U.S. Department of Labor

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

In The Matter of:

TYRONE MOSLEY, **CASE NO. 94-ERA-23**

COMPLAINANT, **DATE: August 23, 1996**

v.

CAROLINA POWER & LIGHT COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988 and Supp. V 1993), and is before the Board for review of the Recommended Decision and Order (R. D. and O.) issued by the Administrative Law Judge (ALJ) on December 12, 1994. 29 C.F.R. § 24.6 (1995). The ALJ recommends that the complaint be dismissed because Tyrone Mosley (Mosley) failed to establish that Carolina Power & Light Company (Carolina Power) violated the ERA. After reviewing the entire record, we agree and dismiss the complaint.

BACKGROUND

From July 26 until September 22, 1993, Mosley worked as a welder at the H.B. Robinson nuclear plant in Hartsville, South Carolina. Carolina Power, a licensee of the Nuclear Regulatory Commission (NRC), owns and operates the Robinson plant. Mosley was hired by Power Plant

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[1/] On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under this statute and the implementing regulations to the newly created Administrative Review Board (ARB). Secretary's Order 2-96 (Apr. 17, 1996), 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 ARB now issues final agency decisions. A copy of the final procedural revisions to the regulations implementing this reorganization, 61 Fed. Reg. 19982, is also attached.

Maintenance (PPM), which contracted to perform modification work and provide support services to Carolina Power within the pertinent time period.

During September Mosley and his work partner, Troy Robinson, raised questions with their PPM supervisors, David Bolton and Brent Rhodes, about work instructions and paperwork that accompanied their assignments. *See* Complaint dated March 17, 1994; Transcript (T.) at 87-90, 487; Respondent's Exhibit (RX) 54 at 22-23. Mosley alleges that he complained about inaccuracies and omissions, lack of proper documentation and instructions contrary to documentation. T. at 32-35, 46-47, 77-78; Complainant's Exhibit (CX) 4.

At some point early in September, a fellow employee improperly removed asbestos from the work site, and according to Mosley he also complained about this incident to Bolton and Rhodes. T. at 44-45. On September 10, Mosley and a number of other employees were sent home from work before the shift was scheduled to end. T. at 47. Mosley complained about this "send home" incident to the Carolina Power supervisor on site, Barry Sullivan. T. at 48, 531. Following this particular incident, another co-worker used profanity and a racial slur in criticizing Mosley for complaining to Carolina Power. T. at 50, 207.

During the same time period PPM began transferring Mosley to other crews and removing him from certain jobs after he performed what Mosley describes as the hard or more strenuous aspects. T. at 35-36, 96, 123; *see* RX 6, 7. On September 15 Mosley and Robinson were loaned out to work in a high radiation area where they became contaminated. RX 20; T. at 36-37. Mosley testified that he complained to Bolton about the lack of proper protective equipment. T. at 111. Mosley also alleges that he complained again to Sullivan on September 17 about improper procedures, paperwork, and retaliatory assignments. CX 4.

On September 20 Mosley approached a PPM coordinator, Tom Cook, and requested a meeting with Jack Epperly, the Carolina Power manager who administered the contract with PPM. T. at 51. Mosley alleges that he again raised paperwork and plant violations, retaliatory work assignments, and also racial concerns. *See* T. at 51-52; CX 4. Epperly maintains that Mosley's allegations involved only racial discrimination. T. at 403. Epperly and Mosley also dispute whether Mosley requested a reduction-of-force (ROF) discharge during the September 20 meeting.

Epperly decided to conduct an investigation of the charges since the September 10 "send home" incident implicated a Carolina Power supervisor and because he felt compelled as an NRC license holder. T. at 401, 424, 439. Epperly confronted Bolton and Rhodes with Mosley's charges of unfair work assignments, and they told Epperly that they moved Mosley and Robinson around to easier jobs because they worked slowly and inaccurately and would take three to five times longer to finish a job than other teams. T. at 405-406, 410. Not content to rely on their opinions, Epperly decided to inquire into Mosley's previous performance record since Mosley had told him that he worked for Carolina Power's maintenance division during a prior outage in 1992. T. at 410. Epperly discovered that the previous supervisor, Donny Douglas, had written an evaluation criticizing Mosley's lack of initiative. T. at 412-14. Epperly also claims that a number of Mosley's previous co-workers and managers described him as lazy. T. at 414-15.

Epperly and Mosley met again on September 22. CX 4. In his Note to File, dated September 22, Epperly described the final meeting as follows:

> I met with Tyrone again to discuss my conclusion in this matter.
> 1) That an individual did use a racial slur and was reprimanded.
> 2) That I could not substantiate the other allegations.
> 3) That I had discovered a history of poor performance and that this would be "dealt with" by his PPM management. . . .

RX 4 at 4.

Mosley became angry and stated that he had never heard of the allegations of poor performance before. T. at 424. According to Mosley, he then requested and accepted the ROF. In support of his claim of constructive discharge, Mosley testified that Epperly implicitly and explicitly threatened to fire him if he did not go back to work and do as he was told, including violate procedures. T. at 54-55. Mosley claims that he requested the ROF because he felt they would fire him later on for complaining about improper procedures, and he did not want his work record to reflect that he was fired for poor work or poor work practice. T. at 162; CX 4.

That afternoon, Mosley contacted the NRC and raised some of the same alleged procedural and safety violations that he claims he raised with Epperly on September 20. CX 5; T. at 58, 172. Some of his concerns were partially substantiated. CX 5.

In his complaint Mosley alleges that he was discriminated against in his work assignments, subjected to a hostile work environment and constructively discharged because he raised protected complaints under the ERA. He contends that Carolina Power should be held liable for all acts, either directly or vicariously. Carolina Power argues that Mosley did not engage in any protected activity, and that even if he did raise protected complaints with his PPM foremen, their knowledge cannot be imputed to Carolina Power. It also contends that Carolina Power took no adverse personnel action against Mosley and is not vicariously liable for any
adverse action imposed by PPM.

DISCUSSION

The ALJ concluded that while Mosley may have raised one protected concern during his meeting with Epperly on September 20, Epperly did not threaten to fire Mosley, and Carolina Power neither took nor collaborated with PPM in any retaliatory action. *See* R. D. and O. at

6-7. These findings are supported by ample evidence and are consistent with applicable law.[2/] We, therefore, accept them.

Although Epperly was aware of certain protected activity by Mosley, Epperly's remarks at the final meeting were not based in whole or in part on retaliatory animus and are insufficient to support Mosley's claim that he was constructively discharged.[3/] Rather, Mosley voluntarily requested an ROF in response to Epperly's nondiscriminatory criticism of his work. We need not address the question of whether Carolina Power is liable for acts by PPM because Mosley also failed to prove that PPM retaliated against him. *Infra* at n.7.

Protected Activity

The ALJ concluded that Mosley engaged in protected activity when he complained to Epperly about practices that allegedly violated the NRC's requirement to keep radiation exposure as low as reasonably achievable (ALARA). R. D. and O. at 6, 7; T. at 394, 440. Cook's notes from the September 20 meeting document that Mosley "complained about unfair ALARA practices by supervisors." RX 3; *see also* T. at 456, 459. Because the ERA protects an employee's internal allegations of noncompliance with regulations promulgated by the NRC pursuant to the statute, Mosley's allegation of ALARA violations is protected. *See* 42 U.S.C. § 5851(a)(1); *cf. Aurich v. Consolidated Edison Co.*, Case No. 86-CAA-2, Sec. Ord., Apr. 23, 1987, slip op. at 3-4 (whistleblower provision protects complaints about compliance with regulations issued under the statute but not complaints related only to occupational health and safety). We, therefore, agree with the ALJ and consider Mosley's ALARA complaint as a protected complaint that his work assignments were being made in violation of the ERA.

The ALJ discredited Mosley's testimony that he also raised with Epperly concerns about paperwork and plant violations and retaliation by Bolton and Rhodes based on these same concerns. R. D. and O. at 6-7. Instead, the ALJ relied on the contrary testimony of Epperly and Cook, as documented by their notes from the September 20 meeting. Although we have considered Mosley's arguments, we find no sufficient reason to overturn the ALJ's credibility determination. *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Dec., Jul. 25, 1995; *see Bartlik v. TVA*, Case No. 88-ERA-15, Sec. Dec., Apr. 7, 1993, slip op. at 5 n.2, *aff'd*, 73 F.3d 100 (6th Cir. 1996).

We add that Mosley's evidence contains inconsistencies. At the hearing Mosley claimed that he told Epperly about plant violations and retaliatory assignments, but in his deposition he answered that the racial slur was "all [he] talked to [Epperly] about." T. at 180-81. Although he testified that

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[2/] The burdens of production and persuasion applicable in whistleblower cases under the ERA are set forth in *Marien v. Northeast Nuclear Energy Co.*, Case No. 93-ERA-00049, Sec. Dec., Sept. 18, 1995, slip op. at 5-6 and *Carroll v. Bechtel Power Corp.* Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1995, slip op. at 11-12, *aff'd*, No. 95-1729 (8th Cir. Mar. 5, 1996), citing *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2756 (1993).

[3/] Even assuming that Mosley did not request the ROF until the final meeting on September 22, we find no constructive discharge.

he complained to Epperly about violations in connection with his radiation contamination and the asbestos incident, during the deposition less than two months earlier, Mosley could not remember whether he mentioned these incidents to Epperly. T. at 150. Even earlier during the Department of Labor investigation, Mosley could not recall clearly what complaints he raised with Epperly. T. at 151.[4/]

Even if Mosley did raise protected complaints about paperwork or plant violations with his PPM foremen, the evidence does not show that Epperly was aware of such complaints or that he became aware afterwards during the investigation.[5/] While Epperly met daily with PPM at the Robinson plant to discuss scheduling issues, specific workers and job assignments were not discussed. T. at 384, 354. Epperly was responsible for developing and implementing modification procedures, but he was unaware of questions about paperwork because he did not work at that level. T. at 380-81, 385, 394. Questions in the field about paperwork were addressed to the PPM foremen, who were responsible for managing the work and making job assignments. T. at 392, 355.

Nor does the record show that Epperly learned of these complaints through other managers. Although Robinson testified that Carolina Power manager Brad Starnes knew about their paperwork complaints, that testimony is unsubstantiated. T. at 194. Mosley alleges that he discussed his ERA concerns with Carolina Power's Sullivan on September 17, but Mosley did not testify at the hearing about this alleged September 17 meeting nor did he question Sullivan about it. On the contrary, Mosley testified that he did not tell anyone but Bolton, Rhodes, and Epperly about his discrimination claims. T. at 122.

Even though Bolton and Rhodes told Epperly that Mosley and Robinson worked more slowly than other workers, the record is insufficient to prove that they told Epperly that Mosley raised questions about potential paperwork or plant violations. Rhodes' deposition testimony is particularly straightforward and candid. RX 54 and CX 10. Rhodes admitted that he and Bolton discussed Mosley's paperwork complaints between themselves, but denied telling either Epperly or Cook about the complaints. CX 10 at 56, 57; RX 54 at 18, 40.

[4/] Mosley's allegation about the contamination incident is also rejected because numerous health physics specialists testified convincingly to the effect that Mosley's theory and concerns regarding the incident were uncommunicated, unreasonable, and probably based on a misunderstood telephone conversation. *See* T. at 572, 615-18, 629, 632-33, 639, 651, 667. We also note that Mosley could not have raised the September 21 interchanging parts incident with Epperly because the incident occurred after their initial meeting. CX 4, 5.

[5/] We reject Mosley's argument that knowledge of protected activity may be imputed to Epperly without proof. Initial Brief at 16. The Secretary has held that knowledge of the protected activity on the part of the alleged discriminatory official is an essential element of a complainant's whistleblower case. *Bartlik v. TVA*, Case No. 88-ERA-15, Sec. Ord., Dec. 6, 1991, slip op. at 7 n.7, and Sec. Dec., Apr. 7, 1993, slip op. at 4 n.1, *aff'd*, 73 F.3d 100 (6th Cir. 1996). Although knowledge can be shown by circumstantial evidence, that evidence must show that an employee of the respondent with authority to take the complained of action, or an employee with substantial input in that decision, had knowledge. *Id.*

Although Bolton admitted that he told Epperly that Mosley complained about the paperwork, he denied telling Epperly that Mosley's complaints included allegations of improper procedures or safety violations. T. at 500-501. We find his testimony inherently probable given PPM's employment relationship, responsibility, and accountability to Carolina Power. It is likely that Bolton simply stated in general terms that Mosley (and Robinson) often asked questions since, as Rhodes credibly explained, the paperwork was complicated and "confusing to everyone." RX 54 at 13, 22; *see also* T. at 88-90. The paperwork had become more involved and lengthy than in the previous year. T. at 393.

Alleged Retaliation

Thus, Epperly's knowledge of Mosley's protected activity was limited to the ALARA complaint, and Mosley failed to prove that Carolina Power constructively discharged him or took any other retaliatory adverse employment action against him because of that complaint.[6/] Epperly investigated and tried to resolve Mosley's complaints about his assignments.

In contrast to Mosley's testimony, both PPM managers who were present in the final meeting testified that Epperly did not threaten Mosley in any manner. T. at 340, 366. We agree and do not view Epperly's language that Mosley's "poor performance . . . would be 'dealt with' by his PPM management" as a threat of firing or reprisal. Rather, Epperly discovered that Mosley's performance was poor, for nondiscriminatory reasons, and merely was communicating the fact that PPM was responsible for dealing with performance issues. Even if Epperly's remarks could be viewed as threatening, they are insufficient to support a constructive discharge or threat of retaliatory reprisal.

To establish a constructive discharge, the employee must show that working conditions were rendered so difficult, unpleasant, unattractive or unsafe that a reasonable person would have felt compelled to resign. *See Nathaniel v. Westinghouse Hanford Co.*, Case No. 91-SWD-2, Sec. Dec., Feb. 1, 1995, slip op. at 20; *Johnson v. Old Dominion Security*, 86-CAA-3, Sec. Dec., May 29, 1991, slip op. at 19, citing *Clark v. Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981). It is insufficient that the employee simply feels that the quality of his work has been unfairly criticized. *Stetson v. Nynex Serv. Co.*, 995 F.2d 355, 360 (2d Cir. 1993). Furthermore, when an employee's performance is poor, "an employer's communication of the risks [of discipline for that poor performance] does not spoil the employee's decision to avoid those risks by quitting." *Henn v. National Geographic Society*, 819 F.2d 824, 829-30 (7th Cir. 1987), *cert. denied*, 484 U.S. 964 (1987).

Mosley has not demonstrated that Epperly's conclusion of poor performance was based on anything other than the nondiscriminatory responses of Bolton, Rhodes, and others from Mosley's

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[6/] We fully agree with the ALJ that the "send home" incident was not retaliatory under the ERA. R. D. and O. at 8. In addition, Mosley produced no evidence whatever of any retaliation in connection with the asbestos incident. R. D. and O. at 7 n.9; *see* T. at 131. He apparently raised the incident as evidence of Bolton's alleged disregard for health and safety concerns. However, the incident shows the contrary. Bolton initiated the question of whether x-rays might be necessary. T. at 132.

previous work experience with Carolina Power. *See* T. at 423, 411-16.[7/] In his testimony that he never received Douglas' prior written performance evaluation or any negative comments about his work performance or the speed of his work, T. at 22, Mosley implies that the evaluation was fabricated or pretextual.[8/] However, he did not call Douglas or any employees from the prior outage as witnesses on his behalf. He produced no evidence that Douglas was lying or that any improper motives were involved. On the contrary, Mosley testified that he considered Douglas to be a fair

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[7/] Mosley also did not prove by a preponderance of the evidence that the explanation offered by Bolton and Rhodes for assigning him to certain jobs was a pretext for retaliation. In fact, Mosley offered very little specific evidence concerning the circumstances of any of his assignments and did not prove that protected complaints were a factor. It is unlikely that PPM was retaliating against Mosley because of complaints of alleged violations since the company telephoned him on the same day as his ROF and offered him another job out-of-state. T. at 72. It was the foremen's lack of confidence in Mosley's welding ability and Robinson's poor workmanship and bad rapport that influenced the assignments. RX 6, 7; RX 54 at 26-27, 32-35; T. at 90, 189, 204, 273, 475. Also, Mosley and Robinson both perceived that the foremen showed favoritism to two more experienced welders because they were their "friends or buddies." T. at 36, 238-40. This is not retaliation forbidden under the ERA. Further, transferring and loaning out workers was common during the relevant time frame, RX 54 at 10, 20; T. at 116, 337, and Mosley and Robinson actually enjoyed being assigned out to other crews. T. at 227. The record falls short of proving retaliatory work assignments.

[8/] The evaluation contained a general recommendation that Mosley be rehired, but added that Mosley would not be a top choice. It also contained the following comments:

> Tyrone's welding ability was good. He would perform well as long as he was directly supervised. He had little initiative to complete work.

His initiative was described as "poor." RX 16.

supervisor. T. at 162. In sum, any pressure by Epperly to improve work performance did not evince retaliatory animus and did not constitute a reasonable basis for resignation.

Accordingly, this case IS DISMISSED.[9/]

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[9/] Although Mosley alleges generally that he was subjected to a hostile work environment, he does not point to any specific instances of harassment or alleged retaliatory actions not previously addressed in this decision. Consequently, we need not apply the hostile work environment legal analysis. *See generally Varnadore v. Oak Ridge Nat'l Lab.*, Case No. 92-CAA-2, Sec. Dec., Jan. 26, 1996, slip op. at 77; *Boytin v. Pennsylvania Power and Light Co.*, Case No. 94-ERA-32, Sec. Dec., Oct. 20, 1995, slip op. at 8 n. 4.