U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 October 2004

Case No.: 2002-WPC-00002

In the Matter of

FRANK LeBRON
Complainant,

v.

CITY OF RALEIGH, NORTH CAROLINA
Respondent.

Appearances:

On Behalf of the Complainant:

Pro se

On Behalf of the Respondent:

Dorothy K. Leapley, Esq.
Dan McLawhorn, Esq.

BEFORE: Richard K. Malamphy
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a case that arises under the employee protection provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1367 (1988).

A formal hearing was held in Raleigh, North Carolina, on June 2, 2004, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Each exhibit in the record has been carefully considered regardless of whether it is specifically mentioned in this recommended decision.

I. PRELIMINARY MATTERS[1]

At the hearing, JX 1 – 36 and EX 1 – 41 were entered into the record. Mr. LeBron assured the Court that he was willing to proceed *pro se* in this matter, and the undersigned Administrative Law Judge found him competent to do so. Tr. at 4. Mr. LeBron made no objection to the admission of EX 40 and 41 which are Requests to Admit by the City. Mr. LeBron did not reply to the Requests; thus, they are deemed admitted. Tr. at 6; 29 C.F.R. § 18.20.

II. ISSUES

A. Whether Complainant can establish a *prima facie* case under the Water Pollution Control Act's whistle-blower provision.

B. Whether Complainant was terminated for a legitimate, non-discriminatory, non-pretextual reason.

III. CONTENTIONS

A. Complainant's Contentions

While Complainant admits that he placed a picture of Osama bin Laden in a delivery person identification book at his water plant, he asserts that he was fired because of his history of complaining to his employer about conditions at the plant. See EX 4d.

Complainant alleges he had discussed the plant's pay and staffing problems with his supervisor numerous times since 1998, and that those problems led to decreased water quality. Id. at 37. Also in 1998, the City sought a public utilities easement across Complainant's property; Complainant contested the easement and was very critical of the City's actions in both obtaining the easement and in constructing a pipeline through his property. Id. Furthermore, Complainant claims that in 2001, the staff at the water plant falsified results on some required lab tests and failed to perform others. Id. at 37, 38.

Complainant contends that his complaints and criticisms were met with retaliation. Id. at 37. Specifically, Complainant states that he received undesirable work schedules and that his actions were scrutinized more closely than that of his fellow employees, and that his complaints eventually led to the termination of his employment. Id.

Complainant characterizes the incident with the bin Laden photograph as a private joke between friends. Id. at 38.

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[1] *The following abbreviations will be used as citations to the record:*

JX - Joint Exhibits;
TR - Transcript of the Hearing
CX - Complainant's Exhibits; and
EX - Employer's Exhibits.

B. Respondent's Contentions

Respondent maintains that Complainant was fired for a legitimate, non-discriminatory reason: Respondent was "shocked" by Complainant's placing a photograph of Osama bin Laden in the security notebook and believed that it showed poor judgment. Respondent's Proposed Recommended Decision & Order at 14. (Hereinafter "Respondent's Brief.")

Initially, Respondent argues that the complaints alleged by Complainant do not constitute protected activity. Id. at 16. Respondent then states that even if the complaints were protected activity, the required nexus between the complaints and the termination is missing. Id. at 17 – 19. Furthermore, Respondent contends that Mr. Crisp – the terminating official – did not know of the complaints at the time of the firing. Id. at 19. Finally, the Respondent asserts that the termination was based on a legitimate, non-discriminatory, non-pretextual reason. Id. at 20 – 21.

IV. FINDINGS OF FACT

The facts of this case are not disputed.[2] The Complainant, Mr. LeBron, was employed by the City of Raleigh from March 22, 1993, until he was fired effective October 15, 2001. EX 40 a.

Complainant worked at the E.M. Johnson Water Treatment Plant. At the time, the plant, which serves Raleigh, North Carolina, provided drinking water for approximately 330,000 people. EX 40 b. During Mr. LeBron's employment, Brad Boris was his immediate supervisor. EX 40 a. John Garland was the plant superintendent. EX40 b. Dale Crisp, the Director of Public Utilities, made the ultimate decision to terminate Mr. LeBron. Id.

Mr. LeBron was promoted to Treatment Plant Operator II on July 16, 1994. EX 40 a. Operator IIs are the lead workers on each shift; they are responsible for the accuracy and quality of work performed on the shift and they supervised Operator Is. Id. Mr. LeBron received regular salary increases at the plant. Id.

Following the September 11th attacks, the City of Raleigh implemented new security measures at its water treatment facility. EX 41 a. The City was motivated to do so by FBI terrorism warnings stating that public water supplies were a possible target for terrorist attack. Id. Part of the new security measures included security guards at the entrance of the plant that verified the identity of everyone that entered the plant. Id. The security measures also included the compilation of photographs of all chemical delivery truck drivers that came to the plant. Id. The photographs were placed into a notebook so that plant personnel could easily verify that deliveries were being made by the employee dispatched by the chemical vendor. EX 41 b.

On October 7, 2001, Complainant inserted a photograph of Osama bin Laden into the notebook of approved chemical delivery drivers as a joke. Id. Despite John Garland's recommendation that Complainant receive a less severe sanction for this incident, Dale Crisp terminated Mr. LeBron's employment. Id. The termination notice stated:

[2] Employer's Exhibits 40 and 41 are Requests to Admit to which Mr. LeBron never responded; when given the opportunity at the hearing, he did not object to them. Thus, they are deemed admitted. Tr. at 6; 29 CFR § 18.20.

> This act [placing the picture of Osama bin Laden in the security notebook] is shocking to me and very disappointing, especially for a TPO II of your experience. It demonstrates extremely poor judgment and in light of recent events, a real lack of professionalism and sensitivity. When I review your employment history, it shows a trend that continues through this incident that leads me to believe that your conduct is not ever going to improve.

Id.

On January 15, 2002, Complainant appealed his termination to the Civil Service Commission for the city of Raleigh. Id. While Complainant listed "retaliation" as one of the grounds for his appeal, he admitted "that just cause existed to impose some form of discipline for his actions and withdrew his claim of 'retaliation.'" Id. The appeal was denied on June 4, 2002. Id.

On November 14, 2001, Complainant filed a complaint with the U.S. Department of Labor, Occupational Safety and Health Administration, alleging that "he was discharged in reprisal [for] raising numerous water quality and safety issues resulting from Respondent's inability to staff water plant with fully qualified operators." EX 40 at b. The OSHA Regional Administrator found no "pretextual motivation by the Respondent." Id.

V. DISCUSSION

While Complainant has established a *prima facie* case under the whistle-blower statutes, this Court is mindful that an employer may ordinarily "terminate an employee for any reason, good or bad, or for no reason at all, as long as the employer's reason is not proscribed by a Congressional statute." Kahn v. United States Sec'y of Labor, 63 F.3d 271, 279 (7th Cir. 1995). Furthermore, this Court does not "sit as a super-personnel department that reexamines an entity's business decisions;" whistle-blower protection is only available in a limited context. McCoy v. WGN Cont'l Broadcasting Co., 957 F.2d 368, 373 (7th Cir. 1992).

This Court has jurisdiction in this case only to determine whether Mr. LeBron's termination violated the employee protection provisions of the FWPCA. It does not matter whether the discharge was warranted under the circumstances, but only whether Mr. LeBron lost his job in retaliation for engaging in protected activity. Seraiva v. Bechtel Power Corp., 84-ERA-24 (ALJ Jul. 5, 1984), adopted (Sec'y Nov. 5, 1985).

Therefore, this Court finds that, while the Respondent's choice to terminate Complainant for placing a picture of Osama bin Laden in a notebook as a joke may have been an over-reaction by Mr. LeBron's supervisor, it is a legitimate, non-discriminatory, non-pre-textual reason for his termination.

A. Claimant's Prima Facie *Case*

Complainant has asserted a claim under the whistle-blower provisions of the Federal Water Pollution Control Act. Section 507 (a) of the Act states:

> No person shall fire, or in any other way discriminate against . . . any employee . . . by reason of the fact that such employee . . . has filed, instituted, or caused to be filed or instituted any proceeding resulting form the administration or enforcement of the [Federal Water Pollution Control Act.]

33 U.S.C. § 1367 (a).

Complainant, Mr. LeBron, was *pro se* in this proceeding. While Mr. LeBron is entitled to "some adjudicative latitude because of his *pro se* status" in this case, he must still establish a *prima facie* case under the applicable whistle-blower statute. Childers v. Carolina Power & Light Co., Case No. 97-ERA-32 (ALJ Jan. 29, 1998) (citing Saporito v. Florida Power & Light Co., 94-ERA-35 at 6 (ARB Jul. 19, 1996); see also Grizzard v. Tennessee Valley Authority, 90-ERA-52 at n.4 (Sec'y Sept. 26, 1991)). The employee's burden in establishing a *prima facie* case is "not onerous; rather, a *prima facie* showing is 'quite easy to meet.'" Kahn v. United States Sec'y of Labor, 64 F.3d 271, 277 (7th Cir. 1995) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

For Complainant to establish a *prima facie* case entitling him to protection as a whistle-blower under any of these provisions he must show: 1) he was an employee of the Respondent; 2) he engaged in protected conduct; 3) the Respondent was aware of that conduct and took adverse action against him; and 4) the evidence creates an inference that the protected activity was the likely reason for the adverse action. Simon v. Simmons Foods, Inc., 49 F.3d 386, 389 (8th Cir. 1995); Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor, 992 F.2d 474 (3d Cir. 1993); see also NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) (holding that use of the test from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is permissible under the environmental safety statutes).

The first element – the employment relationship – is undisputed in this case; the other elements are discussed below.

Protected Activity

First, the Court notes that intracorporate complaints may be protected activity under the environmental protection statutes. Passaic Valley, 992 F.2d 474; see also Marshall v. Whirlpool Corp., 493 F.2d 715, 724-725 (6th Cir. 1979), aff'd 445 U.S. 1 (1980) (holding that making a complaint is an implied initial step in commencing a formal proceeding and deserves protection under remedial safety and health legislation.) Furthermore, the form of a complaint is not important – an informal complaint to a supervisor may be enough to constitute protected activity. Samodurov v. Gen. Physic Corp., 89-ERA-20 (Sec'y Nov. 16, 1993).

In order for a complaint to constitute protected conduct, the Complainant's belief must be "factually reasonable" and the Complainant "must reasonably believe the action violates an environmental statute." Niedzielski v. Baltimore Gas & Elec., 2000-ERA-4 at 35 (ALJ Jul. 13, 2000). The complaint may serve as a basis for a whistle-blower claim even if it is not

"ultimately substantiated" as long as it is "grounded in conditions constituting reasonably perceived violations of the environmental acts." Id. (quoting Minard v. Necro Delamar Co., 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8 (internal quotation marks omitted)).

While the requirement of protected conduct is broadly construed under whistle-blower statutes, not every "incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern" is protected under the statutes. Am. Nuclear Resources, Inc. v. United States Dept. of Labor, 134 F.3d 1292, 1295 (6th Cir. 1998) (citing Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568, 1574 (11th Cir. 1997)). Rather, in order to be considered protected activity, an employee complaint must "implicate safety definitively and specifically." Am. Nuclear, 134 F.3d at 1295. General inquires regarding safety are not protected activity, but particular, repeated concerns about safety procedures will give rise to whistle-blower protection. Bechtel Const. Co. v. Sec'y of Labor, 50 F.3d 926, 931 (11th Cir. 1995).

In this case, Complainant alleges that he made several complaints regarding safety at the water treatment plant. See EX 4d (Hereinafter "OSHA Complaint"). While complaints that are too general do not comprise protected activity under the Act, see Valerio v. Putnam Assoc., Inc., 173 F.3d 35 (1st Cir. 1999), several of Complainant's allegations at least arguably meet the protected activity requirement.

First, while the City's desire for a public utilities easement over Complainant's land likely strained Complainant's relationship with Respondent, the controversy regarding the easement did not constitute a complaint within the meaning of the Act. A complaint regarding the handling of an easement over the employee's personally owned land simply does not fall within the statutory rubric of the FWPCA employee protection provision. Thus, the easement complaint cannot form the basis of a whistle-blower complaint.

Second, Complainant addressed numerous complaints to his supervisors regarding under-staffing at the water plant and the poor wages and low morale that he believed led to the lack of qualified personnel there. OSHA Complaint at 37. These complaints were made in 1998 and 1999. Id. As Respondent points out, complaints about scheduling and complaints about performance evaluations are not generally protected. See Bailey v. System Energy Resources, Inc., 89-ERA-31,32 (Sec'y Jul.16, 1993); Childers v. Carolina Power & Light Co., ARB No. 98-077, ALJ No. 1997-ERA-32 (ARB Dec.29, 2000). Since, however, Mr. LeBron's concerns about under-staffing are reasonably related to safety and the purpose of the Act in maintaining water quality, determining whether these concerns are sufficiently implicated by the FWPCA is, in the words of the Administrative Law Judge in Niedzielski, "a close call." Niedzielski, 2000-ERA-00004 at 35.

This Court is persuaded that Mr. LeBron's complaints regarding staffing were sufficiently related to the purpose of the FWPCA to comprise protected activity under the whistle-blower statute. Mr. LeBron specifically tied his complaints regarding staffing and pay to problems with water quality including improper "chlorine residual," running out of chemicals, and failure to "feed phosphate." OSHA Complaint at 37. Here, the nexus between inadequate staffing and safety concerns is concrete, rather than nebulous. Niedzielski, 2000-ERA-4 at 36.

However, for reasons discussed below, these complaints are too distant in time from Complainant's termination to form the basis of his claim.

Third, beginning in August, 2001, Complainant told his supervisor, Brad Boris, that some of the plant personnel were falsifying lab reports. Tr. at 10. Mr. Boris told Mr. LeBron to copy the data log showing that required tests had not been done and turn it in to him weekly. Tr. at 11.

At the hearing, Complainant explained that the data log for September 26, 2001, showed that instead of doing the required hourly tests, the operators only did five tests in an eight hour shift. Tr. at 11 – 12.; see also EX 4d at 147; EX 4d at 148 – 194 (data log dated Sept. 26, 2001).

According to Complainant, records from the plant showed that the operators were entering test results from tests that had not been done; Complainant concluded that they were falsifying records. Id. Complainant also testified that the data log shows that the plant operators failed to test plant effluent for manganese and iron levels. Tr. at 13. These allegations clearly implicate the purpose of the Act; a failure to properly test water supplies reasonably implicates the safety provisions of the environmental statutes. Thus, the September 2001 complaint is protected activity under the Act.

Employer's Knowledge of Conduct and Adverse Action

Even though the person who actually discharges a complainant is not aware of the protected activity at the time that he discharged the complainant, respondent is deemed to be aware of the protected activity if an employee whose input contributed heavily to the decision to terminate was aware of the protected activity. Thompson v. Tennessee Valley Authority, 89-ERA-14 (Sec'y Jul. 19, 1993).

A complainant can show that the respondent had knowledge of his protected activities when it took the adverse action by either direct or circumstantial evidence. Samdurov v. Gen. Physics Corp., 89-ERA-20 (Sec'y Nov. 16, 1993). In either case, "the evidence must establish that an employee of the respondent with authority to take the complained of action, or an employee with substantial input in that action had knowledge." Mosely v. Carolina Power & Light, 94-ERA-23 (ARB Aug. 23, 1996) (citing Bartlik v. Tennessee Valley Authority, 88-ERA-15 (Sec'y Dec. 6, 1991) slip op. at 7, n.7; (Sec'y Apr.7, 1993) slip. op. at 4, n.1; aff'd 73 F.3d 100 (6th Cir. 1996).

Complainant testified that Mr. Garland, the plant superintendent, discovered that Mr. LeBron had been turning data logs in to Mr. Boris. Tr. at 14. Essentially, Complainant theorizes that Mr. Garland was trying to cover up the plant's failure to properly complete water tests: "[t]here would have been a considerable amount of trouble for the city if [the failure to test] had come out." Id. at 14 – 15. Mr. LeBron believed Mr. Garland knew "that if he presented the Osama bin Laden picture in an improper manner to Mr. Crisp, he would get a knee jerk reaction from Mr. Crisp and get me fired. And I think this is exactly what occurred. Consequently, they did not have to address the falsification" claim. Tr. at 15 – 16.

E-mails addressing the Osama bin Laden picture incident show that both Mr. Garland and Mr. Boris were part of the termination decision in this case. JX 31 – 33. Mr. Crisp, who actually terminated Mr. LeBron, learned of the bin Laden incident from Mr. Boris. Tr. at 56.

On these facts, this Court may draw a reasonable inference that an employee with substantial input into the firing decision had knowledge of protected activity. Thus, Complainant has met his burden as to this element of his *prima facie* case.

Nexus Between Protected Conduct and Adverse Action

When an adverse action closely follows protected activity, causation may be inferred. See, e.g., Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989); Mitchell v. Baldridge, 759 F.2d 80, 86 (D.C. Cir. 1985). When, however, time has passed between the protected activity and the allegedly retaliatory action, the inference becomes suspect. See e.g. Burrus v. United Tel. Co. of Kansas, Inc., 683 F.2d 339 (10th Cir. 1982) (holding three years between the complaint and the termination is too long to give rise to an inference of retaliation); Blackburn v. Metric Constructors, Inc., 86-ERA-4 (Sec'y June 21, 1988) (holding four months between the complaint and the termination is a sufficiently short period of time to give rise to the inference).

With that principal in mind, the Complainant's concerns over pay and staffing that he reported to his supervisors in 1998 and 1999 cannot form the protected activity necessary to his whistle-blower claim. The two-to-three year time period between the complaints and the termination eliminate the necessary causal nexus. The record supports this conclusion: while Complainant's personnel file does contain written warnings for unrelated incidents during this time period (JX 15, 16, 17, 18, 19), Complainant also received numerous positive evaluations during that time period and several pay increases – there is scarce evidence of retaliation in his personnel file during this time period. See JX 5, 6, 7 (annual evaluations showing outstanding and above standard ratings for the years 1997-1998, 1998-1999, 1999-2000); EX 6 (documentation showing Complainant's pay raises during his tenure with the city).

The September, 2001, complaint regarding water testing, however, is close enough in time to raise an inference of retaliation. The data log submitted into evidence is dated September 28, 2001; Respondent fired Mr. LeBron effective October 15, 2001. Thus, the September 2001 complaint is still a viable basis for Mr. LeBron's claim.

The Complainant in this case, Mr. LeBron, has successfully established a *prima facie* case under the Act. At this point in the analysis, the burden of proof shifts to the Respondent to show a legitimate reason for termination. For the reasons stated below, this Court finds that Respondent did have a legitimate reason for terminating Mr. LeBron.

B. Employer's Burden to Show Legitimate Reason for Termination

Even if the Complainant is able establish a *prima facie* case under the whistle-blower provisions, the Respondent Employer may rebut the inference of retaliatory discharge by proving a legitimate, non-discriminatory reason for terminating the employment. Passaic Valley, 992 F.2d at 481.

In this case, the Respondent has presented substantial evidence showing that it legitimately fired Complainant for placing a picture of Osama bin Laden in a security notebook on October 7, 2001, rather than for his safety concerns.

First, the Respondent established the existence of FBI warnings in the days following the September 11th attacks that necessitated increased security in fields dealing with chemicals. EX 22. Second, Respondent showed its implementation of increased security measures following the attacks. EX 23. These new security measures included making a notebook containing pictures of chemical truck drivers; when the drivers made their deliveries, plant personnel were to compare the photographs of the drivers with the person making the delivery. EX 27. Respondent secured the co-operation of its vendors, who sent pictures of their employees for the notebook. EX 29 – 32.

While Complainant was fired a week after he spoke to Mr. Garland regarding the data log (Tr. at 16), this Court is persuaded by Respondent's argument that the notebook incident was an intervening event that created a legitimate reason to fire Complainant. Respondent's Brief at 18. Complainant does not deny having placed the picture of Osama bin Laden in the notebook. Tr. at 22. Given the tensions caused by the September 11th attacks and the threats posed to public utilities at that time, this Court believes that Respondent has shown by a preponderance of evidence that Complainant's light-hearted reaction to the security measures that it established was a legitimate reason to fire Complainant.

Pretext

When the Respondent articulates a legitimate, non-discriminatory reason for the Complainant's discharge, the Complainant has the ultimate burden of persuading the Court that the reasons articulated by the Respondent are pretextual. Nicholas v. Bechtel Constr., Inc., 87-ERA-44 (Sec'y Oct. 28, 1992) (as corrected by Oct. 30, 1992, Errata Order). Complainant may meet this burden by showing that the unlawful reason more likely than not motivated the respondent or by showing that the proffered explanation is unworthy of credence. Id.

For the reasons stated above, this Court finds that the Respondent's proffered explanation is worthy of credence. The Respondent has shown and this Court takes official notice that the FBI issued terror warnings in the weeks following September 11th, that there was heightened concern about security and that Respondent was making an effort to increase security at its facility. While Respondent may have over-reacted in firing Complainant, it did not act in such an outrageous manner that its explanation is unbelievable.

Furthermore, this Court finds that the Complainant has not met his burden in showing that his termination was more likely than not motivated by unlawful reasons. Complainant did not present any witnesses to support his theory that he was actually fired for his history of safety-based complaints or his recent activities with the data logs. Rather, as discussed above, Complainant was likely fired because of the notebook incident. Mr. Crisp's reaction to the notebook incident was nearly immediate, and there was no evidence presented at the hearing or in the pleadings that supports Complainant's theory that Mr. Garland or Mr. Boris influenced Mr. Crisp and persuaded him to fire Complainant in an attempt to cover up the data logs or as retaliation for any complaints that he may have made. Tr. at 64 – 68; JX 31; JX 32 .

Dual Motive

Even assuming *arguendo* that both the notebook incident and the whistle-blowing activities were reasons for Mr. LeBron's termination, Respondent will prevail. When both whistle-blowing activities and legitimate reasons motivate a decision to terminate, a dual motive analysis applies: "once the employee shows that illegal motives played some part in the discharge, the employer must prove that it would have discharged the employee *even if* he had not engaged in protected conduct." Mackowiak v. Univ. Nuclear Sys., Inc., 735 F.2d 1159, 1164 (9th Cir. 1984) (emphasis in original); see also Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977).

In Pogue v. United States Dept. of Labor, 940 F.2d 1287 (9th Cir. 1991), the Ninth Circuit pointed out that the employee there had received mostly "satisfactory" performance evaluations during her employment, and that before her whistle-blowing activities she had never received any formal disciplinary actions. Id. at 1290. Thus, the Court concluded that the employer there did not meet its burden in that case.

That is not the situation before this Court. Instead, while Mr. LeBron did receive overall good evaluations and regular pay increases during his time with Respondent, he was subject to numerous disciplinary actions during his employment, including a six-month probationary period that ran from January 17, 2001 to July 17, 2001. EX 4d at 45; see also EX 4d at 64 – 73; 75 (memorandum indicating that another disciplinary incident could lead to termination); 76 (five-day suspension); 91; 93; 94 – 96 (inappropriate comments on equipment malfunction sheets); 98 – 99 (written warning for "attitude"). Mr. LeBron's employment was apparently precarious even before the notebook incident, making it likely that he would have been terminated regardless of his whistle-blowing activities.

Again, for the reasons discussed above, this Court finds that Employer has met this burden. While Mr. LeBron established a *prima facie* whistle-blower case, the City has successfully rebutted it. On these facts, and after reviewing the entire record which includes Mr. LeBron's personnel file, it is likely that Mr. LeBron would have been fired for the notebook incident regardless of any whistle-blowing activities. At the time he was fired, Mr. Crisp believed that Mr. LeBron was on probationary status at work; Mr. Crisp testified at the hearing in this case that "you are basically subject to be dismissed over almost anything" while on probation. Tr. at 67.

Since this Court does not sit "as a super-personnel department," Kahn, 63 F.3d at 279 (7th Cir. 1995), it can only determine whether the termination in this case was unlawful under the employee protection provisions of the Act. In this case, the termination was not proscribed by the whistle-blower provisions of the Federal Water Pollution Control Act.

VI. ORDER

It is respectfully recommended to the Secretary of Labor that the complaint be DISMISSED.

A

Richard K. Malamphy
Administrative Law Judge

RKM/vlj
Newport News, Virginia

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.