U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

M.C. TUCKER, **ARB CASE NO. 96-043**

COMPLAINANT, **ALJ CASE NO. 94-CER-1**

v. **DATE: February 28, 1997**

MORRISON & KNUDSON,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Complainant M.C. Tucker (Tucker) brought this environmental whistleblower case against his former employer, Morrison & Knudson (MK). Following a hearing on the merits, on November 27, 1995, the Administrative Law Judge (ALJ) recommended that the case be dismissed. Recommended Decision and Order (R. D.& O.) at 28. After review of that recommended decision and the record in this case, the Administrative Review Board concurs and dismisses the case. Because the ALJ prepared a careful and detailed recommended decision, with which we largely agree, it is unnecessary to recite the facts in detail. However, one issue warrants clarification, and for that reason we provide a brief summary of the case.

BACKGROUND

M.C. Tucker began work as an electrical subcontractor working on the construction of facilities at the Vertac Superfund Site in Jacksonville, Arkansas in 1990. In 1991 he was hired directly by MK, the prime contractor at the site, to serve as a control room operator of the incinerator, which was designed to burn dioxin-contaminated hazardous waste recovered from the site. Tucker served in that capacity until December 1993, when he was transferred to the position of Drum Handling Supervisor. Although he suffered no loss in pay as a result of this transfer, Tucker alleged that this change in job assignments constituted adverse action in retaliation for his engaging in activity protected by the environmental whistleblower provisions contained in the Comprehensive Environmental Response, Compensation and Liability Act of

1980, as amended (CERCLA), 42 U.S.C. § 9610 (1988), and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6971 (1988). On February 22, 1994, Tucker was again transferred to another position, as Outside Operator. Shortly thereafter, on March 1, 1994, Tucker was fired. Tucker alleged that the transfer to Outside Operator, as well as his termination, constituted unlawful retaliation for his having engaged in protected activity.

It was stipulated that Tucker had engaged various protected acts involving an incident which occurred at Vertac in May 1993 ("the salt release incident"), including giving statements to EPA criminal investigators, being available to testify in litigation against the joint venture that operated Vertac,[1/] testifying at an unemployment hearing relating to a former colleague, and providing deposition testimony in a Department of Labor environmental whistleblower proceeding involving that same former colleague. R. D. & O. at 4-5. Tucker also alleged that he had engaged in several other protected acts, which the ALJ summarized as:

> (1) Reporting on October, 10, 1992, to [Site Manager] Apa and to John Martin Gillette, a site environmental inspector, that rod ports on the baghouses or spray dryers were intentionally opened to artificially influence the oxygen level in the stack ("the rod port incident");
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> (2) Reporting on December 23, 1993, by verbal complaint to Robert Lang regarding improper operation of thermal destruction unit due to unburned materials found in residual ash ("the residual ash incident");
>
> (3) Reporting to Apa the violation of the federal court order to cease burning "T-waste" at the site as of midnight, October 31, 1992, after burning potentially T-waste contaminated liquid organic waste after the midnight deadline ("the T-waste incident");
>
> (4) Reporting on February 15, 1994, to Milton Smith the safety technician on duty at the Vertac site, to the safety manager at the Vertac site, and to Apa, regarding certain safety violations by [Operations Manager] Lang that were witnessed by Tucker . . . . ("the Lang incident");
>
> (5) Being subpoenaed into Federal Court to testify about the May 13, 199[3], salt release incident. Related to this was providing statements to EPA investigators on June 23, 1993, concerning the May 13, 1993, buildup of salt and salt release at the incinerator at the site ("the salt release incident"). Tucker allegedly answered questions about the May 13, 1993, salt release posed by Ricky Carr, out of MK's Denver office, who led the MK internal investigation, by Langlois and Kearney of the EPA Criminal Investigation Division, by Ehrhart and Massimino, other EPA officials, and by Apa.

[1/] The joint venture was operated by MK and another corporation.

Id. at 5-6.

The ALJ carefully analyzed the testimony regarding each of these incidents. With regard to the "rod port incident" and the "residual ash incident" he concluded that even if the incidents occurred as described by Tucker, "[i]n neither case was there an apparent basis for retaliation." R. D. & O. at 22. The ALJ found that it was unnecessary to resolve the contradictory testimony regarding Tucker's role in the discovery and remedy of the T-waste incident because "there is no proof that MK had any reason to retaliate against Tucker for having reported the problem or having otherwise acted in a protected capacity." *Id.* at 23. With regard to the "salt release incident" the ALJ concluded that there was "no direct, or, indeed, any credible circumstantial, evidence that substantive aspects of Tucker's statements or testimony regarding the salt release incident gave any incentive for MK to retaliate against Tucker, or that they caused MK to retaliate against Tucker." *Id.* at 24. The ALJ did conclude that Tucker had engaged in protected activity in the Lang Incident. *Id.* at 23. However, he found "no plausible indication of retaliation." *Id.* at 25.

With regard to the entirety of the period 1993-1994, the ALJ concluded that there were good, nonretaliatory reasons for Tucker's deteriorating relationship with his supervisors, and consequently for his job transfers and ultimate termination. Indeed, he found that, "[t]here is clear and convincing proof of a reasonable business motive on MK's part which provides independent grounds for the allegedly adverse actions which were taken, without regard to any protected activity." *Id.* at 26. In sum, the ALJ concluded, "[t]he factual record, viewed as a whole, compels the conclusion that it was Tucker's deficient conduct with respect to his regularly assigned duties, and not any reports, statements, or other allegedly protected activities which caused his reprimands, his reassignments, and, ultimately, his termination by MK." *Id.* at 28.

DISCUSSION

The R. D. & O. is in almost every respect a creditably sound and thoughtful analysis of the record and rendition of the prevailing legal principles. The ALJ's factual conclusions are amply supported by the record in this case, and with the exception of one issue, his legal conclusions are unassailable. Out of an abundance of caution we discuss the one issue of concern.

Tucker alleged that he engaged in protected activity in February 1994 when he reported to Site Manager Apa that his immediate supervisor, Operations Manager R. G. Lang, had committed several safety violations. Tucker alleged that his supervisors retaliated against him for having made his safety report by reprimanding him, and a few days later, by terminating him. The ALJ ruled that Tucker's report regarding Lang's safety violations was protected activity under CERCLA and RCRA, but that MK had not retaliated against Tucker for reporting Lang. R. D. & O. at 23. The Board concludes that Tucker's report of Lang's actions did not relate to environmental safety issues, and therefore did not come within the ambit of CERCLA or RCRA. A brief statement of the facts is necessary to explicate this conclusion.

On February 15, 1994, as Tucker walked into the area of the rotary kiln, he saw his supervisor, R. G. Lang, enter the kiln. Lang's entry violated several MK safety rules. The ALJ found that Tucker did not attempt to prevent Lang from committing the safety violations, did not immediately notify the Site Manager, but did notify the safety technician then on duty. R. D. & O. at 8. Tucker also notified the Safety Manager when he arrived on site later, and transmitted a written memorandum detailing Lang's safety violations to the Site Manager the next day.

MK argued before the ALJ that the violations of safety procedures by Lang which were observed by Tucker were internal safety procedures, and not "reasonably perceived violations of environmental act[s]." *Id.* at 23. Thus, MK argued, Tucker was not engaging in protected environmental whistleblower activity when he reported those violations to the safety technician and other MK employees. The ALJ rejected this argument:

> It seems illogical that an internal complaint relating to a violation of an internal *environmental safety* regulation would not be a reasonably perceived violation of an environmental act or a protected activity. Employer's cited authorities are inapposite. Safety regulations to protect personnel charged with effectuating the purposes of environmental legislation such as that involved in this incident should be deemed an integral component of the law and its implementation process.

Id. (emphasis supplied). We are constrained to disagree. The safety violations which Lang committed did not relate to *environmental* safety, but rather to *occupational* safety.[2/]

The distinction between complaints about violations of environmental requirements and complaints about violations of occupational safety and health requirements is not a frivolous one. Worker protection for whistleblowing activities related to occupational safety and health issues is governed by Section 11 of the Occupational and Safety and Health Act, 29 U.S.C. §§ 651-678 (1988), and enforced in United States Federal District Courts, not within the Department of Labor's administrative adjudicatory process. This point has been emphasized in previous environmental whistleblower cases. *See Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Dec. and Ord., January 25, 1995, slip op. at 8. The Secretary has made it clear that there are jurisdictional limits to employees' complaints. Thus *DeCresci v. Lukens Steel Co.*, Case No. 87-ERA-113, Sec. Dec., Dec. 16, 1993, slip op. at 4, discussed the whistleblower provision contained in the Energy Reorganization Act, 42 U.S.C. § 5851(1988):

[2/] Thus, Tucker complained that Lang had entered the kiln without having a properly dressed hole watch (who would be in a position to effectuate a rescue should Lang run into difficulties in the confined space of the kiln), without complying with lock-out/tag-out requirements, without securing the kiln barrel to prevent its moving while Lang was inside, without proper personal protective equipment, and without wearing proper attire under his safety clothes. Complainant's Exhibit 13. Tucker also charged that Lang did not perform proper decontamination procedures after he exited the kiln. *Id.*

> [T]he language of the statute and the Secretary's decisions make it clear that not every act of whistleblowing is protected under the ERA simply because the employer holds a license from the NRC. For example, an employee may complain that a government contractor such as Lukens retaliated against him for reporting that his employer has not complied with the requirements of Executive Order 11,246 which prohibits race and sex discrimination in employment, but his recourse would be to file a complaint with the Office of Federal Contract Compliance Programs under the Executive Order and its implementing regulations, 41 C.F.R. § 60-1.32 (1992), not a complaint under the ERA. A complainant under the ERA must prove that retaliatory action was taken against him *because* he engaged in conduct listed in 42 U.S.C. § 5851(a)(1), (2) or (3), which the Secretary has interpreted broadly to mean any action or activity related to nuclear safety.

Similarly, in *Aurich v. Consolidated Edison Co. of New York, Inc.*, Case No. 86-CAA-2, Remand Order, Apr. 23, 1987, the Secretary remanded the case to the ALJ with instructions that:

> If Complainant has complained that one or more provisions of [EPA regulations dealing with emissions of asbestos to the outside air] had been violated by Respondent, such complaint would appear to be protected under 42 U.S.C. § 7622(a) [the Clean Air Act whistleblower protection provision]. on the other hand if complainant's complaints were limited to airborne asbestos as an *occupational* hazard, the employee protection provision of the CAA would not be triggered.

Slip op. at 3-4 (emphasis supplied). As set forth in those decisions, the environmental whistleblower provisions are intended to apply to environmental, and not other types of concerns.

Thus, Tucker did not engage in protected activity under the environmental whistleblower provisions when he complained about Lang's violations of occupational safety rules. Our holding in this regard does not affect the outcome of the case, however, because the ALJ ruled

that MK's responses to Tucker's complaint about Lang were "not retaliatory or otherwise discriminatory against Tucker for such protected activities." *Id*. at 23.

For the foregoing reasons the complaint is dismissed.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member