**U.S. Department of Labor**

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**Issue Date: 08 July 2008**

**CASE NO. 2005-CAA-9**

**IN THE MATTER OF:**

**ANTHONY ELLISON**

**Complainant**

**v.**

**WASHINGTON DEMILITARIZATION COMPANY, A SUBSIDIARY OF WASHINGTON GROUP, INTERNATIONAL, INC. (A.K.A. WESTINGHOUSE ANNISTON)**

**Respondent**

# RECOMMENDED DECISION AND ORDER ON REMAND GRANTING MOTION FOR SUMMARY DECISION

This proceeding arises pursuant to a complaint alleging violations under the employee protective provisions of Section 322(a) of the Clean Air Act (CAA), 42 U.S.C. § 7622; Section 110(a) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610; Section 1450(i)(1)(A-C) of the Safe Drinking Water Act, 42 U.S.C. § 300j-9; Section 7001(a) of the Solid Waste Disposal Act, 42 U.S.C. § 6971; Section 23(a) of the Toxic Substances Control Act, 15 U.S.C. § 2622; Section 507(a) of the Federal Water Pollution Control Act, 33 U.S.C. § 1367; Section 11(c) of the Occupational Safety and Health Act; and the regulations promulgated at 29 C.F.R. Part 24, et seq.

On April 18, 2005, Respondent filed a "Motion For Summary Disposition" averring that there exists no genuine issue of material fact and that the undisputed material facts of record warrant entry of judgment as a matter of law in favor of Respondent.

The bases of Respondent's Motion were as follows, that:

1. Complainant cannot establish a **prima facie** case, because:

   a. Complainant cannot establish that Respondent was his Employer.

   b. Complainant cannot establish that he engaged in any protected activity.

   c. Complainant cannot establish a causal nexus between any protected activity and his involuntary resignation.

2. Complainant cannot prevail even if he could establish a **prima facie** case, because:

   a. Respondent articulated a legitimate, nondiscriminatory reason.

   b. Complainant failed to establish pretext.

3. Complainant cannot prevail on any other claim.

The instant motion was served upon Complainant through his Attorney of record on April 15, 2005. I initially determined that to be timely, a response should have been filed by April 22, 2005. Pursuant to 29 C.F.R. § 18.4(a) in computing any period of time, the time begins with the day following the act or event. When the period is less than seven (7) days, as here, intermediate Saturdays, Sundays and holidays shall be excluded in the computation.

In support of its motion, Respondent offered various excerpts of Complainant's deposition taken on March 31, 2005, with specific exhibits thereto. In sum, Respondent argued Complainant had offered no evidence that Washington Demilitarization Company (WDC) was ever his Employer; that he ever made a protected complaint under any of the six environmental statutes; or that there was a causal nexus between any alleged complaint made by him and the decision to require

his involuntary resignation. Thus, Respondent averred that Complainant had failed to offer substantial evidence raising a genuine issue of material fact with respect to the foregoing elements which warrants entry of summary decision against each one of Complainant's whistleblower claims.

Complainant filed no responsive pleadings to Respondent's motion. On April 26, 2005, I issued my Recommended Decision and Order Granting Motion for Summary Decision and Cancelling Formal Hearing.

On September 25, 2007, the Administrative Review Board (ARB) issued an Order of Remand in this matter concluding that since Respondent served its Motion for Summary Decision by mail, Complainant was entitled to five additional days in which to respond or until April 27, 2005. See 29 C.F.R. § 18.4(c)(3). Thus, the ARB determined that the undersigned had acted prematurely by issuing the Recommended Decision and Order on April 26, 2005. The ARB concluded that Complainant must be given the time required by the regulations to respond to Respondent's Motion for Summary Decision and remanded this matter for further proceedings consistent with its order.

On April 4, 2008, the record in this matter was received from the ARB. On May 9, 2008, a conference call was conducted with the parties to discuss the briefing schedule which was set by Order dated May 12, 2008. Complainant was to file his response to Respondent's Motion for Summary Decision no later than June 9, 2008, 30 days after the conference call. Respondent was given until June 20, 2008, to file any reply to Complainant's response.

On June 9, 2009, by facsimile, Counsel for Complainant filed a Motion for A One Day Extension of Time To File Complainant's Response. On June 10, 2008, by facsimile, Counsel for Complainant transmitted Complainant's Exhibits 1, 2 and 3, the declarations of Complainant (Complainant's Exhibit 1, consisting of 15 pages), Scott Lindsey (Complainant's Exhibit 2, consisting of 8 pages) and Steve Buttram (Complainant's Exhibit 3, consisting of 6 pages). On June 11, 2008, Counsel for Complainant transmitted, by facsimile, Complainant's Exhibit List For Response In Opposition To Respondent's Motion For Summary Decision with Complainant's Exhibits 4 through 30.

On June 12, 2008, by facsimile, Respondent filed its Motion To Strike Complainant's Response Brief for failure to comply with the Order Setting Briefing Schedule, relying upon Muggleston v. EG & G Defense Materials, Inc., ARB Case No. 04-060 (June 30, 2004). Respondent avers no response brief had been received from Complainant as of June 12, 2008. Respondent sought an Order striking any response brief filed by Complainant after June 10, 2008.

On June 16, 2008, by facsimile, Counsel for Complainant filed another Motion For Extension of Time To File Complainant's Memorandum in Response To Respondent's Motion For Summary Decision requesting an additional extension until June 17, 2008, in which to file his response.

On June 16, 2008, by facsimile, Respondent filed its Opposition To Complainant's Motion For Extension of Time alleging that Counsel for Complainant's habitual delays in filing pleadings has resulted in unnecessary costs to Respondent and has further delayed this proceeding. Respondent sought an Order striking any response brief filed by Complainant after June 10, 2008, and a denial of Complainant's Motion For Extension of Time.

On June 17, 2008, Complainant filed, by facsimile, a Response In Opposition to Respondent's Motion For Summary Decision.

On June 19, 2008, by facsimile, Respondent filed its Motion For Extension of Time To Reply seeking a one-week extension in which to respond to Complainant's Opposition.

On June 23, 2008, Respondent filed a Motion To Strike Portions of Complainant's Evidentiary Submission In Opposition to Respondent's Motion For Summary Disposition and Motion To Strike Portions of Response Brief Relying Upon Inadmissible Evidence. Respondent argues Complainant has submitted unauthenticated documents and is relying upon inadmissible hearsay, conclusory evidence not based on personal knowledge and evidence which contradicts prior sworn testimony.

On June 26, 2008, Respondent filed its Reply Brief.

On June 27, 2008, Respondent filed a Supplemental Motion To Strike Portions of Complainant's Evidentiary Submission In Opposition to Respondent's Motion For Summary Decision. Respondent argues that paragraphs of the declaration of Scott Lindsey lack personal knowledge and are conclusory in nature and that Complainant's exhibits lack proper authentication, are not the best evidence, contain hearsay statements and are irrelevant and immaterial.

## DISCUSSION

### Respondent's Motions to Strike

On May 12, 2008, the undersigned issued an Order Setting Briefing Schedule which confirmed the schedule discussed with the parties in a conference call conducted on May 9, 2008. The undersigned unambiguously ordered Complainant to file his response to Respondent's Motion For Summary Decision **no later than Monday, June 9, 2008,** by mail or facsimile. Complainant failed to file his response brief in compliance with the scheduling order.

Rather, on June 9, 2008, Complainant filed a motion seeking a one-day extension within which to file his response to Respondent's Motion. Respondent did not file an opposition thereto. This motion was not ruled upon nor granted. On June 10, 2008, the undersigned received only three declarations, as above mentioned, but no response brief. Even conceding a one-day extension of time to file, Complainant failed to file a response brief timely.

Inexplicably, on June 16, 2008, Counsel for Complainant filed yet another motion for a one-day extension within which to file a response to Respondent's motion. This motion was not ruled upon nor granted. A response brief was filed by facsimile on June 17, 2008.

Respondent filed motions to strike any response brief filed after June 10, 2008, portions of Complainant's evidentiary submission and response brief. Respondent opposed Complainant's June 16, 2008 Motion for Extension of Time.

For reasons advanced by Respondent, and the dilatory actions of Counsel for Complainant, all filings after June 10, 2008, are stricken. Deadlines set by the undersigned are not aspirational and must be met. Thirty days to file a response to Respondent's motion was exceedingly generous, given the history of this motion and the passage of time since its filing. Clearly, Counsel for Complainant had no regard for these settings, the affects upon the undersigned's calendar or upon Respondent and its counsel, and abused the process established on remand to entertain his client's position once again. His failing actions cannot be countenanced.

Accordingly, only the three declarations received on June 10, 2008, are deemed timely and will be considered on remand.

**Summary Decision**

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d)(2001). See, e.g. Stauffer v. Wal Mart Stores, Inc., Case No. 99-STA-21 (ARB Nov. 30, 1999)(under the Act and pursuant to 29 C.F.R. § 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial); Webb v. Carolina Power & Light Co., Case No. 93-ERA-42 @ 4-6 (Sec'y July 17, 1995). This regulatory section, which is derived from Fed. R. Civ. P. 56, permits an administrative law judge to recommend decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." 29 C.F.R. § 18.40(d). Thus, in order for Respondent's motion to be granted, there must be no disputed material facts upon a review of the evidence in the light most favorable to the non-moving party (i.e., Complainant), and Respondent must be entitled to prevail as a matter of law. Gillilan v. Tennessee Valley Authority, Case Nos. 91-ERA-31 and 91-ERA-34 @ 3 (Sec'y August 28, 1995); Stauffer, supra.

The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and a declaration in

opposition to the motion for summary decision. Id. Again, the determination of whether a genuine issue of material fact exists must be made by viewing all evidence and factual inferences in the light most favorable to Complainant. Trieber v. Tennessee Valley Authority, Case No. 87-ERA-25 (Sec'y Sept. 9, 1993).

Specifically, 29 C.F.R. § 18.40(c), relating to "Motion for Summary Decision," requires that:

> "any affidavits submitted with the motion shall **set forth such facts as would be admissible in evidence** in a proceeding subject to 5 U.S.C. [§§] 556 and 557 and shall **show affirmatively that the affiant is competent to testify to the matters** stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denial of such pleading. Such **response must set forth specific facts showing that there is a genuine issue of fact for the hearing**. (Emphasis added).

The purpose of a summary decision is to pierce the pleadings and assess the proof, in order to determine whether there is a genuine need for a trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Where the record taken as a whole could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial. Id.

In considering the appropriateness of a motion for summary decision under the employee protection provisions of the Energy Reorganization Act, provisions which are analogous to those applicable in this matter, the Secretary has noted that where there is no protected activity or any discrimination as a result of protected activity, there is no cause of action. Richter v. Baldwin Assocs., Case No. 84-ERA-9 @ 3 (Sec'y Mar. 12, 1986). Under Richter, "any facts which are probative of whether a complainant engaged in protected activity or whether adverse action taken against the complainant was in retaliation for a protected activity are material facts. A dispute as to such probative facts demands the denial of a motion for summary decision and requires that a hearing be held to resolve the disputed facts." Id. The Secretary amplified this standard in Bassett v. Niagara Mohawk Power Co., Case No. 86-ERA-2 (Sec'y. July 9, 1986), wherein she stated that "it is not required that every element of a legal cause of action be set forth in an employee's . . . complaint." Id. @ 4.

Lastly, the U.S. Supreme Court has cautioned that "summary procedures should be used sparingly . . . where motive and intent play lead roles . . . It is only when witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." Pollar v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 491 (1962).

Accordingly, in order to withstand Respondent's Motion, it is not necessary for Complainant to prove his allegations. Instead, he must only allege the material elements of his **prima facie** case. Bassett, @ 4. Whether the alleged acts actually occurred or whether they were motivated by the requisite animus are matters which cannot be resolved conclusively until after the parties have presented their evidence at a formal hearing.

Respondent argues that Complainant cannot establish that WDC was his employer at the time of the alleged discrimination. Respondent has presented evidence that Complainant's application for employment, letter of hire, employee profile, direct deposit slips and insurance coverage correspondence contain no support for a conclusion that WDC was his employer at the time of the alleged discrimination. There is no evidence that WDC controlled the time, manner and context of Complainant's employment. Rather, deposition testimony reveals Complainant assumed he was employed by WDC.[1] (Complainant's deposition, p. 204).

Respondent argues, and I find, that Complainant's declaration (Exhibit 1), the declarations of Scott Lindsey and Steve Buttram (Exhibits 2 and 3) are riddled with inadmissible hearsay statements, contradictions of Complainant's prior sworn deposition testimony, and conclusory statements which have no factual foundation. Respondent correctly argues that assumptions are no substitute for evidence. See Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998)(Conclusory allegations, conjecture, and speculation, however, are insufficient to create a genuine issue of fact); Evers v. General Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985)(Conclusory allegations without specific supporting facts have no probative value."

[1] It is noted that WDC is the only entity named by Complainant in his complaint. Respondent correctly avers that identifying WDC as a subsidiary to another entity does not name the other entity as a party. See Klopfenstein v. PCC Flow Technologies Holdings, Inc., Case No. 2004-SOX-11 (ALJ July 6, 2004; ARB May 31, 2006).

Only facts determinative of an issue to be tried are material, and the party with the burden of proof on that fact must come forward with admissible evidence sufficient to satisfy every element of his claim. Complainant cannot substitute speculation or argument for evidence.

Respondent argues that Complainant has presented no evidence that he engaged in protected activity. He did not raise environmental concerns with any government agency or entity. He did not make any internal complaints to Respondent and no employee concerns were filed. Respondent argues Complainant has not alleged nor shown that his concerns were "grounded in conditions constituting reasonably perceived violations of environmental acts." Complainant's deposition testimony establishes that his concerns were **occupational safety issues**, rather than environmental, which are hazards not considered protected activity under the environmental acts.[2]

The proffered evidence shows that Complainant worked at Anniston Chemical Weapons Incinerator as a CHB operator from March 2003 to October 2004. As a CHB operator, Complainant received a copy of the substance abuse procedure and signed a document agreeing to abide by such procedure. (Complainant's deposition, Exhibits 27-28). As CHB operator, Complainant was also aware of an employee concerns program and understood he was to report his concerns to Human Resources. Upon being hired, he agreed to abide by certain standards of conduct. As a CHB operator, it is undisputed Complainant was required to obtain and maintain a security status from the Chemical Personnel Reliability Program (CPRP), which was operated by the U.S. Army, not his Employer. (Complainant's deposition, Exhibits 6-7). Complainant was required to report any vulgar, abusive or threatening language or conduct, as was his Employer. (Complainant's deposition, Exhibit 8).

On October 10, 2004, Complainant's CPRP certification was revoked by the U.S. Army, not Complainant's Employer, based on inappropriate threatening and intimidating behavior that occurred on September 10, 2004, for which other employees were terminated. (Complainant's deposition, Exhibit 21). Respondent assisted Complainant in his appeal of the revoked certification which was denied on October 18, 2004, by the Certifying Officer

[2] In his declaration, Complainant contradicts his deposition testimony that the sole concern expressed was his belief that fellow workers could be crushed by lifting the EONC on September 10, 2004, by claiming the arguable presence of chemical agent in an effort to enhance the nature of his activity. Respondent correctly notes that although, arguably Complainant could have complained, he did not complain of this potential hazard on September 10, 2004.

of the U.S. Army. Respondent argues that no employee has been retained after their CPRP certification was revoked, which required Complainant's involuntary resignation and loss of other job opportunities with Employer. Complainant has presented no admissible evidence, other than conclusory allegations, to the contrary.

Respondent further avers that even assuming Complainant could establish a **prima facie** case, summary decision remains appropriate because the undisputed evidence establishes that Employer had legitimate, non-discriminatory, non-pretextual reasons for Complainant's involuntary resignation. Complainant has failed to offer any admissible evidence that Employer's reasons are not true and that protected activity was the true reason for his resignation. Complainant has offered no facts suggesting that the true reason for his involuntary resignation was retaliatory. There is no evidence of animus or Employer influence of the U.S. Army's decision to revoke Complainant's CPRP certification. There is no admissible evidence that the U.S. Army did not follow its usual investigative procedure. Furthermore, Complainant has not offered any admissible evidence that any similarly situated employee or comparator was retained under such circumstances. Moreover, Employer argues it selected another, more-qualified employee to fill a utility maintenance department job for which Complainant had applied.

In sum, Complainant has not shown any probative material facts that he engaged in protected activity within the meaning of the alleged environmental Acts or that Respondent retaliated against him with adverse action for his alleged protected activity.

In view of the foregoing, and having reviewed Respondent's Motion and exhibits, Complainant's "Complaint of Discrimination" consisting of 157 paragraphs and 31 pages with no supportive attestation or affidavit of truthfulness accompanying the Complaint and Complainant's three proffered declarations, and in the absence of any further timely response, I find and conclude there are no disputed material facts that Complainant offered any evidence that WDC was ever his Employer, that he ever made a protected complaint under any of the six environmental Acts or that there is a causal nexus between any alleged complaint made by him and Employer's decision to require his involuntary resignation. Based on the pleadings before me, I further find

and conclude that Complainant did not engage in protected activity nor did any discrimination occur as a result of any protected activity and, accordingly, Complainant cannot sustain his cause of action. Therefore, Respondent is entitled to summary decision.

## ORDER

In view of the foregoing findings and conclusions,

**IT IS HEREBY RECOMMENDED** that Respondent's Motion for Summary Decision be **GRANTED.**

**ORDERED** this 8th day of July, 2008, at Covington, Louisiana.

A

LEE J. ROMERO, JR.
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 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. The date of the postmark, facsimile transmittal, or e-mail communication 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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

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 the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. 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, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).