U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 August 2004

CASE NO.: 2004-CAA-00002

In the Matter of:

JAMES McKOY
Complainant

v.

NORTH FORK SERVICES JOINT VENTURE
Respondent

Appearances:
Marty Glennon, Esq.
Kristina Judice, Esq.
Robert McGovern, Esq.
For Complainant

Benjamin Thompson, Esq.
Jennifer Miller, Esq.
Stephen Sundheim, Esq.
For Respondent

Before:
Hon. Paul H. Teitler
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of the Clean Air Act ("CAA"), 42 U.S.C. §7622, the Water Pollution Control Act ("WPCA"), 33 U.S.C. §1367, and the implementing regulations found at 29 C.F.R. §24.3.[1] James McKoy ("Complainant") filed his complaint with the Occupational Safety and Health Administration ("OSHA") on July 7, 2003. (RX 1).[2] OSHA conducted an investigation and issued an October 28, 2003 letter in which it summarized its conclusion that North Fork Services Joint Venture ("Respondent") violated the whistleblower protection provisions of the CAA and WPCA when it terminated Complainant's

[1] Although commonly known as the Clean Air Act, the statute was passed by Congress as the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970), amending the 1967 Air Quality Act, Pub. L. No. 90-148, 81 Stat. 485 (1967). The 1970 legislation was later amended in 1977 and 1990.

[2] Abbreviations used throughout this recommended decision and order include: "CX" for Complainant's exhibits, "RX" for Respondent's exhibits, and "TR" for the transcript of the January 26-27, 2004 and April 27-28, 2004 hearing.

employment. (RX 2). Respondent filed a timely appeal and the matter was referred to the Office of Administrative Law Judges on November 3, 2003.

A formal hearing was held in New York City on January 26-27, 2004 and April 27-28, 2004. Post-hearing briefs were due 30 days after the receipt of final transcripts. (TR 692). Respondent received its copy of the transcript approximately eleven days later than did Complainant and on June 8, 2004 requested that the parties be given until July 9, 2004 to submit their briefs. On June 8, 2004, I granted Respondent's request and Complainant and Respondent filed their briefs on July 9, 2004. On July 14, 2004, Respondent filed a motion requesting that I allow it the opportunity to file a reply brief. On July 16, 2004, I granted Respondent's motion and allowed both parties until July 28, 2004 to submit reply briefs. Complainant and Respondent filed their reply briefs on July 28, 2004.

Complainant contends that he engaged in protected activity when employed by Respondent, and that Respondent discriminated against him as a result of that protected activity by terminating his employment on June 20, 2003. Specifically, Complainant contends that he reported health and safety concerns to an official of the Department of Homeland Security (DHS) and an aide to Senator Hillary Clinton. (*Complainant's post-hearing brief* at 1). Respondent denies it took any adverse personnel action against Complainant. Respondent alleges that it terminated Complainant because he violated an established company policy by being absent from his work area without first obtaining supervisor approval. (*Respondent's post-hearing brief* at 17). Based on the evidence contained in the record of this proceeding, it is recommended that this case be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

Complainant was employed by Respondent and its predecessor, LB&B Associates Incorporated (LB&B), as a heating, ventilation and air-conditioning (HVAC) mechanic from November of 2002 until his termination on June 20, 2003. Complainant was assigned to the U.S. Department of Agriculture's Plum Island Animal Disease Center (PIADC) on Plum Island, New York. Plum Island is a federally owned and located off of the northeastern tip of Long Island. It is accessed by ferry from Orient Point, Long Island and Old Saybrook, Connecticut. (CX 5 at 6; TR 47). PIADC is the sole facility in the United States for the study of live animal-borne foreign diseases, such as African swine disease, camelpox and foot-and-mouth disease. (TR 155). The release of these diseases from the facility is prevented through the use of a specially designed biocontainment area equipped with air seals on its doors and a negative air pressure. (CX 5 at 8). The negative pressure forces the air within the biocontainment area to pass through a special filter system before being exhausted into the environment. (CX 5 at 8).

LB&B contracted with the Department of Agriculture in March of 1996 to operate the support facilities at PIADC. (TR 47). Its contract expired on January 7, 2003 and the task was assumed by Respondent, a joint venture between LB&B and Olgoonik Logistics LLC, a Native American entity based in Alaska. (TR 285-286, 570). LB&B's maintenance and operations employees were represented by the International Union of Operating Engineers, Local 30 (Local

30) until the union went on strike in March of 2002. (TR 47-48). LB&B, and later Respondent, hired non-union workers to replace the striking members of Local 30. (TR 574-575). Complainant, who was hired by LB&B but retained by Respondent when it took control in January of 2003, was one of these replacement workers. (TR 285-286, 575). On June 1, 2003, control of PIADC passed to the Department of Homeland Security (DHS). (TR 598). Respondent held the contract for operations and maintenance support at PIADC until the contract expired on December 31, 2003. (TR 570).

B. Evidence

My decision in this case is based on the sworn testimony presented at the hearing and the documents admitted into evidence. Each exhibit entered in evidence, although possibly not mentioned in this Recommended Decision, has been carefully reviewed and considered in light of its relevance to the resolution of a contested issue. The relevant evidence and testimony is summarized below.

Complainant's exhibits

CX 4

The flyer distributed by Complainant to fellow employees and supervisors on June 19, 2004:

ONLY YOU CAN MAKE A DIFFERENCE
TAKE CONTROL OF YOUR LIFE
CREATE CHANGE
If you are concerned about a safe work environment
If you are concerned about working conditions
If you are concerned about your health
If you are concerned about the community's health
If you are concerned about deteriorating facilities
If you are concerned about your medical benefits
CONTACT THE INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 30
At
(718) 847-8484
If you want to take control of your life and get the respect
Both you and your family deserve them it is up to you to
Take charge.

CX 5

September 2003 report by the United States General Accounting Office (GAO) titled "COMBATING TERRORISM Actions Needed to Improve Security at Plum Island Animal Disease Center." The report states that there are specific biosafety guidelines that laboratories are required to adhere to. These guidelines establish four levels of biosafety. The level of biosafety a facility is required to maintain depends on the relative risk

presented by the organisms to be studied, with the fourth level being reserved for the most dangerous pathogens, including ebola. PIADC is a biosafety level 3 facility in which "all research is conducted within a specially designed and sealed biocontainment area within the research facility that adheres to specific safety measures. For example, the biocontainment area has air seals on its doors and operates with negative air pressure so that air passes through a special filter system before leaving the system." The report states that "employees and visitors must change into protective clothing before entering the biocontainment area and shower when going between rooms containing different animal diseases and before leaving the biocontainment area." Finally, the report notes that the biocontainment area covers approximately 190,000 square feet of floor space over three levels and that USDA's procedures require that all people and material be decontaminated before leaving the biocontainment area.

CX 6

Complainant's employment records. The records state that Complainant was hired by LB&B on November 13, 2002 as a full-time HVAC mechanic. His supervisor was Ray Corwin and his starting salary was $22.01 per hour plus additional fringe benefits valued at $3.52 per hour. Complainant signed documents acknowledging that he was aware of certain company work rules and LB & B's disciplinary policy. The disciplinary policies listed numerous policy violations that would subject Complainant to progressive discipline, including "[f]ailure to personally and properly notify the immediate Supervisor or Project Manager when absent or tardy," "[p]osting or removing notices on the bulletin board without Company approval," "[d]istributing printed material on Company or Customer premises without permission," and "[f]ailure to be at the designated work area ready to work at the regular starting time, including start of shift, after breaks, or after meal-time." Policy violations that would result in immediate discharge include "[s]exual harassment" and "[l]eaving the job or work area during work hours without proper supervisory approval." The documents note that the rules listed were not comprehensive and that a complete list was provided in "Disciplinary Action Policy, No. 5.027," which was only available in the Project Manager's office. Complainant indicated on the insurance forms that his wife, Catherine McKoy, was his sole dependent.

CX 7

LB & B policy number 5.027. This policy specifies that, with regard to the discharge of an employee, "[a]ll apparent violations will be thoroughly investigated before any disciplinary action is taken." The policy also lists potential violations of company policy that are essentially identical to those listed in the rules signed by Complainant.

CX 14

September 25, 2003 statement prepared for OSHA by Ronald Primeaux. Mr. Primeaux stated that, at the time, he was employed by respondent at PIADC as the site's Utilities Manager. He wrote that HVAC employees would begin their work shifts by stopping at the powerhouse to check-in with the engineer prior to taking over the operation of the HVAC system. From there the HVAC employees would go to the Chiller Plant to resolve any issues from the previous night requiring attention and then proceed with routine work

and preventive maintenance. Mr. Primeaux wrote that employees were permitted two fifteen minute breaks during the day, usually taken between 10 am and 2 pm, along with one half-hour lunch break taken between 12 pm and 1 pm. Employees were not required to get permission prior to taking their breaks. Mr. Primeaux stated that Complainant was a HVAC mechanic whose duties included monitoring and troubleshooting problems within the Chiller Plant. Mr. Primeaux considered Complainant's duties critical to the operation of PIADC's operations since failure of the chiller system would result in a shutdown of the laboratories. Because of the need to maintain the operation of the chillers, Respondent assigned one HVAC mechanic to constantly monitor the chiller system. On June 19, 2003, Mr. Primeaux stated that he observed Complainant posting a notice on the bulletin board located in the Power Plant's break room. Mr. Primeaux asked Complainant if he had permission to post the notice and Complainant responded that he did not require permission. Mr. Primeaux proceeded to advise Respondent's Project Manager, Matthew Raynes, of Complainant's actions. Mr. Raynes reviewed Respondent's disciplinary action policy and determined that the appropriate action was to issue Complainant a warning. Mr. Primeaux returned to his office at "around 12:25 or 12:45 pm" and drafted a letter explaining to Complainant that he had violated Respondent's policy by posting the notice. At approximately 1:00 pm Mr. Primeaux went to the Chiller Plant to counsel Complainant and give him the letter. However, he could not find Complainant at the Chiller Plant. Joe Franco, Complainant's fellow HVAC mechanic in the Chiller Plant, thought that Complainant might have gone to Building 100. Mr. Primeaux then searched sections of Building 100 where he felt he might have found Complainant, but did not succeed in finding him. Mr. Primeaux then checked to see if Complainant was with Mr. Raynes or had returned to the Chiller Plant. Mr. Primeaux could not find Complainant at either location. Mr. Primeaux wrote that by this point it was nearly 2:00 pm and he was scheduled to attend a meeting regarding employee benefits. Complainant, whose department the meeting was being held for, did not attend. Mr. Primeaux went to the Chiller Plant but again did not find Complainant there. He returned to the meeting, which ended at approximately 2:30 pm. Following the meeting, Mr. Primeaux went back to the Chiller Plant but did not find Complainant. However, upon returning to Building 100 Mr. Primeaux encountered Complainant in the lobby of Building 100. The time was between 2:30 and 2:45 pm. He asked Complainant where he had been and Complainant replied, "I've been with Marc Hollander and Senator Clinton's aide. Do you know who Marc Hollander is?" Mr. Primeaux then escorted Complainant to Mr. Raynes' office, where he explained to Mr. Raynes what Complainant had said. At that point Complainant stated that he was a member of Local 30 and that he had a right to talk to Mr. Hollander and Senator Clinton's aide. Mr. Primeaux then wrote that at no time did Complainant state what he had discussed with Mr. Hollander and Senator Clinton's aide. Mr. Raynes asked Complainant if he had told Mr. Primeaux or laboratory manager Ray Corwin where he was going when he had left the Chiller Plant. Complainant's response was that "he felt did not need to tell anyone where he was headed." Mr. Raynes also asked Complainant if he knew how seriously his actions were being regarded, but Complainant stated that his actions were "something that he felt he had to do, regardless of company policy." Mr. Raynes then asked Complainant why he had not spoken with him instead of Mr. Hollander and Senator Clinton's aide. Complainant responded that he did not do so because he felt he would have been fired as

a result. Mr. Primeaux stated that Mr. Raynes directed Complainant to leave the office. He and Mr. Raynes then determined, based on Respondent's policies, that Complainant should be immediately discharged for leaving his work area without supervisor approval. Complainant was then brought back into the office and informed of their determination. His response was to question where the policy called for his termination. Mr. Raynes then showed Complainant the policy. Mr. Primeaux added that "[i]t was not until later, around 4:30 or 5:00, that I heard any details of what [Complainant] was supposedly discussing with Mr. Hollander and Senator Clinton's aide." He also stated that Complainant never raised safety concerns to him and was "one of my best employees."

Respondent's Exhibits

RX 1

July 7, 2003 letter from Complainant, via his attorney, to Teri Wiggers (sic), regional investigator for OSHA. In the letter, Complainant alleged that he told Senator Clinton's aide and Mr. Hollander about "security deficiencies at PIADC relating to viruses and diseases, which [Complainant] believed posed a threat to the general public."

RX 2

October 28, 2003 letter from Patricia K. Clark, OSHA Regional Administrator, to Benjamin Thompson, Respondent's attorney. Ms. Clark stated that the evidence in the matter supported a *prima facie* finding that Respondent would not have taken the same unfavorable personnel action of terminating Complainant if he had not engaged in protected activities. Ms. Clark found that Complainant engaged in protected activities under the CAA and WPCA when he stated to Mr. Hollander and Senator Hilary Clinton's aide that "Respondent was failing to provide adequate security to protect the unauthorized removal of biological pollutants and materials from the Containment Lab and their dispersal into the air and water." The investigator additionally found that Respondent had knowledge of Complainant's protected activities because Complainant had provided his supervisor with a copy of a leaflet that contained statements regarding safety and security concerns at PIADC. Adverse treatment occurred when Complainant was discharged on June 20, 2003 and when Respondent's security escorted Complainant past his fellow workers. Ms. Clark concluded that Respondent did not provide a clear and convincing reason to justify terminating Complainant in the absence of his protected activity.

RX 7

June 24, 2003 memorandum to file written by Christopher Aiello, Respondent's Safety Manager. Mr. Aiello wrote that following a meeting on the morning of June 19, 2003, Complainant approached him explaining that he had a safety concern regarding the operation of an exit door. Complainant was concerned that the door, which was normally locked and could be opened only by using a security badge, would remain locked during a fire emergency. Mr. Aiello explained to Complainant that the door would automatically be unlocked in the event of a fire emergency. While examining the door, an engineer with whom Complainant was familiar happened to walk through the door at issue. Complainant asked the engineer how the door's lock operated and the engineer confirmed

that the door operated as Mr. Aiello had described. When asked if he needed additional confirmation regarding the operation of the door, Complainant responded that he accepted the engineer's explanation

RX 22

July 11, 2003 affidavit by Complainant. In the affidavit, Complainant stated that he was asked by a representative from his union, Local 30, to apply through a job search website for a HVAC technician position at PIADC. The union wanted to have him seek the position in order to allow the union a means of monitoring working conditions on the island and, if necessary, to organize the replacement workers on the island. On the day of his hiring in November of 2002, Complainant signed forms acknowledging his awareness of Respondent's rules and regulations, though he did not have an opportunity to review the documents and was not provided with copies of them. During his time of employment Complainant observed fellow employees Ray Corwin, John Conley and Sandy Luke handling asbestos without utilizing proper safety procedures. On June 18, 2003, Complainant met with Jack Ahern, president and business manager of Local 30. Mr. Ahern asked Complainant to organize the PIADC replacement workers in regard to an upcoming decertification election. At Mr. Ahern's behest Complainant met with John Fitzpatrick, also of Local 30, in order to create an information leaflet for distribution on PIADC. During his lunch break the next day, Complainant first left copies of the leaflet in the Building 102 changing room. He then proceeded to the powerhouse lunch room where he handed copies to Mr. Primeaux and two co-workers. Complainant also posted a copy of the leaflet on the lunch room's bulletin board. Mr. Primeaux commented that Complainant was not allowed to post the leaflet because he did not have permission to do so. Mr. Primeaux then asked Complainant if he was a union member, to which Complainant responded that he was. Complainant then went to the employee's cafeteria of Building 101 where he handed out copies of the leaflet to the operations and maintenance employees he found there. Prior to going to the employees' cafeteria he placed copies of the flyer in the employee mailboxes in Building 101's time office. Complainant finished distributing the leaflets at 12:25 pm and spent the rest of his break, until 12:30pm, in the cafeteria drinking a soda. At 12:30 pm, when his break was over, he returned to his work area in the Chiller Plant. At approximately 1:50 pm Complainant went to Building 100 where he knew there was a meeting attended by representatives from the Department of Homeland Security (DHS) and Senator Clinton's office taking place. He "gently knocked on the door and stuck [his] head in and asked if [he] could speak to someone from [DHS] and Senator Clinton's office regarding health and safety issues on Plum Island." Mr. Hollander of the DHS immediately agreed to meet with Complainant in his office and asked Senator Clinton's aide, Resi Cooper, to join them. During this meeting Complainant introduced himself to Mr. Hollander and Ms. Cooper. He explained that he was a member of Local 30, that he had distributed union flyers earlier in the day, and that he had safety and security concerns regarding PIADC. Complainant related incidents regarding the handling of asbestos, lack of compliance with security procedures, and there being too few deck hands on the ferry servicing Plum Island from Orient Point. At the end of the meeting Mr. Hollander thanked Complainant for coming forward and asked him to encourage others to do so. Complainant wrote that he then left to return to work and that the meeting, which had lasted approximately fifteen

minutes, had been taken during his break. He was intercepted "immediately upon exiting the meeting" by Mr. Primeaux and escorted to Mr. Raynes' office, where Mr. Primeaux explained that "handing out the flyers was 'a problem'" and leaving his post without permission was a violation of company policy. Shortly thereafter, administrative manager Patty Browne entered the office and presented Complainant with a termination letter, which he refused to sign, and also instructed him to have an exit blood test taken at 4:00 pm at the hospital in Greenport. Mr. Hollander and Carlos Santoyo, a USDA representative, also entered the office and instructed everyone but Complainant to leave. Mr. Hollander then told Complainant that he had done the 'right thing for the right reasons' but had erred by not seeking permission from his supervisor. Complainant then wrote that he explained to Mr. Hollander that he did not seek permission because it would not have been granted. Mr. Hollander then instructed Complainant to go home and return the next morning. Complainant stated that he left the island on the 3:30 pm ferry for Orient Point. When Complainant arrived at Plum Island the next day he was met by Mr. Primeaux and an armed guard. In front of his fellow workers he was escorted to a waiting van and driven to Building 100. Once at Building 100, and again in front of his fellow workers, he was removed from the van and escorted to the office of security manager Joe Cuciti. Once in Mr. Cuciti's office, Complainant was told that Mr. Hollander did not wish to speak with him. Mr. Cuciti asked permission to perform a body search on Complainant, warning that if Complainant did not allow the body search and later reached for a pen, "it could be interpreted as a threatening gesture and [he] could be shot." Complainant consented to the search and also submitted to a blood test. Complainant again refused to sign a letter of termination and requested to speak with Mr. Hollander, who arrived several minutes later. Mr. Hollander stated to Complainant that Respondent was Complainant's employer, not DHS, who Mr. Hollander represented. Complainant expressed to Mr. Hollander that he had expressed his views in the only way possible and that he had expected that the presence of Ms. Cooper would have shielded him from being terminated. Complainant concluded his affidavit by stating he had waited until June 19, 2003 to complain about conditions at PIADC because he had hoped that the June 1, 2003 turnover to DHS of PIADC would have led to improvements. Approximately two weeks into the turnover he felt that nothing had changed and in response reported his concerns to Mr. Hollander and Ms. Cooper.

RX 23

July 17, 2003 statement to US DOL from Complainant. This statement is in large part consistent with Complainant's July 11, 2003 affidavit (RX 22). Complainant added that approximately three months prior to being terminated he was assigned to the Chiller Plant under supervisor Mr. Primeaux. The purpose of the assignment was for Complainant to prepare the Chiller Plant for the approaching cooling season. However, on certain days his former supervisor, Mr. Corwin, would ask him to work inside the Building 101 containment laboratory. In addition, Complainant would perform HVAC work in other buildings on an as-needed basis and was given preventive maintenance assignments by Steve Jester. According to Complainant, during the course of a work day he could be expected to "be anywhere on the island" and that neither of his two supervisors would be able to contact him. Complainant also added that his daily routine, if not provided in the morning via his mailbox, was self-directed and not dictated by Mr. Primeaux. He stressed

that he and fellow HVAC mechanic Mr. Franco never asked Mr. Primeaux for permission when they took their breaks nor told Mr. Primeaux where they took their breaks. In regard to the meeting with Mr. Hollander and Ms. Cooper, Complainant stated that it "lasted 15-20 minutes." Upon leaving the meeting and being taken to Mr. Raynes' office by Mr. Primeaux, he waited five to ten minutes before Mr. Raynes arrived. When Mr. Raynes arrived he explained to Complainant that, as stated in Respondent's policy, leaving an assigned work area without approval was grounds for immediate dismissal. Complainant added that prior to June 19, 2003, no disciplinary complaints had been made against him.

C. Testimony

Theresia Cooper-Schwartz

Theresia Cooper-Schwartz, who is known as Resi Cooper, had been Senator Clinton's Long Island Regional Director since January of 2002. (TR 133, 135).[3] Prior to June 19, 2003, she had attended approximately seven meetings at PIADC. (TR 136). The June 19, 2003 meeting was the first to be held following the June 1, 2003 takeover of PIADC by the DHS. (TR 136). She arrived at the meeting room at approximately 1:45 pm and the meeting started shortly before 2 pm. (TR 145-146). Ms. Cooper testified that she first saw Complainant shortly after 2 pm when he "popped his head into the meeting" and asked to speak with someone from the DHS and Senator Clinton's office. (TR 147). She could not remember if he had knocked first, but added that he did not disrupt the meeting. (TR 147-148). Mr. Hollander, Ms. Cooper, and Complainant proceeded to Mr. Hollander's office where Complainant introduced himself. (TR 148). Complainant then "began to detail some safety and security issues, told us that he was coming forward only because he was concerned for the safeties of the - - safety of the employees and the surrounding community, and went on to detail some safety and security issues." (TR 148, 151, 152). Complainant explained that the issues regarded the handling of asbestos in the bio-containment area, security badge checks, and the presence of unescorted people in the bio-containment area. (TR 153). Ms. Cooper's relevant testimony regarding asbestos was as follows:

Q	The asbestos removal occurred - - from what you understood, occurred where?
[Ms. Cooper]	My understanding was that it was in bio-containment.
Q	Within the building?
[Ms. Cooper]	Yeah, within the lab.
Q	And did [Complainant] at any time say that the asbestos had gone into the outside air?
[Ms. Cooper]	I don't recall.

[3] In the record Ms. Cooper is also frequently referred to as being Senator Clinton's aide.

Q You don't recall him saying that, though, do you?

[Ms. Cooper] I don't recall. I know so little about asbestos handling that as he was talking it just sort of - -

Q But he told you that this occurred in a building, correct?

[Ms. Cooper] I believe so, yes.

Q And it's a building that's totally contained, correct?

[Ms. Cooper] Yes.

(TR 235). Ms. Cooper's testimony regarding Complainant's statements involving the presence of unescorted employees in the biocontainment area was as follows:

Q Okay. And the other issue you indicated that he raised was unescorted employees. Did he say anything about that?

[Ms. Cooper] He said that there were unescorted subcontractors and employees who had not received their background check yet completed who were in the bio-containment area unescorted.

Q Did he elaborate upon that?

[Ms. Cooper] Not that I recall.

Q Did he say why he was concerned about any of these issues?

[Ms. Cooper] Well, having an - - having people who don't have security backgrounds unescorted in the Bio-containment Lab is not a good thing in this post-9/11 era, and he exposed those - -

Q The question was - -

[Ms. Cooper] Okay, sorry. And he expressed that , that, indeed, anyone really could have access to the Bio-containment Lab and could - - he was concerned for the community, not only the employees, but also the community and the country actually should someone who did not have the best of intentions be in the lab and be able to smuggle out a pathogen.

(TR 167-168).

Complainant also related an incident in which he and another employee of PIADC switched security badges prior to arriving at Plum Island and were not detected. (TR 154). Mr. Hollander

asked Complainant if he or the other employee had entered the bio-containment area using the switched badges, but Complainant responded that they had not done so. (TR 169). Asked if Complaint had stated why the undetected switching of badges concerned him, Ms. Cooper responded:

> Yes. Security is a major issue at Plum Island. Plum Island is a secure facility. It is a Bio-safety Level III facility which means that they have pathogens, viruses, if you will, that are highly contagious.

(TR 154).

Ms. Cooper testified that Complainant mentioned an incident in which an individual hired during the strike had disappeared with a laptop that could control PIADC's HVAC system from off-site. (TR 157). Ms. Cooper elaborated, stating that she was aware of two incidents involving laptop computers stolen from PIADC. (TR 161). In the first incident a computer was stolen by a replacement worker who was later determined to have had an arrest record. (TR 161). The second incident, which occurred subsequent to Complainant's termination, involved a computer that was stolen from the biocontainment area without first being de-contaminated. (TR 161). Ms. Cooper's knowledge regarding the stolen computers was derived from her conversations with officials from the USDA. (TR 158, 160).

In addition to describing Complainant safety and security concerns, Ms. Cooper also described the elaborate procedure required to enter and exit the bio-containment area:

Q	Could you explain the process of going into bio-containment - - in and out of bio-containment as it relates to yourself?
[Ms. Cooper]	Sure. You go and you're given specific instructions. You go in - -
Q	By whom?
[Ms. Cooper]	We were given them by a USDA official.
Q	Okay. Go ahead.
[Ms. Cooper]	Let me also say this was not June 19th. We - - you go into the locker room. You have to get completely undressed to the extent that if you wear contact lenses, you have to take your contact lenses out, or jewelry. Everything comes off. You are completely naked and you walk in through the shower area, and on the other side of the shower area there are clothes waiting for you. I mean everything, shoes, socks, everything, waiting for you. You then put those clothes on and, and

then you move throughout the lab. There are different air lock systems that you go though.

. . .

Q Okay. And how do you exit the lab?

[Ms. Cooper] You exit the lab - - you have to get completely undressed again. I believe you have to go over to a sink and wash your hands with a scrub brush and then they tell you to spit in a sink. You have to do this all completely unclothes (sic) also. Spit into a sink three times to get the phlegm in case you picked up anything, to get the phlegm and everything out of your system. And then you go into the shower and, and you have to shower for a couple of minutes. I forget. They tell you how long. And shampoo yourself down, and then you can [go] back to the other side.

Q Okay. You said there was something, vapor lock doors?

[Ms. Cooper] Yeah. There [are] some sort of air-sealed doors. There's a - - it's almost like a maze in the lab. I mean it's all sorts of different air lock systems throughout.

Q Okay. Were you able to bring anything in or out of the lab?

[Ms. Cooper] No.

(TR 165-167).

James McKoy

James McKoy, Complainant, testified that he has a high school diploma along with four years of service in the Navy and forty years of HVAC work experience. (TR 246). He was hired by LB&B on November 13, 2002 as a HVAC mechanic. (TR 246-247). He applied for the job after being instructed to do so by Local 30 dispatcher Brandon McPartland. (TR 247). Complainant was told that the purpose of him in taking the position was to allow Local 30 to gather information regarding working conditions at PIADC. (TR 247). His immediate supervisor for the first 4-5 months was Ray Corwin and he was assigned to the Building 101 bio-containment area. (TR 248). In April of 2003 he was re-assigned to the Chiller Plant and would only on rare occasions perform work for Mr. Corwin. The background check to allow him to work at the site was completed in approximately one week but he had been told that a clearance

with the government should take seven months to one year to complete. (TR 249). When DHS took over operations he realized that he did not have the proper government-required clearances to work in the bio-containment area. (TR 249).

Complainant testified that in his June 19, 2003 meeting with Ms. Cooper and Mr. Hollander he initially explained who he was and how long he had worked at PIADC. (TR 272). He then related several issues that concerned him regarding safety and security at PIADC.[4] The first issue regarded the improper removal of asbestos from around pipes in the basement of the Building 101 bio-containment area by his supervisor, Mr. Corwin, and fellow replacement worker John Connelly. (TR 273). Complainant stated that he was aware that the material was asbestos from years of work experience and because Mr. Corwin later confirmed to him that it was asbestos. (TR 275). However, Complainant did not report the incident to more senior management because he had been employed at PIADC for only three weeks when the incident occurred. (TR 275). Complaint testified that he explained to Mr. Hollander and Ms. Cooper that the asbestos released "got into the airstream because there's ventilation going all the time inside there" and that the asbestos "would contaminate anyone who came into contact with that air." (TR 276-277). Regarding the mode by which the asbestos was released to the external environment, the following exchange occurred:

> Q Okay. But that would only be people inside the containment area, correct?
>
> [Complainant] At that time, yes, but there are times when that that (sic) mechanical equipment does fail within the bio-containment area and I've witness (sic) that where an area is supposed to be under a negative air pressure and, because of the mechanical control or fan failure, it goes into positive mode - -
>
> Q Okay.
>
> [Complainant] - - which could release these - - anything that's in that air to the outside atmosphere.

(TR 277).

The other concern he testified to regarded security in the bio-containment area. (TR 280). Complainant testified that when DHS assumed responsibility for PIADC he became aware that he did not possess the security clearance required for entry into the bio-containment area. (TR 281). He also claimed that his supervisor, Mr. Corwin, told him that he did not have the clearance required for entry into the bio-containment area. (TR 281). Once DHS assumed control, the policy for entering the bio-containment required an individual to possess either the proper clearance or be in the presence of a cleared escort. (TR 281-282). However, Complainant testified that the policy was not enforced and non-cleared workers were allowed to roam the bio-

[4] Complainant also related to Ms. Cooper and Mr. Hollander his concern that the Orient Point-Plum Island ferry lacked the required number of deck hands. At the start of the hearing both parties agreed that the issue was not properly before this Court and I will therefore not address it in this decision.

containment area unsupervised once they had been escorted through the security checkpoint. (TR 283). Complainant explained to Ms. Cooper and Mr. Hollander that he "could have taken that virus - - a tube of that virus, concealed it in my body some way and left that laboratory without anybody knowing about it." (TR 284). He testified that he explained to them that he "was very concerned about the possibility of the - - of these pathogens and viruses getting into our community and to Long Island and Connecticut." (TR 288). Immediately following this statement the following exchange took place regarding potential water contamination:

> Q Did anybody say - -
>
> [Complainant] And the water.
>
> Q I'm sorry?
>
> [Complainant] And also in the water through maybe a - - you know, the decontamination process, the water went right back into the Long Island Sound after it was decontaminated.

(TR 288). Complainant also testified that he related to Ms. Cooper and Mr. Hollander an instance in which he and a co-worker switched identification cards prior to boarding the morning ferry to Plum Island and "worked most of the day with the wrong picture, and nobody noticed." (TR 287).

On cross examination Complainant stated that he had been a member of Local 30 for 34 years. (TR 337). Complainant also testified that he reported his concerns regarding the asbestos to his attorney, Mr. Glennon, and Local 30's business manager, Mr. Ahern. (TR 344, 346). Mr. Glennon told Complaiant that he should be patient and wait until the appropriate time to take action regarding his safety and security concerns. (TR 344-345). Complainant was not aware of any actions taken by Mr. Glennon or Mr. Ahern to address the problems he had reported to them. (TR 346). Complainant did not report his concerns to any of the management officials at PIADC. (TR 354-345). Regarding Complainant's testimony that in May of 2003 he and a co-worker swapped identification badges prior to boarding the ferry to Plum Island, Complainant stated that he reported the incident to Mr. Glennon. (TR 368, 373). He did not ask Mr. Glennon or Mr. Ahern to do anything to rectify the problem, which he considered to be "pretty serious." (TR 373). Complainant also did not follow-up with Mr. Glennon to determine if he had taken action on the issues. (TR 374). When asked why he had not reported his safety and security concerns to the site's management, Complainant responded that he "never felt close enough to anyone to bring them into [his] confidence." (TR 375).

Matthew Raynes

Mr. Raynes was Respondent's project manager, a position in which he oversaw day to day operations and maintenance at PIADC. (TR 571). He started his position at PIADC on April 14, 2003. (TR 574). The portion of Mr. Raynes' testimony relevant to this decision is as follows:

Q Had Mr. McKoy ever raised any safety or health concerns with you or with any other, any other supervisor to your knowledge?

A That morning he had raised a concern to the new safety manager on the island.

Q Okay. That morning being June 19th, 2003?

A Yes.

Q Okay. And do you know what that safety concern was?

A There was a new locking system that was -- had been installed on the exits -- the side exits of Building 100 and his concern was that in an emergency windows, doors automatically opened and was there a mechanism that automatically opened the doors, and I believe that they were addressed immediately with the safety manager and, and that was resolved.

Q Okay. Other than that one incident on the 19th of June 2003 which Mr. McKoy addressed a safety concern with the new safety technician, are you aware of any other safety concerns that he raised to any other supervisor?

A No, I'm not.

Q Okay. Are you aware of any safety concerns that Mr. McKoy raised with other employees while he was employed with LB&B Associates and North Fork Services?

A No, I'm not.

(TR 577-578).

D. Applicable Law

The CAA at 42 U.S.C. § 7622 states:

(a) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of an employee)--

> (1) commenced or caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,

> (2) testified or is about to testify in any such proceeding, or
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of the Act.

The WPCA's provisions regarding whistleblower protection are almost identical:

> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee . . . by reason of the fact that such employee . . . has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of this chapter.

33 U.S.C. § 1367(a).

To establish a *prima facie* case of retaliation under the whistleblower provisions invoked here, a complainant must show that: (1) the complainant is a covered employee; (2) the complainant engaged in protected activity; (3) the employer was aware of that protected activity; and (4) the employer took some adverse action against the complainant. The complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Dartey v. Zack Co. of Chicago, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 8. Passaic Valley Sewage Com'rs v. Dept. Of Labor, 992 F.2d. 474, 480-81 (3rd Cir. 1993); Carroll v. U.S. Dept. Of Labor, 78 F.3d. 352, 356 (8th Cir. 1996); Kahn v. U.S. Secretary of Labor, 64 F.3d. 271, 278 (7th Cir. 1995). If the complainant makes out a *prima facie* case, the burden of production shifts to the employer to articulate a legitimate business reason for the adverse action. Where the employer articulates a legitimate nondiscriminatory reason for the adverse action, the complainant must prove that the reason articulated by the employer is pretextual, either by showing that the unlawful reason more than likely motivated the employer or by a showing that the proffered explanation is not credible and that the employer discriminated against him. Nichols v. Bechel Construction Co., 87-ERA-44 (Sec'y October 26, 1992); Carroll, *supra;* Kahn, *supra.*

If the case proceeds to a hearing before an Administrative Law Judge, the complainant must prove the same elements as in the *prima facie* case, but this time must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in an unfavorable personnel decision. Trimmer v. U.S. Dept. of Labor, 174 F.3d 1098 (10th Cir. 1999) (case below 93-CAA-9 and 93-ERA-5); *See also* Dysert v. Secretary of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997) (holding that Secretary's construction of § 5851(b)(3)(C), making complainant's burden a preponderance of evidence, was reasonable). Only if the complainant meets his burden does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

E. Issues

1. Was Complainant engaged in activity protected under the CAA or WPCA?

2. If Complainant engaged in protected activity, was Respondent aware of this activity and did this awareness contribute to Respondent's decision to terminate Complainant's employment?

3. If Complainant's protected activity is found to have contributed to her termination, has Respondent demonstrated by clear and convincing evidence that it would have terminated Complainant even in the absence of the protected activity?

4. What damages, if any, is Respondent liable to Complainant for as a result of violating the CAA or WPCA?

F. Analysis

1. Applicability of the CAA

The CAA only gives the Environmental Protection Agency (EPA) authority to regulate "air pollutants," and defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is *emitted into or otherwise enters the ambient air***.**" *See* 42 U.S.C. § 7602(g)(emphasis added). Regulations implementing the CAA define "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e) (2003).[5] *See, e.g.,* Kemp v. Volunteers of Am. of Pa., Inc., ARB No. 00-069, ALJ No. 2000-CAA-6 (ARB Dec. 18, 2000).

When an individual makes a safety complaint that implicates an EPA regulation dealing with the release of pollutants into the ambient air, such a complaint is protected under the CAA. If the complaint identifies the release as an occupational hazard, the employee protection provision of the CAA is inapplicable. *See, e.g.,* Aurich v. Consolidated Edison Co. of N.Y., Inc., 86-CAA-2 (Sec'y Apr. 23, 1987) (emissions to outside air are covered by CAA whistleblower provision; emissions as an occupational hazard are not covered). Additionally, "an employee's reasonable belief that his employer is violating the law is a sufficient basis for a retaliation claim if the employer takes action against the employee because he expressed this belief, irrespective of after-the-fact determinations regarding the correctness of the employee's belief." Rivers v. Midas Muffler Ctr., 94-CAA-5, slip op. at 3 (Sec'y Aug. 4, 1995). *See also* Smith v. Western Sales & Testing ARB N. 02-080, 2001-CAA-17 (ARB Mar. 31, 2004).[6]

Complainant's CAA claim involves issues relating to the improper handling of asbestos and the potential impact of inadequate security measures.

Improper handling of asbestos

[5] For purposes of discussion I will refer to the "ambient air" generally as the "environment."

[6] In Smith v. Western Sales & Testing, the complainant reported witnessing paint spraying operations that released paint fumes into the environment. The ARB found that the complainant had engaged in activity protected under the CAA because the pollutant, paint fumes, had been released into the atmosphere.

Complainant allegedly observed his supervisor and another individual improperly handling asbestos in the basement of the PIADC biocontainment area. However, this event occurred inside of the contained structure of the biocontainment area, a location that, according to the testimony of Ms. Cooper and the GAO's report, is sealed off from the environment. (CX 5; TR 235; TR 166-167).[7] Further, Complainant testified that the asbestos was not released "[a]t that time" and Ms. Cooper testified that she could not recall Complainant mentioning the escape or potential escape of asbestos from the biocontainment area. Unlike in Smith, where the complainant witnessed the actual release of pollutants into the environment, the situation here is one in which Complainant did not see the actual release of the pollutant. The CAA is therefore not directly applicable to the alleged event because it is an indoor workplace issue. Complainant's concerns would therefore properly arise under an EPA regulation covering workplace conditions. Aurich. However, Complainant's concerns regarding the release of asbestos could still come under the CAA if his belief that the public was at risk was, although mistaken, reasonably held. Kemp. For several reasons I do not find that Complainant's belief was reasonable.

Although Complainant admitted that the asbestos did not escape into the environment at the time he allegedly observed its mishandling, during his testimony Complainant stated that he had observed the air handling system of the biocontainment area fail and cause the air pressure in the area to become positive. (TR 277). The implication of this failure is that the air in the biocontainment area, along with the pollutants contained in it, would be released into the atmosphere. If accepted, it would then be possible to find that Complainant's claims regarding the release of asbestos reasonably implicate issues of public safety and therefore come under the CAA.[8] Without such a finding, Complainant's claim must fail for lack of stating a mode by which the asbestos could have been released into the environment. However I do not find Complainant's testimony regarding the failure of the air handling system to be credible.

In particular, Ms. Cooper could not recall Complainant stating at the June 19, 2003 meeting that the asbestos could have escaped into the environment. In his written statements Complainant did not make mention of any failures by the air handling system. (RX 22, 23). In his affidavit of July 11, 2003 Complainant discussed the improper handling of the asbestos and made no mention of how the asbestos might have escaped. He did not mention any events involving failures by the biocontainment area air handling system. In his Complaint to OSHA, Complainant stated that at the June 19, 2003 meeting he discussed with Ms. Cooper and Mr. Hollander "security deficiencies at PIADC relating to viruses and diseases" which he felt "posed a threat to the general public." Complainant did not mention issues regarding failures by the air handling system. OSHA's letter of findings also does not mention failures by the air handling

[7] The bio-containment area is completely sealed off from the environment due to a system of interlocks and the maintenance of the area as a low air pressure zone. (TR 165-167; TR 235; CX 5).

[8] I note that Complainant has not alleged a safety concern based solely on a failure of the air handling system. Such a failure would seem to present a much more severe crisis to public safety, likely in the form of released pathogens, than would the release of a seemingly small amount of asbestos. Yet, Complainant did not assert a complaint alleging that the failure of the air handling system itself was a safety concern.

system. It solely refers to Respondent "failing to provide adequate security to prevent unauthorized removal of biological pollutants and materials." The flyer Complainant distributed and posted on June 19, 2003 also does not contain any reference to failures by the air handling system in the biocontainment area. Further, Complainant presented no additional evidence to support his contention that the air handling system failed and led to a pressure reversal. He presented no computer monitoring system records, alarm reports, or eyewitness. In contrast to his silence regarding such a seemingly important issue, earlier in the day on June 19, 2003 Complainant reported his concern that a door was not operating properly. (RX 7; TR 577-578). The report by Respondent's safety official documents the lengths Complainant went to in order to address his concerns regarding the operation of a single door. However, no report was presented regarding the failure of a system so important in keeping extremely dangerous organisms and substances out of the environment. Unlike Complainant's other concerns regarding safety and security, he also did not report the air handling system failures to Local 30's leadership. Based on this discussion I must conclude that Complainant in fact did not witness a failure of the biocontainment area's air handling system.

Because I do not find Complainant to be credible on the issue of air handling system failures, I also do not find his complaint, as it relates to asbestos leaks into the environment, to be objectively reasonable.

Lack of proper security clearances/switching of badges

Complainant's security concern regarded the ability of individuals who lacked proper security clearance to roam freely around the biocontainment area and potentially remove hazardous materials to the external environment. As evidence of improper security at PIADC, Complainant indicated that he was allowed to freely roam around the biocontainment area even though he had been told that he did not have the necessary clearance to do so, and that he and a fellow employee exchanged security badges without their ruse being detected. However, none of Complainant's security-related concerns are sufficient to support a claim under the CAA. In Johnson v. Oak Ridge Opeations Office, U.S. Department of Energy the Court found that security issues alone are not a sufficient basis for an environmental whistleblower claim. Johnson v. Oak Ridge Operations Office, U.S. Department of Energy, ARB No. 97-057, ALJ 1995-CAA-20 at 9. (ARB Sept. 30, 1999). Such a finding is especially true where there has been no indication that the individuals who allegedly gained improper access to the facility intended or threatened any harm to the environment. *Id*. at 9. The facts and claims presented in the instant case mirror those found in Johnson. Complainant has alleged deficiencies in security at PIADC but has not shown that the deficiencies led to any environmental harm or that any harm was threatened. His concern regarding security is therefore entirely speculative in nature and not sufficient to support a claim under the CAA. By virtue of its speculative nature, Complainant's concern regarding safety is also not reasonable. This lack of objective reasonableness is confirmed by Ms. Cooper's testimony and the GAO's report, both of which indicate that elaborate security measures prevent the unauthorized removal of materials from the biocontainment area. Testimony did indicate that a laptop computer had been stolen from the biocontainment area but this theft occurred after Complainant's termination and could therefore

not have contributed to the reasonableness of his concerns.[9] In summary, Complainant's security concerns are not sufficient to support a complaint under the CAA.

2. Applicability of the WPCA

Complainant's claims regarding water pollution are also too speculative to support a complaint under the WPCA. As discussed *supra*, Complainant's statements regarding asbestos do not support an environmental whistleblowing complaint because he has not shown the actual release of asbestos or a reasonably held belief that asbestos was being, or even could be, released. Similarly, Complainant has not shown that there was any actual water pollution occurring or a reasonable belief that water was being polluted. Complainant indicated a potential that faulty security procedures could lead to the removal of hazardous materials from the biocontainment area and result in their subsequent dispersal into the waters of the Long Island Sound. However, as I found regarding the release of materials into the outside air, Complainant's concerns regarding water pollution resulting from inadequate security measures are far too speculative to form the basis of a whistleblower claim. *See* Johnson. Complainant did not witness the discharge of hazardous materials into the water and did not profess knowledge of a threat to do so. Security concerns therefore do not support his WPCA complaint.

Beyond security issues, Complainant also stated that pollution might occur "through maybe a - - you know, the decontamination process, the water went right back into the Long Island Sound after it was decontaminated." (TR 288). This statement is insufficient to support a claim under the WPCA for two reasons. First, his statement is pure speculation. Complainant only states that "maybe" the decontamination process employed at PIADC could lead to the contamination of the Long Island Sound. But he does not indicate that contamination did occur or in any way explain how contamination might occur (*e.g.*, due to the decontamination system failing). Second, Complainant's statement represents the only evidence in the entire record regarding the decontamination system causing water pollution. There is no evidence that Complainant indicated his concern regarding the decontamination process at the June 19, 2003 meeting or that the concern formed part of the basis for his concerns. As such it seems to represent an attempt by Complainant to, in court, shore up his WPCA complaint. Complainant's statement regarding the contamination process is therefore too speculative and unsupported to advance his claim under the WPCA.

[9] I also give little weight to the testimony regarding the theft of laptops since the information regarding the thefts was not first hand to the witnesses.

RECOMMENDED ORDER

On the basis of the foregoing, I recommend that Mr. James McKoy's complaints under the CAA and WPCA be **DISMISSED**.

A

PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE: This Recommended Final Order of Dismissal 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, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. To be timely filed, a petition for review must be filed **within ten (10) business days** of the date of this Recommended Final Order of Dismissal and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7, 24.8.