



In the Matter of:

DAVID HERMANSON,

CASE NO. 94-CER-2

COMPLAINANT,

DATE: June 28, 1996

v.

MORRISON KNUDSEN CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND ORDER

Before us for review is the Recommended Decision and Order (R. D. and O.) issued on March 24, 1995 by the Administrative Law Judge (ALJ) in this case arising under the employee protection provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9610 and the regulations promulgated thereunder, 29 C.F.R. Parts 18 and 24. Complainant, David Hermanson (Hermanson) alleges that Respondent, Morrison Knudsen Corporation (MK), through its subsidiary Vertac Site Contractors (VSC), wrongfully discharged him on March 1, 1994 for raising safety concerns regarding VSC's operation of its incinerator facility. After a thorough review of the record we accept the recommended decision of the ALJ, as modified, and dismiss this complaint.

^{1/} On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996) (copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization is also attached.

BACKGROUND

MK was authorized in 1990 by the Arkansas Department of Pollution Control and Ecology to operate a dioxin-disposition facility. It entered into a joint venture known as VSC, with MK being the lead company because it provided the expertise, personnel and funding for the operation of the facility. R. D. and O. at 3. The United States Environmental Protection Agency (EPA) took control of the facility in 1993, and contracted the operation of the incinerator and the monitoring of ambient air around the site to URS Consultants (URS). URS subsequently subcontracted the operation of the incinerator to VSC. T. 215, 785-787.

VSC also developed a system under which the accumulation of points by an employee could lead to that employee's suspension or termination. Assessment of 100 points within 90 days constituted grounds for termination. T. 261, Defendant's Exhibit 18 ("Rules of Conduct on the Job").

Hermanson commenced his employment at VSC in the early 1990's and worked as a laborer at various job locations at VSC including the drum handling building, decontamination unit, and baghouse assembly area. R. D. and O at 3. Hermanson was involved in various safety incidents throughout his tenure at MK/VSC and received a number of warnings and reprimands. R. D. and O. at 8-9, Defendant's Exhibits 1-11, 13-15. He occasionally raised questions as to whether his equipment was sufficient to protect him from the level of the waste he routinely handled. T. 872-873. He expressed safety concerns about the Vertac facility to co-workers while employed at VSC, and expressed concern that a torn liner was installed to prevent waste from penetrating the soil in the event of a major spill, when in fact the liner was in place to prevent the growth of vegetation. T. 196, 197, 449, 500, 569-70, 644, 675, 689.

Hermanson testified that on June 29, 1993, he and a co-worker agreed to spray each other with a Hot Water Spray Washer or "Hotsy" in order to cool off on during a hot afternoon. T. 151. The Hotsy is a high-pressure water spray apparatus used to clean and decontaminate tools and equipment. Quatro Smith (Smith), a decontamination foreman, observed the co-worker spraying Hermanson. Mike Henry, the business manager, wanted to fire both Hermanson and the co-worker. T. 459. Smith did not want to lose both workers at that time and suggested looking at their overall safety record. T. 460. Hermanson and the co-worker were each assessed 50 points. In addition, Smith warned them as follows:

. . . Q. Did you tell Mr. Hermanson that he would be fired if he misused that equipment again ?

A. I don't know if I said it like that, but I told him if he ever had another offense dealing with the Hotsy, that he most likely was going to become -- I told him, "You know, you already . . . you know, you should have been fired now," and I told him that you've just got to be careful.

T. 461.

On February 18, 1994, Hermanson and other employees were involved in emptying an aqueous waste tank. During this task, a drum of waste material fell off of a forklift onto the ground, its top came off, and a portion of its contents spilled into a gravel area. James Winchester, a URS shift engineer, investigated the incident by talking to the employees involved, including Hermanson. Hermanson alleges that he spoke with Winchester on February 22, 1994:

. . . It was getting close toward the end of the day and Mr. Winchester came up to me and he said, "Dave, what are you talking about?" I said, "What do you mean? What are you talking about?" He said, "That spill." I Said, "You mean the one Friday?" And he says, "Was it a bucket, a gallon, or how much was it? How big of a spill was it?" I said, "Mr. Winchester, I can't tell you. There's a gag order and I can't speak to you. I'll have to refer you to my supervisors and management because my job is on the line." And he understood.

T. 75. URS and VSC management instructed VSC laborers not to talk to URS personnel about incidents. T. 801. Winchester stated that Hermanson knew about the February 18th incident, but did not provide any details. T. 242-243.

On March 1, 1994, eleven days after the February 18th incident, Hermanson was on the TDU pad cleaning a round metal pipe when he sprayed his left boot with the Hotsy:

. . . And I was starting on another pallet and when I reached for the wand and I grabbed it, I picked up the wand and it shot across me with force, and it cut through my boot covers on my right foot and I seen that it could have gone further so I was trying to drop it with my hand, and when I let go of the throttle, you know, at the time I let go of the throttle of the wand itself, it was above my left foot. And that's where it had penetrated into my left boot and it had gone through the boot covers, through the boot, through my sock into my foot. And Randy Davidson and Wayne Davidson were there not very long after.

Q. All right. Now, before we talk about the Davidsons, I'd like to ask you why you dropped -- why you felt you needed to drop the wand ?

A. I needed to drop the wand so no one else would get hurt because of the force of it.

T. 82. Hermanson was helped by co-workers to a safety trailer for first-aid treatment. There were no witnesses to the incident.

Smith investigated the incident and concluded that Hermanson had used his foot to hold the pipe in place while cleaning it. An earlier incident in which an employee sprayed his foot with the Hotsy prompted MK to inform employees that they were ". . . forbidden to use their feet to hold down tools and devices, or pipe, or anything else." T. 836. Thereafter MK utilized heavy clamps and baskets to hold lightweight material during decontamination. Hermanson testified that baskets were used in other locations, but not on the TDU pad ("They said it was unnecessary, that they didn't even take that into consideration for smaller pieces of metal.") T. 84. Hermanson admits that

sometimes he would hold down smaller pieces of metal with his foot while spraying them with the Hotsy. T. 85.

Joe Wofford (Wofford), Analytical Compliance Health and Safety Manager for VSC, spoke to Smith and concluded that Hermanson was negligent in his operation of the Hotsy:

A. Well, first of all, I talked to the operating foreman, Quatro Smith, and he informed me that, first of all, there were no witnesses. And this, I believe, is on the supervisor's investigation report to the first-aid injury. Other than that, sir, I don't believe we did anything else other than to make the decision that -- basing it on what Mr. Hermanson said that when he started the Hotsy power washer that it kicked back in his hand. In my opinion he was not operating it properly and correctly and negligence on his part.

Q. Was there something specific that you felt he should have done that he did not do?

A. I don't believe he followed our standard operating procedure for the Hotsy power washer. I sure don't.

T. 264.

Hermanson was assessed 100 points under VSC's disciplinary system for an intentional violation of a safety rule.^{2/} After being told that he was terminated because of this final safety violation, Hermanson was transported to a physician for treatment of the foot injury. T. 270.

DISCUSSION

At issue in this case is whether Hermanson engaged in protected activity prior to his being fired and whether that protected activity was a cause of his termination. The ALJ's finding that Hermanson failed to show that his termination was not motivated, even in part, by protected activity is wholly supported by the record. However, we are reluctant to accept the ALJ's decision in its entirety.

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^{2/} The Spray Washer Operational Instructions, which Hermanson was required to review after the first Hotsy incident, included the following precautions:

B. Do not stand in front of nozzle or point nozzle at parts of body, other people, animals, or electrical equipment . . .

G. Do not turn on machine without firmly holding gun jet. Failure to do so may allow gun jet to whip along floor, possibly causing personal injury.

Defendant's Exhibit 19, page 8.

Internal Complaints and Safety Concerns

Although the ALJ recognizes that internal complaints are protected under the whistleblower provisions of the pertinent environmental statutes, he makes several statements^{3/} suggesting reluctance to accept Hermanson's alleged complaints because they were internal and informal in nature. An informal and internal safety complaint may constitute protected activity. *See, e.g., Nichols v. Bechtel Construction, Inc.*, Case No. 87-ERA-0044, Dec. and Order of Rem., Oct. 26, 1992, slip op. at 10 (employee's verbal questioning of foreman about safety procedures constituted protected activity), *appeal dismissed*, No. 92-5176 (11th Cir. Dec. 18, 1992); *Dysert v. Westinghouse Electric Corp.*, Case No. 86-ERA-39, Final Dec. and Order, Oct. 30, 1991, slip op. at 1, 3 (employee's complaints to team leader protected). Internal safety complaints are covered under the environmental whistleblower statutes in the Eighth Circuit, the Fifth Circuit and every other circuit. See Amendments to the ERA in the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. No. 102-486, 106 Stat. 2776.^{4/}

Additionally, the ALJ draws too broad a conclusion by stating that “the whistleblower provisions of the various environmental statutes are intended to apply to the expression of environmental concerns rather than general safety concerns.” R. D. and O. at 17. Under the appropriate conditions a general safety concern stated by an employee can have an environmental impact such that it would be covered. *See, e.g., Aurich v. Consolidated Edison Company of New York, Inc.*, Case No. 86-CAA-2, Rem. Order, April 23, 1987, slip op. at 3-4; *Decresci v. Lukens Steel Company*, Case No. 87-ERA-13, Final Dec. and Order, December 16, 1993, slip op. at 4.

Protected Activity and Causation

The ALJ held that Hermanson was not a party to the investigation of the February 18th incident and therefore could not have engaged in protected activity. We agree that Hermanson did not provide substantial information concerning the incident, but his statement to Winchester confirming that a spill had occurred was a clear indication that further investigation of the incident was necessary, and thus was protected.

^{3/} R. D. and O. at 14 (“However, none of these incidents involved giving information directly to government personnel or agencies . . . therefore, there is no evidence that complainant's expression of safety concerns while employed at Vertac meets the literal protected activity requirements of the pertinent environmental statutes and regulations.”); R. D. and O at 15-16 (“Since this case arises within the jurisdiction of the Eighth Circuit Court of Appeals, I find that I must follow the Secretary's position that Mr. Hermanson's internal safety complaints to VSC can constitute activity protected under the applicable federal statutes and regulations.”); R. D. and O at 19 (“Again, I do not believe the employee protection provisions of the environmental statute were intended to cover such casual comments. It is unreasonable to conclude that such conversation is an indication on the part of the employee to initiate proceedings or investigations such as those mentioned in the pertinent employee protection provisions.”).

^{4/} The only current exception to this rule is for cases filed in the Fifth Circuit under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1988), prior to October 24, 1992.

The short time lapse (11 days) between Hermanson's conversation with Winchester regarding the February 18th incident and his discharge is sufficient to raise the inference that his discharge was in retaliation for protected activity. *See Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). However, Hermanson has failed to produce sufficient evidence to prove by a preponderance of evidence that MK's proffered reasons for discharging him are not the true reasons, but a pretext for retaliation.

We agree with the ALJ's alternative conclusion that:

Assuming *arguendo* that Mr. Hermanson was involved in protected activity while employed at VSC, the evidence convinces me that Mr. Hermanson's discharge would have occurred on March 1, 1994, even if the complainant had not been involved in such activity. David Hermanson was terminated solely for a legitimate, non-discriminatory business reason.

R. D. and O. at 24. Hermanson was not the first person fired by VSC for improper use of the Hotsy. Another employee had been fired for using the Hotsy to wash off his gloves, which resulted in a hand incision. The overwhelming evidence presented by MK demonstrates Hermanson's failure to adhere to conduct and safety rules and thus supports the company's decision to fire him for nondiscriminatory reasons. Accordingly, it is hereby ORDERED that the complaint be DISMISSED.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member