
3. Complainant was merely performing his job duties when he questioned the permitting on the Tchefuncte River Project.
4. Respondent's decision to discharge Complainant was made for unrelated, non-retaliatory reasons and was not pretextual.

(Resp. Mtn. for Summary Decision, pp. 20-33).

On October 17, 2016, Claimant filed a Response to Respondent's Motion for Summary Judgment, contending that summary decision should be denied as to each of Respondent's grounds in support of its Motion for Summary Decision and that Respondent's Motion is merely a reassertion of the same arguments made in its previous Motion to Dismiss. Specifically, Complainant asserts he engaged in protected activity by filing internal complaints with

management and that he had a reasonable belief that Respondent had violated the WPC. Further, Complainant avers his protected activity was a contributing factor in his termination and Respondent's reasons for his termination are merely pretextual. (Comp. Resp., pp. 4-8).

On October 21, 2016, Complainant filed a Supplemental Affidavit in Opposition to Respondent's Motion for Summary Decision, contending there were additional facts not in the record which should be considered in ruling on Respondent's Motion. In his Supplemental Affidavit, Complainant contends other projects along the Tchefuncte River were done at a different location because of some factor that might cause environmental damage or due to other unknown factors, such as potentially interfering with an existing pipeline. As a result, Complainant felt that the Army Corps' permitting process would help avoid any potential problems. Complainant also alleged the first time he was criticized by Respondent for the February 3, 2016 email was during the termination meeting on February 18, 2016. (Supp. Resp., pp. 1-2).

On October 24, 2016, Respondent filed a Reply to Complainant's Opposition to Respondent's Motion for Summary Decision. In its Reply, Respondent argues there is no factual dispute regarding Complainant's lack of protected activity. Specifically, Respondent contends Complainant does not dispute that he had no knowledge of the WPC, that he expressed an unspecified permit was necessary, that he did not know why a permit was required, and that he did not complain about any activity which would be a violation of the WPC. (Reply, pp. 1-3).

On October 25, 2016, Respondent also filed an Opposition to Complainant's Motion for Leave to File Supplemental Affidavit, contending there is no basis to depart from the deadlines established in the Per-Hearing Order that would justify a late filing and that the allegations in the supplemental affidavit are merely speculative and unsupported.

Complainant's supplemental affidavit and Respondent's Reply and Opposition to Complainant's supplemental affidavit were not permitted filings in accordance with May 31, 2016 Pre-Hearing Order. After reviewing these filings, I will consider these documents in determining whether to grant or deny Respondent's Motion as each gives the undersigned a more comprehensive understanding of the facts of this case as well as aid in determining whether summary decision is proper in this matter.

### **ISSUES PRESENTED**

Respondent's Motion for Summary Decision presents the following issues for resolution:

1. Did Complainant raise a genuine issue of material fact regarding whether he engaged in protected activity under the WPC?
2. Whether genuine issues of material fact exist as to whether Complainant's protected activity was a contributing factor in his termination?
3. Whether Respondent has proven as a matter of law that it would have taken the same adverse action in the absence of any protected activity?

## ***PRIMA FACIE* ELEMENTS OF A FEDERAL WATER POLLUTION CONTROL ACT (WPC) WHISTLEBLOWER RETALIATION CLAIM**

The employment protection provision of the WPC provides:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

33 U.S.C. § 1367(a).

To establish a violation of the WPC, Complainant must establish by a preponderance of evidence that (1) he engaged in protected activity; (2) Respondent was aware of the protected activity; (3) he suffered an adverse action, and (4) the protected activity caused, or was a motivating factor in, the adverse action. Relief may not be ordered if Respondent demonstrates by a preponderance of evidence that it would have taken the same adverse action in the absence of the protected activities. 29 C.F.R. § 24.109(b).

An employee engages in protected activity if he:

1. commenced, caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the federal statutes listed in §24.100(a) or a proceeding for the administrative or enforcement of any requirement of any requirement impose under such statute;
2. testified or is about to testify in any such proceeding; or
3. assisted, 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 statute.

29 C.F.R. § 24.102(b).

Protected activities also include external and internal complaints, written or oral, and extend to the filing of complaints under OSHA when such complaints touch on the concerns for the environment and public health and safety that are addressed by the statute. *Melendez v. Exxon Chemical Americas*, ARB No. 96-051, ALJ 1993-ERA-6, slip op. at 17 (ARB July 14, 2000). Whistleblower protection requires an employee's complaints be grounded in conditions constituting violations of the environmental acts. *Powell v. City of Ardmore, Oklahoma*, ARB No. 09-071, ALJ No.2007-SDW-1 at 5 (ARB Jan 5, 2001). The reasonableness of a whistleblower's belief regarding statutory violations by an employer is determined on the basis of the knowledge available to a reasonable person in the circumstances within the employee's

training and experience. *Melendez*, ARB No 96-051, ALJ No. 1993-ERA-006, at 27. An employee must establish not only a subjective, good faith belief that his employer violated a provision listed, but also that his belief was objectively reasonable. *Wiest v. Lynch*, 710 F.3d 121, 132 (3d Cir. 2013).

While the Act does not require a complainant to specifically mention the WPC and the alleged violations, the Act does require that a respondent must be reasonably aware that it was in violation of the WPC. *See, e.g. Gale v. U.S. Dep't of Labor*, 382 F. App'x 926 (11th Cir. 2010); *Welch v. Chao*, 536 F.3d 269, 279 (4th Cir. 2008) (holding that although an employee need not identify the statutory provision when complaining to an employee, the employee's complaint must at least clearly relate to a law listed under the statute). However, the Fifth Circuit has repeatedly held that unexpressed concerns of violations are not sufficient to constitute protected activity when the expressed concerns are vague and do not clearly relate to a violation of an enumerated statute under the whistleblower law. *See Getman v. Admin. Review Bd.*, 265 F. App'x 317 (5th Cir. 2008); *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103, 108-109 (5th Cir. 2014); *Thomas v. ITT Educ. Servs., Inc.*, 517 F. App'x 259 (5th Cir. 2013).

### **SUMMARY DECISION STANDARD**

The standard for granting summary judgment or decision is set forth at 29 C.F.R. § 18.72 (2015), which is derived from Federal Rule of Civil Procedure (FRCP) 56. Under Section 18.72, a party may move for summary decision, identifying each claim or defense on which summary decision is sought. An administrative law judge shall grant summary decision if the movant shows that there is no genuine issue of material fact and the movant is entitled to decision as a matter of law.

If movant meets the initial burden of showing no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate facts showing the existence of genuine issue(s) for trial with doubts and reasonable inferences resolved in favor of the non-moving party. *Reves v. Sanderson Plumbing Products Inc.*, 120 S. Ct. 2097, 2110 (2000); *Matsushita Elec. Indus. Co. Ltd., v. Zenith Radio Corp.*, 475 U.S. 574 587 (1986). *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 278 (5th Cir. 2004). An issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. A fact is material and precludes a grant of a summary decision 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., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

When a motion for summary judgment or decision is made and supported by appropriate evidence, the non-movant or party opposing the motion may not rest upon mere allegations or denials of such pleading, but must set forth specific factors showing there is a genuine issue of material facts. As the Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), the non-movant must present affirmative evidence in order to defeat a properly supported motion for summary decision, even where the evidence is within the possession of the moving party, as long as the non-movant had a full opportunity to conduct discovery. In reviewing a request for summary decision, all evidence and inferences must be viewed in the light most favorable to the nonmoving party. *Id.* at 262.

The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324. The non-movant's evidence, if accepted as true, must support a rational inference that the substantive evidentiary burden of proof could be met. Where the non-movant presents admissible direct evidence such as affidavits, answers to interrogatories or depositions, the judge must accept the truth of the evidence set forth without making credibility or plausibility determinations. *T.W. Electric Service v. Pacific Electric Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). If the non-movant fails to sufficiently show an essential element of his case, there can be "no genuine issue as to any material fact," entitling the movant is entitled to summary judgment, since a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial." *Id.* at 322-323; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323.

The ALJ cannot summarily try the facts. Rather, the ALJ must apply the law to the facts that have been established by the parties. *See 10 A. Wright and Miller, Federal Practice and Procedure*, § 2725, at 104 (1983). A motion cannot be granted merely because the movant's position appears more plausible or because the opponent is not likely to prevail at trial. *Id.* at 104-5. In short, the trier of fact has no discretion to resolve factual disputes on a summary decision motion. *Id.* at § 2728, at 186. Accordingly, "if the evidence presented on the motion is subject to conflicting interpretations, or reasonable men might differ on its significance, summary judgment is improper." *Id.* § 2725, at 106, 109. Once it is determined that a triable issue exists, the inquiry is at an end and summary decision must be denied. *Id.* at 187.

## **DISCUSSION**

### **A. Protected Activity**

#### **1. The Positions of the Parties**

In its Motion, Respondent argues dismissal is proper since Complainant did not engage in protected activity under the WPC. Specifically, Respondent contends Complainant failed to mention or allude to the WPC, specify what kind of permit from the Army Corps of Engineers was necessary, why he thought a Corps permit was necessary, or bring up the potential discharge of pollutants. Rather, Respondent argues Complainant's statements were vague and did not refer to Army Corps permits regarding the WPC. (Resp. Mtn. for Summary Decision, pp. 20-21).

In support of its position, Respondent points to Complainant's deposition testimony in which he states he did not specify what Corps permits he believed were necessary for the project or why he thought a Corps permit was necessary. (*Id.* at 21; EX-4).

Also, Respondent argues Complainant did not engage in protected activity under the WPC because he did not have a reasonable belief that the lack of permits violated the Act. Specifically, Respondent contends Complainant could not have a subjective or objective reasonable belief that Respondent was in violation of the WPC since Complainant did not know that the WPC existed. (Resp. Mtn. for Summary Decision, pp. 23-24).

In support of its position that Complainant did not have a subjective reasonable belief, Respondent points to Complainant's deposition testimony in which he states there were no conversations regarding the WPC while he was employed by Respondent and that he did not have any knowledge about the WPC. *Id.* at 24; EX-4. Also, Respondent points to Complainant's admissions that (1) he had no knowledge of the Corps permit process; (2) he had no formal training regarding Corps permits; (3) he did not educate himself on the Corps permit process while employed by Respondent; and (4) he did not have any knowledge of the WPC provisions in his OSHA complaint. *Id.* Further, Respondent relies on Complainant's testimony in which he states he did not know a permit was necessary based on past projects and that he was not involved in the permitting process. *Id.*

Regarding Complainant's objective reasonable belief, Respondent argues Complainant did not have any reason to believe that the Tchefuncte River project would result in the discharge of pollutants. Also, Complainant was discharged before boring actually occurred and did not know if any material was ever actually discharged into the Tchefuncte River. Also, Respondent contends Complainant should have been aware of its normal practice of cleaning up any material displaced or discharged during the drilling activities. Further, any discharge or runoff would have been cleaned up by the contractors associated with the project. Accordingly, Respondent argues even if Complainant believed it was possible for materials to enter the waterway, that amount would have been *de minimus*. *Id.* at 25-26; EX-3-4.

In response, Complainant argues there is no requirement that he explain the underlying legal basis for his concerns about Respondent's failure to obtain a permit for the Tchefuncte River project in order for his activity to be protected. (Comp. Resp., p. 1). Complainant alleges his supervisor Donald Cooper told him a permit from the Army Corps of Engineers was necessary for the Tchefuncte River project. (Comp. Resp., p. 1; Resp. Mtn. for Summary Decision, EX-4). Complainant also alleges that Coastal Conservation permits were required in order to receive Corps permits. *Id.*

Complainant states he was concerned about not having a permit, because another project had been shut down by the Corps and because Cooper had told him a permit was necessary for crossing a navigable waterway. Complainant also states he was concerned about the location of the boring pits along the river's banks based upon the location of boring pits of past similar projects completed by different companies. (Comp. Resp., p. 2; CX-1; Resp. Mtn. for Summary Decision, EX-4). Complainant believed the Army Corps' permitting process would expose any factor, environmental or otherwise, that would prevent Respondent from crossing the Tchefuncte River at the proposed crossing. (Comp. Resp., p. 2; CX-1).

Complainant argues his statements to Cooper regarding the lack of permits for the Tchefuncte River project touch on environmental concerns and public health and safety addressed by the WPC. Complainant argues the permitting process gives the Army Corps the opportunity to determine whether a specific project will endanger the environment or public health and safety. Accordingly, Complainant contends the Army Corps' requirement that a permit be obtained for the project creates a sufficient nexus between Complainant's complaints and the concerns for the environment and public health and safety. (Comp. Resp., pp. 4-5).



Complainant also argues he had both a subjective and an objective reasonable belief that Respondent was in violation of the WPC based on Cooper's statement to Complainant that an Army Corps permit was necessary and based on Respondent completing the project without one. (Comp. Resp., p. 5). As a result, Complainant argues that Respondent's Motion for Summary Decision should be denied.

## **2. Analysis**

After reviewing the record, I agree with Respondent that there is no genuine issue as to any material facts regarding whether Complainant engaged in protected activity. While it is undisputed that Complainant asked Cooper why Army Corps permits had not been obtained for the Tchefuncte River project and raised the issue of the lack of permits with Respondent's contractor, Complainant did not have a reasonable belief that Respondent was in violation of the WPC and his inquiry did not "touch on the concerns for the environment and public health and safety." *See Powell, supra; Melendez, supra.*

Initially, I find that Complainant did not make an internal or external complaint regarding the lack of permits for the Tchefuncte River project. Based upon Complainant's deposition testimony, he merely asked why unspecified permits from the Army Corps were not obtained and merely told the contractor that the Tchefuncte River did not have all necessary permits. (Resp. Mtn. for Summary Decision, EX-4). These vague and ambiguous statements regarding unspecified permits fail to make Respondent aware of any alleged violations under the WPC or that he was attempting to engage in protected activity under the WPC.

Also, Complainant's statement did not relate to any environmental or public health and safety concerns addressed by the WPC. Complainant never complained to any employee of Respondent that it did not have a permit for discharge of pollutants or regarding any other alleged WPC violation. Similarly, Complainant's discussion with Respondent's contractor regarding the lack of Army Corps permits was vague and did not clearly relate to a violation of the WPC. As evidenced by Cooper's deposition, the Army Corps issues permits pursuant to many different federal laws, not just the WPC. Specifically, the Army Corps also issues permits under the Rivers and Harbor Act, which requires a permit when crossing a navigable waterway. (Resp. Mtn. for Summary Decision, EX-3). Simply put, Complainant asked whether an unspecified permit was necessary without complaining about the environmental impact of Respondent's actions.

Complainant argues that his inquiries touch on environmental concerns based upon his observations of the location of the boring pits and where other utility companies had performed similar projects at a different crossing further down the Tchefuncte River. Complainant also stated Coastal Conservation permits were needed in order to obtain Army Corps permits. Further, Complainant argues the requirement of an Army Corps permit creates a sufficient nexus between his complaints regarding the lack of permits and his concerns for the environment and public health and safety. (Comp. Resp., pp. 1-5; Supp. Resp., p. 1).

However, those thoughts and concerns are too attenuated to form a sufficient nexus and were never expressed to Respondent or to the contractor. While Complainant's thoughts may have touched on environmental concerns, unexpressed concerns of violations are not sufficient to constitute protected activity when the expressed concerns are vague and do not clearly relate to a violation of an enumerated statute. *See Getman, supra; Thomas, supra.* In this case, Complainant's only expressed concerns revolved around unspecified permits and did not touch on any environmental concern or impact of Respondent's activities. It is undisputed that Complainant never expressed his concerns for the environmental or raised any concerns regarding the potential discharge of pollutants to Respondent or the contractor.

Further, the undisputed evidence shows that Complainant did not have a reasonable belief that Respondent was in violation of the WPC. It is undisputed that Complainant did not have a subjective reasonable belief that Respondent was in violation of the WPC. In his deposition, Complainant admitted that he did not have any knowledge of the Act or that he had any conversation regarding the Act while he was employed by Respondent. Also, Complainant admitted he had no knowledge of Army Corps permits or why an Army Corps permit was necessary. (Resp. Mtn. for Summary Decision, EX-4). Based on Complainant's testimony, it appears Complainant's vague statement that an Army Corps permit was necessary could have referred to any number of permits issued by the Army Corps. Since Complainant did not have any knowledge of the WPC or the Army Corps permitting process, I find that it is undisputed that Complainant did not have a subjective reasonable belief that Respondent was in violation of the WPC.

In like manner, I also find that it is undisputed that Complainant did not have an objective reasonable belief that Respondent was in violation of the WPC. Complainant was terminated before the boring began on the Tchefuncte River project and testified that he did not know if any material was ever discharged or runoff into the river. (Resp. Mtn. for Summary Decision, EX-4). He also testified that he had no reason to believe that any material discharged from the bore hole would not be cleaned by Respondent or a contractor. *Id.* Further, Cooper stated that no displaced dirt or drilling fluid was expected to enter the Tchefuncte River from the bore hole per Respondent's normal practices. (Resp. Mtn. for Summary Decision, EX-3). Complainant also testified that he was aware that a contractor would be responsible for cleaning of materials removed from the bore hole after drilling. (Resp. Mtn. for Summary Decision, EX-4). In fact, upon review of the Tchefuncte River project, the Army Corps determined that a permit under the WPC was not necessary since no unlawful discharged occurred and since there was no proposal to deposit dredged or fill materials into the Tchefuncte River. (Resp. Mtn. for Summary Decision, EX-3).

In sum, no genuine dispute as to any material fact exists as to Complainant's actions regarding his alleged protected activity under the WPC. The documentation submitted by Respondent in its Motion for Summary Decision supports its position that there is no genuine issue of material fact because there is no evidence that Complainant engaged in protected activity under the WPC. This shifts the burden to Complainant to set forth specific facts under 29 C.F.R. § 18.72. However, Complainant has failed to provide specific facts showing that there is a genuine issue of material fact to be resolved at a hearing. Rather, Complainant presented

insufficient evidence showing his internal thoughts and unexpressed concerns. Accordingly, summary decision is proper in this matter.

**B. Remaining Issues Presented in Respondent's Motion for Summary Decision**

In view of the foregoing, the remaining issues presented in Respondent's Motion for Summary Decision are moot and will be not be considered.

**CONCLUSION**

Respondent has shown no dispute of material fact regarding whether Complainant engaged in protected activity under the WPC. Accordingly, I conclude as a matter of law, viewing the evidence in a light most favorable to Complainant, that Complainant failed to set forth specific facts showing a dispute regarding whether he engaged in protected activity. Therefore, Respondent is entitled to summary decision pursuant to 29 C.F.R. § 18.72(a).

**ORDER**

For the reasons stated above, **IT IS HEREBY ORDERED** that Respondent's Motion for Summary Decision is **GRANTED**.

**YOU ARE HEREBY NOTIFIED** that a formal hearing on the merits of the above proceeding which was scheduled to commence at **9:00 a.m.** on **November 7, 2016**, in **Covington, Louisiana**, is **CANCELLED**.

**SO ORDERED** this 28<sup>th</sup> day of October, 2016, at Covington, Louisiana.

**CLEMENT J. KENNINGTON**  
**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.