



In the Matter of

FRED ODOM,

COMPLAINANT,

v.

**ANCHOR LITHKEMKO/
INTERNATIONAL PAPER,**

RESPONDENT.

ARB CASE NO. 96-189

ALJ CASE NO. 96-WPC-0001

DATE: October 10, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Complainant, Fred Odom, alleges that Respondent, Anchor Lithkemko/International Paper (Anchor), harassed, fired, and blacklisted him in violation of the employee protection provisions of certain environmental statutes collectively referred to as the Acts.^{1/} In a Recommended Decision and Order (R. D. and O.) dated August 29, 1996, the ALJ found the evidence insufficient to support Odom's complaint. After reviewing the entire record, we accept the ALJ's decision as supplemented and modified below. *See* 29 C.F.R. §24.6 (1996).

BACKGROUND

Anchor, a division of International Paper, operates a chemical blending plant that manufactures products for the graphic arts industry. Complainant's Exhibit (CX) 55 at 20. It hired Odom as an environmental coordinator on July 12, 1993, after an interview with Laurie Nichols, the Regulatory Manager who later became his supervisor. Transcript (T.) 502; CX 2. Odom's task was to ensure Anchor's compliance with applicable regulations, which required, among other things, that he conduct "walk-arounds," or visual inspections of the interior and exterior of the facility, and report his findings. T. 502-503. Nichols also expected Odom to be involved in issues related to the

^{1/} The statutes include the Solid Waste Disposal Act, 42 U.S.C. §6971 (1988); Federal Water Pollution Control Act, 33 U.S.C. §1367 (1988); Toxic Substances Control Act, 15 U.S.C. §2622 (1988); and Safe Drinking Water Act, 42 U.S.C. §300j-9(i) (1988).

removal of Anchor's underground storage tanks, with which Odom had prior experience. T. 123, 494.

It is undisputed that Odom received three reprimands during his employment. T. 661. In late 1993 or early 1994, both Odom and George King, Anchor's Safety Coordinator with whom Odom jointly conducted walk-arounds, were verbally reprimanded by Nichols and her supervisor, George Calvert. T. 662-63, 821; *see* Complainant's Proposed Findings of Fact and Conclusions of Law (CPFF) at pages 63-64. On June 29, 1994, Odom received a written reprimand for missing a training deadline. CX 2 at 30; T. 829. On August 8, 1994, Nichols gave Odom a poor performance review, stating that she had not seen an improvement in his performance since the June 29 meeting and that he needed improvement in prioritizing responsibilities, showing initiative, accomplishing tasks in a timely manner, and presenting a professional demeanor. CX 3; T. 831-32.

On August 10, 1994, Odom wrote a letter to Burley Moss, Anchor's President, complaining that Nichols was unfairly criticizing his performance because of incidents related to environmental compliance issues he had raised. CX 6. As an example, he explained that during his second week of employment he raised environmental safety concerns about Anchor's use of a chemical called Envirowash; that Nichols ignored his concerns; and that she was embarrassed and defensive approximately one year later when a corporate audit revealed these items and requested corrective action plans. He implied that Nichols had given him the June written reprimand simply out of frustration for her own shortcomings. Odom also complained about his August 9, 1994 performance review in which Nichols informed him that he lacked professional demeanor and initiative, and he stated that if his initiative was stifled, it was because of Nichols' refusal to discuss or review information he presented pertaining to many environmental issues.

Odom was terminated on September 12, 1994, for the stated reason of "poor job performance." CX 2 at 34. Nichols testified at length concerning her reasons for terminating Odom, including his failure to be a "team player." *See, e.g.*, T. 126-28, 140-41, 1312-14. In sum, she explained:

I decided to terminate him because I had sat down with him twice, given him two written warnings. In my opinion, his attitude to me was continuously going downhill.

T. 1312.

[T]hings were not getting any better . . . [h]is attitude, his performance, the way he -- the way he interacted with me.

T. 126.

Odom contends that Anchor's explanation is pretextual or that, at the very least, he presented evidence to establish dual motives for the decision. He alleges that Nichols harassed him for finding too many problems on his walk-arounds and "set [him] up to fail" by imposing unrealistic deadlines, assigning him menial tasks, moving him into her office, and canceling multiple training classes that

he was required to teach. Complainant's Post-Hearing Brief at 3. According to Odom, Nichols felt threatened by his competence in raising protected safety issues; imposed reprimands as a pretext for retaliation; and then, in collaboration with other managers, fired him for not being a "team player" when he went over her head and complained to Moss. T. 667-68; *see* CPFF at 80. Additionally, Odom charges that after he was fired, Anchor engaged in blacklisting when a prospective employer inquired about his work history.

The ALJ found that Odom made a *prima facie* showing based on the close temporal proximity between his termination and his August 10 protected letter to Moss. R. D. and O. at 4. He concluded, however, that neither the termination nor any of the other challenged actions were improperly motivated. R. D. and O. at 6-9, 10. In addition, the ALJ rejected Odom's blacklisting claim, noting first that the allegation did not comport with the generally understood and accepted use of the term "blacklisting." R. D. and O. at 9 n.10. Considering the claim as another allegation of retaliatory action by Anchor, the ALJ found it also without merit. R. D. and O. at 10.

DISCUSSION

The burdens of production and persuasion in whistleblower cases are based on the framework applied under Title VII of the Civil Rights Act of 1964. *See Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1995, slip op. at 9-10, *aff'd*, 78 F.3d 352, 356 (8th Cir. 1996); *see also Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926, 933-34 (11th Cir. 1995). The ultimate question to be decided is whether the employee has shown by a preponderance of the evidence that the employer retaliated against him because of protected activity. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *White v. Osage Tribal Council*, Case No. 95-SDW-1, ARB No. 96-137, Aug. 8, 1997, slip op. at 4. If the employee proves that a retaliatory motive contributed at least in part to the employer's decision, *i.e.*, that "dual motives" existed, then the employer must prove by a preponderance of the evidence that it would have taken the action for the legitimate reasons alone. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Dodd v. Polysar Latex*, Case No. 88-SWD-4, Sec. Dec., Sept. 22, 1994, slip op. at 3.

In arguing that he met his burden of proof, Odom points out that the ALJ failed to discuss all the favorable evidence and arguments mentioned in his post-hearing pleadings. However, the ALJ was not required to explicitly accept or reject each of the parties' proposed findings and conclusions in the recommended decision. *Smith v. Richard L. Littenberg, M.D.*, Case No. 92-ERA-52, Sec. Dec., Sept. 6, 1995, slip op. at 12, *citing* 5 U.S.C. §557(c)(3)(A). An agency's decision need only be "sufficiently clear so that a court is not required to speculate as to its basis." *Lockert v. United States Dep't of Labor*, 867 F.2d 513, 517 (9th Cir. 1989), *quoting Lodi Truck Serv., Inc. v. United States*, 706 F.2d 898, 901 (9th Cir. 1983). The ALJ's reasoning is clear, and after independently reviewing and assessing the entire record, including evidence that Odom claims was overlooked by the ALJ, we reach the same conclusion that Odom failed to meet his burden of proof.^{2/}

^{2/} We grant Odom's unopposed motion to file a brief that exceeds the page limitation and have considered all pleadings in full.

I. The Termination

A. Nichols made the Decision

Odom contends that Anchor's testimony at the hearing regarding who was involved in the termination decision is diametrically opposed to its answer to an earlier interrogatory and shows lack of credibility. We disagree. Nichols and Calvert testified at the hearing that they alone were the decisionmakers. Nichols actually made the decision and Calvert concurred. T. 126, 139, 360, 1326. Although the response to the interrogatory identifies two other managers who "participated" in the decision -- Moss and Anchor's Human Relations Manager, Russ Erwine -- Anchor stated in the interrogatory that Moss "was advised of the termination," not that he directed or had any input in the decision. *See also* T. 1327.^{3/} At the hearing Nichols explained that Erwine too may have been advised or involved after the decision was made. T. 1327-29. These uncontradicted explanations of post-termination involvement by upper management are plausible and do not present any "yawning credibility gap" or coverup as Odom alleges. CPFF at 6.

B. Nichols Was Aware of the Letter to Moss

It is undisputed that on August 11, in a comment to Eugene Masters, Nichols either threatened or somehow stated that she was about to fire Odom. CPFF at 49-50. Odom argues that the ALJ improperly relied on late filed evidence to find that Nichols was unaware of the August 10 letter to Moss when she made this comment. However, the ALJ correctly found that the record contains no evidence that Odom delivered the letter to Moss on August 10, and his inference that Nichols was uninformed of the letter on August 11 is reasonable. R. D. and O. at 9; Complainant's Initial Brief at 19. Odom never testified concerning how the letter was delivered to Moss, and it was his burden to prove his legal theory that Nichols was aware of the letter when she made her comment to Masters.

In any event, Nichols testified several times that she did not form the intent or decide to fire Odom until the weekend of September 12. T. 154. At that time she was well aware of his August 10 letter to Moss.

C. Odom's Letter and Other Protected Activity Played No Part

The ALJ credited Nichols' testimony that the letter did not impact her decision to fire Odom, and also concluded that Odom's environmental concerns essentially were too insignificant or remote to have threatened or intimidated Nichols into firing or otherwise retaliating against him. R. D. and O. at 8-9. He further found support in the record for Nichols' criticisms of excessive socializing, missed deadlines, and disrespectful behavior. R. D. and O. at 6. Odom contends that the ALJ erred

^{3/} It is undisputed that Moss used profanity in referring to Odom's August 10 letter when he told Calvert to investigate the issues raised. T. 371-72. However, there is no indication that Moss influenced Nichols or had any input in the termination decision. *See also* T. 74-75.

in crediting Anchor's evidence, failed to properly consider the totality of his protected activities over a sixteen month period, and applied improper legal standards.

As explained below, while we do not agree with every aspect of the ALJ's decision, we fully agree with his conclusion. We have carefully considered Odom's numerous arguments attacking the veracity of Anchor's testimony, but they do not convince us that the ALJ was wrong. Anchor's testimony is consistent with other evidence, and we find no reason to disturb the ALJ's credibility determinations. *See Seater v. Southern California Edison Co.*, ARB Case No. 96-013, Sept. 27, 1996, slip op. at 18; *Bartlik v. TVA*, Case No. 88-ERA-15, Sec. Dec., Apr. 7, 1993, slip op. at 4-5 n.2, citing *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496 (1951).

Odom alleges that during the course of his work as Anchor's environmental coordinator he raised protected concerns about: (1) failure to provide emergency respirators to workers, (2) empty drums as hazards to children, (3) inclusion of Charlie Rhodes on the Hazardous Waste Minimization (HWM) Team, (4) permitting Envirowash to enter the storm drains,^{4/} (5) orders to change dates on hazardous waste labels, (6) improper use of the Reid vapor pressure machine, (7) a leaking underground storage tank, (8) Anchor's failure to "stick" the underground tanks and perform accurate inventories,^{5/} (9) improper containment of contaminated soil, and (10) use of incorrect Standard Industrial Classification (SIC) codes that misdescribed chemicals in reports to the Environmental Protection Agency. *See, e.g.*, Complainant's Post-Hearing Brief at 37-38; T. 131-32, 559, 635, 800-801.

First, several of these concerns were not protected under the Acts. It is well established that the whistleblower provisions forbid an employer from retaliating against an employee because he complained about reasonably perceived violations of the Acts' requirements related to environmental safety. *See Tucker v. Morrison & Knudson*, Case No. 94-CER-1, ARB Case No. 96-043, Feb. 28, 1997, slip op. at 4-5; *Oliver v. Hydro-Vac Servs., Inc.*, Case No. 91-SWD-00001, Sec. Dec., Nov. 1, 1995, slip op. at 9; *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Dec., Jan. 25, 1995, slip op. at 4 n.4. The provisions do not apply to Odom's occupational, racial, and other nonenvironmental concerns about respirators, physical danger to children posed by empty drums, and inclusion of Rhodes on the HWM Team. *See* T. 605-607, 1341; CPFF at 98. However, we have considered whether the evidence relevant to these allegations, particularly the HWM Team allegation, shows any hostility toward protected activity bearing on the question of Nichols' motivation. We also have assumed that the remaining concerns alleged by Odom, in addition to his August 10 letter, constitute protected complaints. Even so, it is clear that Odom's protected activity was not a factor in his reprimands and did not motivate Nichols to terminate him.^{6/}

^{4/} Envirowash is a solvent that Anchor used to loosen labels and clean reusable containers. *See* T. 928; Respondent's Exhibit (RX) 38.

^{5/} Company policy was to "stick" or measure the tanks twice daily to gauge inventory. T. 1092.

^{6/} We have considered whether these earlier personnel actions were retaliatory, even though they
(continued...)

1. The Oral Reprimand

The first reprimand, given in late 1993 or early 1994, resulted from Nichols' perception that Odom and King were spending too much unproductive time conducting their joint walk-arounds and not from disapproval of his protected concerns.^{7/} In Odom's own words, he and King "were to cease and desist of the dual walk-arounds," and Nichols and Calvert "were concerned with deadlines." T. 824, 823. Walk-arounds were not eliminated or otherwise restricted, and there is no evidence that Odom could not continue to raise concerns independently. It is not significant that this reprimand was not in writing and there is no indication that it constituted some meaningful deviation from Anchor's routine practice. T. 80-81.

Odom contends that by this point he had raised concerns about Anchor allowing Envirowash to enter the storm drains and about Nichols' orders to change dates on hazardous waste labels. However, there is insufficient evidence to establish that Odom ever voiced concerns about Nichols' orders to change dates on the waste labels. Although Odom established that he lied to Nichols about following her orders, which the ALJ reasonably found adversely affected his credibility, he failed to establish that he communicated his concerns. *See* T. 516-523, 129; R. D. and O. at 5 n.6.

The issue about labels surfaced during a surprise hazardous waste compliance inspection conducted by the Florida Department of Environmental Protection (DEP) in late August 1993. CX 121, 55 at 17. The inspector issued Nichols a warning letter noting six possible violations, including improper accumulation and labeling of hazardous waste. Odom himself substantiated that the labeling violation was considered minor and easily remedied, and that Nichols was not upset or resentful about the citation over this particular issue. T. 770-77, 881; *see also* T. 1146.^{8/} Nichols acknowledged responsibility for changing the dates or ordering Odom to change the dates on the labels, and the ALJ accepted her explanation that she was following prior procedure in poor judgment. T. 208-210; R.D. and O. at 8. Evidence that Nichols committed a violation does not overcome highly probative contrary evidence that she was concerned and conscientious about safety issues. Elvin Rhodes, who appeared on Odom's behalf, testified that Nichols was regarded as the "bad guy" by the manufacturing manager because her efforts to implement environmental regulations held up his production. T. 449-50. Rhodes also described Nichols as "focused" and "fussy" about safety issues, even before Odom was hired. T. 457-59, 465; *see also* T. 948-49. This portrayal is not consistent with the picture Odom paints.

^{6/}(...continued)

were discrete incidents that occurred outside the limitations period, since they formed a basis in part for Odom's termination and "shed light on the true character of matters occurring within the limitations period." *See Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1140-41 (6th Cir. 1994); *McCuiston v. TVA*, Case No. 89-ERA-6, Sec. Dec., Nov. 13, 1991, slip op. at 18, *citing Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989).

^{7/} We note that Odom's failure to establish with specificity some of the dates relevant to his claims also undermines his case

^{8/} Nichols did argue with the inspector about a training issue citation which she believed was incorrect. *See* T. 776-77. Anchor ultimately settled the entire matter for \$5,050. RX 1.

The Envirowash issue was not a source of conflict between Odom and Nichols until a year later in August 1994. Odom only raised the issue several times in 1993. *See* T. 215, 544, 548-51. King, who conducted walk-arounds and meetings with Odom, remembered their raising the issue with Nichols once, within a short period after Odom was hired. T. 1140. Nichols investigated and conveyed to Odom her findings that Envirowash was permitted to be discharged. T. 544, 551. She relied on previous testing conducted before Odom was hired, T. 723-24, 1272-74, in combination with waste water plans and permits written by independent consulting engineers. T. 1267-73, Respondent's Exhibit (RX) 34. There is no evidence of hostility, disputes or confrontations over the issue that would support an inference that Nichols felt threatened or intimidated by Odom's questions.

The ALJ noted that Masters, one of the consulting engineers who formerly had worked at Anchor, testified that he would not have been concerned about a runoff of Envirowash. R. D. and O. at 7; T. 931. Odom contends that the ALJ erred in crediting Masters as a disinterested expert witness, and we agree. Masters was not called as an expert but as a fact witness, T. 972, and was not appointed as an expert by the ALJ as provided in the regulation at 29 C.F.R. §18.706 (1996). The ALJ improperly designated Masters as an expert without Masters' consent and without proper opportunity for the parties to participate.

The error, however, is harmless in this case. The essential difference is that a qualified expert may answer hypothetical questions, *Teen-Ed, Inc. v. Kimball Intern., Inc.*, 620 F.2d 399, 404 (3d Cir. 1980), and it is unnecessary to rely on Masters' responses to hypotheticals to determine the issues here. There is ample evidence that until May 1994, Nichols "viewed" the Envirowash issue as settled, without looking to Masters' opinion on the merits of Odom's concern. R. D. and O. at 8.

Following the August inspection by DEP, Nichols and Calvert suggested that Odom and King view a film to refresh their memories on the company's procedure for responding to an inspection by a government agency. T. 1147. Nichols was perturbed that Odom and King did not follow protocol by notifying a member of management before inviting the inspector into the building. T. 1146-48. Odom argues that this evidence demonstrates animus, but we disagree. He did not raise either the Envirowash or the label issue with the inspector, and he has not shown that Nichols was perturbed because of any comment he may have made to the inspector or that the purpose of the protocol was to prevent protected communications between employees and inspectors.^{9/}

Two months after the inspection, on October 12, 1993, Odom received a raise based on successful completion of his probationary period. CX 2 at 26. In an internal memorandum dated January 13, 1994, Calvert praised "the diligent efforts of Fred Odom" in getting the Reid Vapor Pressure (RVP) Analyzer apparatus operational. CX 2 at 27. This approval and praise indicate the

^{9/} Of course, an employer may not, with impunity, fault an employee for failing to follow the chain-of-command in raising safety or environmental issues. *Saporito v. Florida Power and Light Co.*, Case No. 89-ERA-7, 17, Sec. Decs., June 3, 1994, and Feb. 16, 1995; *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1290 (9th Cir. 1991).

absence not the presence of retaliatory motives. *See Bonanno v. Stone & Webster Eng'g Corp.*, ARB Case No. 96-110, Dec. 12, 1996, slip op. at 2-3 n.2.

Nor is it believable that Odom's concerns about the RVP Analyzer experiment in January or February, 1994, played a role in his discipline. *See* RX 14. Odom alleges that he questioned Nichols about erroneous numbers being generated by Anchor's technique of "icing the bath." T. 635. However, she had placed Odom and another employee in charge of the experiment and there is no reason why she would then be unreceptive to his concerns. *See* T. 1300. Odom's *post hoc* allegation that Anchor actually was attempting to report low numbers so that they could have an edge on competition is rejected as wholly unsupported. T. 842, 850. Moreover, the machine was not working properly, and Nichols stopped using it. T. 272 (Bourne), 843-44 (Odom), 1303, 1338-39 (Nichols).

2. The Written Reprimand and Performance Evaluation

Odom contends that the June reprimand for missing a training deadline was retaliatory and a pretext for his termination because he completed volumes of paperwork in a timely fashion and never missed another deadline after the June reprimand. *See* CX 24-46, 50, 54-107. He elaborates that Nichols knew he was having trouble meeting the June training deadline, that she reassured him, and then purposefully postponed the rescheduled class and manufactured a crisis over which she imposed the reprimand. *See* T. 816-17. As proof, Odom states that Calvert admitted in a "Freudian slip" at the hearing that there were "some training problems that didn't occur." T. 354; CPFF at 24.

The argument that a crisis was manufactured, implying that no corporate deadline for the training existed, is disingenuous. At the hearing Odom did not dispute that the training was in fact required under the Corrective Action Plan that was developed following the May internal audit by International Paper, and he acknowledged that International Paper was controlling the training class. T. 629-30; *cf.* T. 816-17. Also, Calvert's testimony taken in its proper context substantiates that Nichols told him that Odom's meeting the training deadline "didn't occur." T. 353-54. Odom is correct that Nichols canceled the rescheduled class herself several times, but only after Odom already had missed his initial deadline. In any event, it is undisputed that Odom missed his deadline for conducting hazardous waste training. T. 628, 631.

By the time of Odom's June reprimand and August performance evaluation, Nichols had developed disdain for Odom's work ethic and lack of initiative, as illustrated by the following examples. The "April Things to Do" list, dated April 1, 1994, contains the following notation:

Environmental Self-Audit - WFO [Odom]; your version of final draft; this should have been submitted to me by 3/31(!); due no later than 4/8/94. . . .

RX 8. In her May 1, 1994 list addressed to Odom and King jointly, Nichols wrote:

Please understand that I am under time restraints from both the Imaging Products Division and Corporate I.P. When I give you completion dates for certain projects, these dates are based on deadlines given to me. I do not like to be called by either

divisional or corporate personnel looking for information which I should have already submitted to them.

Id. Considering this ongoing problem, it is understandable that Nichols responded harshly when Odom missed the June training deadline.

Nichols' criticism in Odom's August 8 performance review is consistent with the record as a whole. She stated that she found it necessary continuously to remind him of projects or tasks, that he engaged in lengthy chats unrelated to work, and that he failed to keep her apprised of his projects and to follow-up or motivate others to respond when needed. CX 3.

On the other hand, Odom's concerns relevant to the underground storage tanks, which he raised in the spring and summer of 1994, were not a contributing factor in his discipline. The project to remove all of Anchor's fourteen underground storage tanks and replace them with above-ground tanks began in May 1992, before Odom was hired. RX 36. Anchor employed an outside engineering firm that conducted tank integrity testing and soil contamination assessments and issued reports and plans on how to proceed under applicable regulations in consultation with the Florida DEP. RX 35-37.^{10/} In May 1993, the first tank, Underground Storage Tank (UST) 7, was removed. Odom testified that he questioned Nichols, and then Calvert at a later date, about the handling of certain allegedly contaminated soil that had been removed simultaneously with UST 7. T. 779, 800. However, Odom was not adamant or outspoken about his concerns. At the hearing Odom described his concern about the soil merely as an inquiry about whether it was being properly contained to which "they [said] they'd take care of it." T. 777-80. He did not report the concern in any of his monthly reports, audits, memoranda, or even in his daily log. T. 779-80.^{11/} Neither Nichols nor Calvert remembers having any conversation with Odom about this matter. T. 131, 421. Moreover, as Odom concedes, the tank was removed under the supervision of consulting engineers with no evidence to indicate that the engineers did not follow proper procedures for testing and handling the excavated soil. T. 802. Nichols and Masters knew that the soil was not contaminated. T. 124-25, 922.^{12/} These facts show the absence of motive, not any reason to fear exposure of wrongdoing or

^{10/} We agree with Anchor that Odom's allegation that Nichols precluded him from reviewing the reports after May 1994, is specious. His daily notes for June 8 contain the following entry as work accomplished that day: "reread closure report." CX 121. *Compare* T. 570, 889 *with* T. 1264-65.

^{11/} At some point Odom claimed that Nichols told him not to put anything in writing, but he later testified that he communicated his concerns to her orally and through written memoranda and that he had the opportunity to include concerns in his monthly reports. T. 828.

^{12/} Basically, Odom does not disagree. He indicates that it was his "memory" or "understanding" that the soil was contaminated. T. 778, 790, 803. In any event, the ALJ properly credited the testimony of Nichols and Masters. Masters had considerable experience and direct involvement in Anchor's underground storage tank project, T. 932, and his opinion on this subject was based on his perceptions. The ALJ could, therefore, credit his opinion as testimony by a lay witness. *See* 29 C.F.R. §18.701. The ALJ was not required to find Odom's opinion conclusive, even though Odom was proffered and qualified at the hearing as an expert witness on the subject of underground storage tanks. T. 494; *see United* (continued...)

otherwise feel the need to silence Odom. As the ALJ indicated, proof that management considered the concerns invalid may be relevant to the question of motivation, *see Rivers v. Midas Muffler Center*, Case No. 94-CAA-5, Sec. Dec., Aug. 4, 1995, slip op. at 5, and we accept his finding here, particularly in view of the significant evidence that Nichols was concerned about safety issues.

Nichols' actions in response to Odom's concerns about improper tank sticking also do not afford any basis to find retaliatory motives. Quite the opposite, they demonstrate that Nichols was conscientious in addressing and trying to remedy Odom's concerns. Odom himself confirmed that Nichols took corrective action by writing a memorandum and repeatedly cautioning the responsible department. T. 811-12, 557. Nichols even requested that the department document its improprieties. While that department may have failed to heed Nichols' warning and follow proper procedure, there is no showing that Nichols condoned the improprieties.

Odom alleges that he spoke to Nichols, as well as Calvert, "about the possible need to file" reports with the Florida DEP because of "unexplained" water in UST 13. T. 809, 558-59, 563, 569. However, it is undisputed that Nichols investigated, discussed the issue with a number of Anchor managers and employees, and reached the firm conclusion that reporting was unnecessary. T. 217-21, 559-60, 809-10. A mere difference of professional opinion, without more, does not prove retaliatory motives.

Similarly, there is evidence that Nichols disagreed not only with Odom but also with an internal auditor who raised a question about whether Anchor was using an incorrect SIC code. T. 603. The evidence shows only that she was blunt, not vindictive.

Finally, there is insufficient evidence to prove that animosity over International Paper's May 1994 internal audit findings played a role in Odom's discipline.^{13/} The audit revealed that in fact, pursuant to the new regulations promulgated under the Clean Water Act, no non-storm water discharges were permitted. Odom intimates that Nichols became jealous and set him up to fail because the findings validated his concerns about Envirowash. While the audit findings supported Odom's intuition, they were based on a change in law that occurred after he first raised his concerns,

^{12/}(...continued)

States v. Jackson, 19 F.3d 1003, 1007 (5th Cir. 1994), *cert. denied*, 513 U.S. 891 (1994). The issue became one of witness credibility. Even though Odom was qualified as an expert, it is clear from the transcript that his knowledge of Anchor's project was limited. *See* T. 803, 815, 796 ("possibly" part of his duties to update himself on that project).

^{13/} We reject Odom's argument that Nichols destroyed this internal environmental audit and her 1994 calendar after receiving Odom's complaint and that, therefore, the most unfavorable inferences should be drawn and Nichols' testimony on events in 1994 should be discredited. The record does not show that Anchor refused to comply with any requests for production of documents or deliberately destroyed any potential evidence. T. 1382.

and if anything, Nichols resented Odom's failure to adequately apprise her of his concerns. T. 1330.^{14/}

3. The Termination

Even if Odom did not miss another deadline, Nichols testified that she did not terminate him for not meeting a deadline. T. 153-54. Rather, as she explained:

I was tired of following up, trying to follow up with every little thing he did. If he didn't do it, he wouldn't report back to me. . . . I was completely and totally frustrated because I felt that after he'd been there for a year, I didn't need to be doing a lot of the things behind him that I had to do.

T. at 1313.^{15/}

Nichols thought it was possible she threatened to fire Odom on August 11, because she was angry at the time. T. 1325-26. She had discovered yet another instance of Odom's failure to follow through on an assignment. Masters had just informed her that Odom had not begun the waste water bench testing. T. 944-46. Odom admits that performing the bench tests was part of his job duties, T. 655, 939, and his records corroborate that he did not start the testing until August 15. CX 121.

Nichols also criticized Odom for concentrating on efforts that would bring him "fame and fortune" at the expense of his paperwork or more tedious tasks. T. 156. This criticism, consistent with all the evidence showing Nichols' repeated reminders, was based on Odom's failure to prioritize his work properly, not the protected aspects of his job. Any resentment by Nichols concerning Odom's August 10 letter to Moss and his reference to the Envirowash issue was justified and lawful because it indicated to her that he may have downplayed or concealed his concerns and test results from her. *See* RX 5; *cf. Pooler v. Snohomish County Airport*, Case No. 87-TSC-1, Sec. Dec., Feb. 14, 1994, slip op. at 8-12 (employer lawfully disciplined employee not because he reported a violation but because he failed to take proper corrective action).

Several witnesses testified that Odom considered Nichols inferior and unqualified for her job because she did not have a college education. T. 942-43 (Masters), 1172 (King). Nichols was aware that Odom made these remarks and criticized her "behind her back." T. 148, 145. Consequently, it is not surprising that she detested his attitude and suspected that he tried to "make a lot of trouble" for her. T. 145. She disapproved of Odom's complaints about management and thought it was odd that he made references to International Paper as "tree killer." T. at 144-47. These complaints

^{14/} Nichols began taking corrective measures immediately. *See* T. 742, 1281-87; RX 34 at 4-2a. We also reject, as contrary to the evidence, Odom's argument that Nichols was resentful and unreceptive to his concerns about storage drums, bungs, and triple rinsing. *See, e.g.*, T. 211-12; RX 34 at 4-2a and 4-3, RX 8-9.

^{15/} It is not believable that Nichols risked her reputation and gave Odom short deadlines for retaliatory reasons. Nichols' schedule was controlled by International Paper.

centered around the purchasing department, not environmental concerns. T. 128, 142. Odom also contends that Nichols' criticism of him for not being a "team player" has special meaning under whistleblower law, but we find that her basis for using the expression -- that Odom was uncooperative and disrespectful -- was reasonable and nondiscriminatory. *See Erb v. Schofield Mgmt, Inc.*, ARB Case No. 96-056, Sept. 12, 1996, slip op. at 2-3 (Board rejected employee's claim that he was unlawfully fired for failing to be "team player" where record showed employee's continuing negative attitude toward the supervisor, lack of cooperation, and failure to improve work habits).

Considering the totality of the evidence, we are persuaded that the ALJ correctly denied Odom's claim. In view of the significant evidence that Nichols hired Odom to assist in overseeing environmental and related regulatory matters, that she expected him to provide expertise related to underground storage tank removal, that she was conscientious and fussy about safety issues, that she made inquiries and took corrective measures in response to Odom's safety concerns, and that his reprimands were warranted, we find no retaliatory motives in Nichols' decision to terminate Odom. *See Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987).^{16/}

D. Dual Motive Analysis

Even if the record could be viewed as showing that Odom's August 10 letter influenced Nichols' decision, the evidence proves that Nichols would have fired him in the absence of the letter. Odom knew or sensed that "documentation . . . [was] in place" and that his termination was imminent at the time he wrote the letter. CX 2 at 33; *see* T. 176. Nichols was angry enough to fire Odom upon hearing of his failure to begin the waste water bench testing on August 11, before she was aware of the letter. She had given repeated warnings about his failures to show initiative, follow through with his assignments, and prioritize his work, but he showed no improvement. CX 2, 3. Odom's poor performance and attitude problems, wholly independent of any protected activity, would have induced Nichols to fire him even if he had not written the letter. *See Price Waterhouse*, 490 U.S. at 252.

II. Alleged Blacklisting

It is undisputed that in response to an inquiry from a prospective employer, Nichols stated that she had fired Odom because he was not living up to the day-to-day expectations of a manufacturing facility and that Odom was not geared to their type of work. Odom contends that Nichols' statement, made with knowledge that Odom had filed this complaint with the Department of Labor, was a blacklisting communication remediable in this proceeding. He also contends that a subsequent statement given by the Human Resources Director, Judy Barr, that Odom was not eligible for rehire was unlawful blacklisting.

^{16/} We also specifically agree with the ALJ's conclusions that Odom's tasks of filling sandbags and drawing "fetid" water were not retaliatory. R. D. and O. at 10. Nor was his office relocation motivated by retaliation for protected activity. Its purpose was to allow him to improve his performance. T. 1313.

Although the ALJ failed to recognize that the term "blacklisting" can be interpreted to include "marking an employee for avoidance" through negative employment references, he properly found the record insufficient to establish the allegation. *See Leveille v. New York Air Nat'l Guard*, Case No. 94-TSC-3, Dec. 11, 1995. Odom incorrectly implied in his post-hearing pleadings that the decision in *Gaballa v. Atlantic Group, Inc.*, Case No. 94-ERA-9, Sec. Dec., Jan. 18, 1996, prohibits an employer from providing a negative reference once the employee has filed a retaliation claim. In *Gaballa*, unlike here, the employer explicitly mentioned the employee's protected complaint of retaliation. Odom now incorrectly claims that under *Leveille*, any communication that has a tendency to impede or interfere with employment opportunities is prohibited. But to be discriminatory such a communication must be motivated at least in part by protected activity. Odom's allegation is without merit because he did not prove that either Nichols' criticisms of his work performance or Barr's statement of his ineligibility for rehire was based on or motivated even in part by any of his protected activity, including this complaint. Events that Odom alleges occurred at Anchor after these employment references were given, CPFF at 110-13, have no bearing on the disposition that Odom failed to establish blacklisting under the Acts.

Accordingly, this case **IS DISMISSED**.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member