U.S. Department of Labor

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Issue Date: 12 August 2004

CASE NO.: 2004-TSC-00003

In the Matter of

SHAWN HAND
Complainant

v.

CLARK COUNTY SCHOOL DISTRICT
Respondent

Appearances: Richard Segerblom, Esq.
For Complainant

Africa Sanchez, Esq.
Jon Okazaki, Esq.
For Respondent

Before: ROBERT D. KAPLAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of the Toxic Substances Control Act, 15 U.S.C. § 2601, et seq. ("the Act") and the regulations at 29 C.F.R. Part 24. The employee protection provisions, 15 U.S.C. § 2622, protect employees against discrimination in their employment for attempting to carry out the purpose of the Act. The Secretary of Labor is empowered to investigate "whistleblower" complaints filed by employees who allege that they have been so discriminated against.

This proceeding involves a complaint filed on or about August 20, 2003 by Complainant, Shawn Hand, against Respondent, Clark County School District, located in Las Vegas, Nevada ("Respondent" or "the District"), alleging that it discriminated against him in violation of the Act. The complaint was investigated by the Occupational Safety and Health Administration ("OSHA") and Secretary's Findings were issued on November 19, 2003. (RX 1)[1] OSHA determined that Complainant's complaint was without merit. Complainant objected and on January 26, 2004 requested a hearing before an administrative law judge. The case was assigned to me, and a hearing was held before me in Las Vegas, Nevada on April 15, 2004. The parties

[1] The following abbreviations are used herein: "CX" refers to Complainant's Exhibits; "RX" refers to Respondent's Exhibits; and "T" refers to the transcript of the April 15, 2004 hearing.

filed post-hearing briefs that were received on July 9, 2004. The decision that follows is based on the arguments of the parties, the record evidence, and the applicable law.

I. ISSUES

The following issues are presented for adjudication:

1. Whether Complainant engaged in protected activity within the meaning of the Act.

2. Whether Respondent subjected Complainant to adverse employment action because of his protected activity.

3. If so, what is the appropriate remedy?

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

Complainant Shawn Hand

Complainant testified at the hearing that he began to work for the District in the summer of 1994 as a transportation worker. Subsequently he was promoted to the position of custodian. After a year and a half he was promoted to the position of head custodian. In June 1999 the District assigned Complainant to Western High School as head custodian. Complainant testified that his custodial duties at Western High School consisted of cleaning the school and preparing its facilities for events such as track meets and open-houses. In addition, as head custodian Complainant was responsible for supervising seven or eight other custodians.

The District had provided the custodians a liquid cleaning product called "Mark E II" – contained in a rust-colored package – for cleaning restrooms. Complainant testified that in April 2003 this product began to come in a new neon-pink package with a large warning card.[2] Complainant stated that shortly after the custodial staff began to use this new Mark E II product they began having adverse physical reactions to it. Complainant informed his supervisors, Terry Price and Rocky Lange, about this problem. According to Complainant, Price and Lange told him to continue using the product, and Lange told Complainant that he would investigate the complaints about the new Mark E II product. Complainant and his custodial staff continued to use the new Mark E II cleaning product for a few weeks.

[2] Mark E II came in two packages with different instructions for the amounts of the product and the water with which it was to be mixed. The product's different strengths depended on the cleaning purposes for which it was to be used, with each strength having its own-color package. It appears that the strongest concentration of the product was for use in cleaning restrooms. See testimony of Eddie Giron, discussed below. Copies of the Mark E II labels and warning card are set forth in CX V.

On May 7, 2003 Complainant and custodians Denice Bassett, Francis Hicks, and Karsha Fox each filled out one of the District's "C-1" injury reports in which they described their allergic reactions to the new Mark E II product: rashes and burning sensations in the eyes and nose. (RX 12) Complainant, along with custodian Everett Shipler, took the C-1 forms to Juareen Castillo, an assistant principal at Western High School. Castillo signed the forms, removed the yellow copies and gave the yellow copies to Complainant.

On May 21, 2003 Complainant spoke with Lange again and told him that the staff was continuing to have reactions to the new Mark E II product. Lange told Complainant to keep using the product and that Complainant (and the other custodians) should file C-1 injury reports.

Complainant also testified about a union grievance he filed against Castillo on May 13, 2003. (RX 32) In the grievance, Complainant referred to an incident on March 20, 2003 in which Complainant stated that Castillo threatened to terminate his employment due to his repeated complaints about the custodial staff being overworked by the administration. A meeting was subsequently held between Complainant's union representative and Castillo in which Complainant's complaint was withdrawn based on the understanding that Castillo would create a non-hostile work environment for Complainant. Complainant testified that at that time Castillo admitted she had threatened to fire him because of those complaints. (T 61–66, 130-31)

On June 13, 2003 Castillo suspended Complainant from work for 10 days due to an incident in which Complainant refused a teacher's request that he open restrooms at Western High School's track and field facility during a track event.[3] (RX 27) According to Complainant, he and the custodial staff prepared the track and field facility for an event, but only cleaned and opened the restrooms on the visitor's side of the field. Complainant testified that he refused the teacher's request to clean and open the home-side restrooms because

> [w]ith the staffing and people out sick that day, I have photocopies of the timesheets to show there were people out sick that day [and] we still had to get the school cleaned. Since the visitor side [restrooms were] clean, stocked, and more than adequately ready to go, I didn't see trying to ... remove the entire crew from cleaning the school to clean one bathroom as a priority.

(T 69) Complainant also testified that he believed that only personnel in administration, but not teachers, had authority to make requests of custodians, "so that I don't have 150 bosses in one building." (T 69) Complainant denied ever hearing of a District policy whereby an administrator can designate a teacher to act in the former's absence. Complainant stated that another reason he refused the teacher's request was that the home-side restroom facilities were not usable because their water had been turned off. (T 132-37)

In early August 2003, after not hearing anything about the C-1 injury reports left with Castillo in early May, Complainant checked with the District's Risk Management Department

[3] Previously, Complainant was suspended for three days in April 2002 for several incidents in which he refused directions from administration. (T 71; RX 25)

and discovered that the reports had never been received by that department. Subsequently, Complainant went to Western High School's administrative secretary, Della Haddad, to inquire about the status of the May 7, 2003 C-1 injury reports.[4] Haddad found the forms in a file cabinet in her office; they had not been sent to the Risk Management Department. Complainant took the forms from Haddad and personally delivered them to the Risk Management Department on August 6, 2003. (T 50-61)

In a letter dated August 13, 2003 Castillo informed Complainant that he was immediately suspended without pay pending the District's review of her recommendation that he be dismissed from employment because he had harassed custodial employee Karsha Fox. (RX 28) Castillo's letter states:

> On or about Friday, July 25, 2003, I received statements from Karsha Fox, Custodian, Western High School; Everett Shipler, Lead Custodian, Western High School; Thomas Henderson, Custodian, Operations Department; and Terry Price, Custodial Supervisor, Northwest Region. These statements provide evidence that you recently hit Ms. Fox in the chest with your fist, hit Ms. Fox on the top of her head with your gloves, and kicked Ms. Fox on her rear. The statements also provide evidence that you observed Mr. Shipler dump a bucket of cold water on Ms. Fox's head and did nothing about it.

Complainant provided the following testimony about the events referred to in Castillo's letter (T 73):

> Well, toward the end of the summer we had our usual barbecue, blow off steam day, so at lunchtime we barbecued. We all got goofing off like we do. Karsha and another employee, Francis, threw cups of water on Everett Shipler and myself, ran out of the office down the hall. Everett followed with a cup of water and threw it on Karsha.
>
> So basically, Ms. Castillo charged me with a threat of violence towards Karsha Fox, had it investigated through the school police. The police report is included, and basically no basis for any threats of violence were determined by Clark County School District Police, but Ms. Castillo proceeded on to terminate me anyway.

Complainant denied striking Fox on the head with his gloves. Rather, Complainant testified that he "tapped her on the head lightly." Complainant also denied hitting Fox in the chest, and stated that he "tapped her on the shoulder." (T 78) Further, Complainant stated that while good-natured "horseplay" occasionally happened among his staff, he would never permit punching or kicking

[4] As discussed below, upon receiving C-1 injury reports from a principal such as Castillo, Haddad is responsible for sending the reports to the District's Risk Management Department.

that would hurt a staff member. Complainant also stated that the statement provided by Thomas Henderson was inaccurate since Henderson stated that he saw Complainant hit Fox in the custodian's break room, which differs from the statement provided by Fox which states that Complainant struck Fox in the gym. (T 50–164, 313–16)

Terry Price

Terry Price, a custodial supervisor for the District, testified at the hearing that he supervises all head custodians and non-supervisory custodians in the northwest region, which includes Western High School.

Price recalled that in May 2003 Complainant, the head custodian at Western High School, complained about the Mark E II cleaning product being used to clean restrooms at Western High School. Price testified that Complainant complained that he broke out in rashes due to a change in the chemical composition of the product. Price brought Complainant's complaints to the attention of his administrator, Rocky Lange. Price testified that he did not feel any animosity toward Complainant for complaining about the Mark E II product.

Price also testified that at some point in 2003 a substitute custodian informed him of an incident in which Complainant possibly harassed Karsha Fox by punching her in the chest, kicking her and throwing water on her. Price testified that he is responsible for investigating disciplinary problems and informing his supervisors of the facts. Consequently, on July 25, 2003 Price called Fox into an office at Western High School where Fox wrote a statement about the incident. Price testified that Fox was upset and cried as she filled out the statement. The undated statement, signed by Fox, states (RX 29):

> On July 17 or 18 we where (sic) in the new gym and me and Shawn was going out the door and Shawn hit me in my chest. Thomas [Henderson] saw it. The same day he hit me on top of my head with his gloves. At the end of the day he kick (sic) me in my butt. Now that Denise is back he said he can pick on her. Last Friday Everett and Shawn wet me with a bucket of ice water. I got water in my ear. I had to go to the [doctor].

After speaking with Fox, Price called custodian Thomas Henderson into the office, and Henderson subsequently filled out a statement. The statement, dated July 25, 2003 and signed by Thomas Henderson, states (RX 29):

> On July 15th, I was in the custodian break room on break, I saw the head custodian ball up his fist and hit Karsha in her chest. It was not a hard hit but he did hit her, he might have been playing. He also said you can't do anything about it because your probation is not up.

Price also took a statement from Everett Shipler. The statement, dated July 25, 2003 and signed by Shipler, states (RX 29):

> I threw water on Karsha, we were just playing around and I didn't realize that she was intimidated by this.
>
> When I was called to Miss Castillo's office I had no idea what this was about.
>
> I waived my right to representation. I wanted to know what was wrong right now.
>
> I have told Shawn and Miss Castillo that I don't want to be involved in his wars with administrators.

As a result of these statements, Price issued a 24-hour notice to Complainant that a possible disciplinary action was going to be taken against him and that he should have his union representative present at any meeting with Price regarding the allegations of harassment towards Fox. Price testified that as a result of Shipler's actions towards Fox, Shipler was demoted. According to Price, the District does not condone any kind of "horseplay" among employees. (T 7–24)

Mitch Sperling

Mitch Sperling testified that he is presently employed with the District as a custodian at Jydstrup Elementary School. Sperling testified that he was injured when he used the Mark E II cleaning product. Sperling stated that his injuries consisted of red sores on his arms, face, cheeks, and nose. Sperling told his supervisor of his injury and filed a C-1 injury report with the District on February 17, 2004. (CX X) Sperling stated that, as far as he knew, the District did not retaliate against him for complaining about the Mark E II cleaning products. Presently, Sperling still uses the cleaning product but dilutes it. (T 35–39)

Denice Bassett

Denice Bassett testified that she previously worked as a custodian for Western High School and was injured by the Mark E II cleaning product sometime in early 2003. Bassett reported her injuries to Complainant and filled out a C-1 injury report. According to Bassett, she gave this report to Complainant. Bassett's 2003 injury report is dated May 6, 2003. (RX 12) The report states,

> When using the Mark E II 264 whenever it came in contact anywhere on me my skin became irritated, red, itchy, & I developed a rash. I am also 8 months pregnant, don't know if any complications have occurred.

(RX 12) Bassett stated that the District never responded to her complaint. Bassett also stated that she did not file a worker's compensation claim, which is separate from a C-1 injury report.

Bassett believed that she was discriminated against by the District for filing her injury report. Bassett stated that her probationary employment period, which was supposed to only last three months, was extended to six months. Bassett stated that she left employment with the District the fall of 2003 on her own accord. However, she characterized her leaving as "be fired or leave." (T 45) According to Bassett, she was summoned to a conference by a supervisor and was not allowed to postpone the meeting so that her union representative could attend. At that point, Bassett decided to quit. (T 40–47)

Dorothy Page

Dorothy Page testified that she presently works for the District and has been a custodian at Western High School for 20 years. At one point, Page worked under Complainant. Page recalled observing Complainant on occasions playing or fooling around with the other custodians, including Fox. According to Page, "sometimes [Complainant would] walk up to you and tickle you . . . tell jokes, and [he'd] try to scare you." (T 48) Page stated that this was common behavior among custodians at Western High School and that she also engaged in horseplay on occasion. (T 47–50)

Della Haddad

Della Haddad testified that she has been an administrative secretary at Western High School since August 2002.

Haddad stated that the usual practice for filing C-1 injury reports is that Castillo first signs the report and then gives it to Haddad to be filed. Haddad removes the white copy and sends this copy to the Risk Management Department. A pink copy is retained in her file cabinet.[5] (RX 28)

Haddad recalled that in approximately August 2003 someone came into her office to inquire if particular C-1 injury reports had been filed with Risk Management. Haddad was unable to recall if this person was Complainant or someone else. Haddad found unfiled copies of the four C-1 injury reports set forth at RX 12 in her file cabinet. Haddad could not explain why the copies of these reports were in her cabinet and could not recall if she filed any copies with Risk Management. (T 183–94)

[5] No testimony directly explains the C-1 injury report process. I infer that the C-1 injury report is a form that provides notice to the District about a dangerous condition at a school facility and is not a worker's compensation claim. Apparently, the document consists of a white page followed by several carbon copies.

Oleta Marie Dolly Maestas

Oleta Marie Dolly Maestas testified that she has worked as a coordinator for the District's Operations Department for 20 years. Maestas stated that her duties involve supervising custodians for the District.

Maestas testified that District regulations provide that administrative personnel are generally responsible for assigning work to the custodians. However, Maestas recalled two occasions on which she directed Complainant to clean certain facilities when he was asked to do so by people other than administrators. Maestas stated that she never told Complainant that it was inappropriate for teachers to give him instructions and also stated that regulations exist which allow administrators to designate others with authority to supervise custodians. Maestas stated that custodians must use their own judgment when teachers make requests of them. (T 194–204)

Regarding Complainant's refusal to open the restrooms at the track and field facility, Maestas stated that Complainant was required to open the restrooms based on the Facilities Use Permit set forth at CX M-5. The Facilities Use Permit is signed by Mr. Hagman, an assistant principal, and dated May 30, 2003. The form states that restrooms should be open at 3:00 [p.m.]. (CX M-5)

Eddie Giron

Eddie Giron testified that he has worked for the District for approximately 12 years in various custodial positions. Currently Giron is employed as a training manager with the Operations Department.

Giron stated that the Mark E II cleaning product comes in two packages. Mark E II "202" is mixed with water and used for cleaning bathroom floors. Mark E II "264" is mixed into a 64-ounce stock solution bottle and then dispensed into 16-ounce bottles and used for spraying and wiping. Giron stated that both are chemically the same product but are required to be diluted differently.

Giron testified that at some point he became aware of problems with the Mark E II product. Giron stated that the color of the product had changed and the package was mislabeled. Giron testified that custodians were trained to use products according to a color-coding system: "[O]ur employees are trained that a pink chemical goes into a pink bottle with a pink materials safety data sheet, and so forth." (T 207) A news letter was sent to custodial staff in October 2001 informing the staff of the changes and that the Operations Department was working on correcting the problem. (RX 13) The October 2001 newsletter states (RX 13):

> The last shipments of Germicidal Detergent (202) for making a 2-gallon mop bucket of detergent solution are packaged incorrectly. The packaging states to mix it with two gallons of water and also to mix it with five gallons of water.

> Do not use this detergent unless you are completely out of the correct packages. If you must use it, mix the concentrate with five (5) gallons of water to provide the correct concentration and prevent sticky floors.

Giron stated that another news letter was sent to the custodial staff in January 2002 to update the staff about ongoing concerns with the Mark E II cleaning products. The January 2002 news letter states (RX 13):

> The new, correctly packaged, Germicidal Detergent (202) is now in the Brady warehouse and is being delivered. Please check your remaining stock to make sure you do not have any of the incorrect packages. You must call Mike Saca at Brady immediately to have it replaced free.
>
> The bad Germicidal Detergent (202) for making a 2-gallon mop bucket of detergent solution is packaged incorrectly. The instructions on the package are to mix it with two gallons of water and also to mix it with five gallons of water.
>
> ***Do not*** use this detergent unless you are completely out of the correct packages. If you *must* use it, mix the concentrate with five (5) gallons of water to provide the correct solution and prevent sticky restroom floors.

Giron testified that in January 2002 and January 2003 several employees filed complaints with the state of Nevada about the Mark E II product, alleging it caused respiratory problems. Giron stated that subsequent investigations by the state found adequate ventilation in the restrooms where the product was being used. (RX 15, 16) Giron recalled meeting with Complainant about concerns with the Mark E II product on one occasion in the summer of 2003. Complainant told Giron that he saw a doctor regarding his bad reaction to the Mark E II product, and that another custodian was injured as well. Complainant did not provide any medical documentation about his injuries. Giron later learned that the Mark E II product was not being mixed correctly. According to Giron, "[the custodians] were taking a 202, which should be used for mixing in two gallons for mopping, they were putting it in a 16-ounce spray bottle . . . and so, therefore, this solution was too strong." (T 219)

Finally, Giron stated that he did not have any conversations with Castillo regarding Complainant's complaints about the Mark E II product. (T 205–24)

Rocky Lange

Rocky Lange testified that he is currently employed as the coordinator of custodial services in the Operations Department. Lange has worked for the District for 35 years.

Lange recalled that in May 2003,[6] Complainant spoke with him regarding problems with the Mark E II product. Complainant told him that the product's coloring had changed and some of the custodial staff had bad reactions to it. Lange told Complainant that the District was in the process of obtaining a new cleaning product to replace the Mark E II. Lange told Complainant to give a sample of the packet to Price. Lange also told Complainant to fill out a C-1 injury report.

Lange subsequently spoke with the product manufacturer and the District's Purchasing Department regarding problems with the product's coloring. Lange testified that, based on his conversations with the Purchasing Department and the product's manufacturer, the Mark E II product's chemical composition was essentially the same as it had been. On cross-examination, Lange acknowledged that the chemical composition printed on the product's packaging had changed, but stated that the new chemicals were used to stabilize the dye and did not affect the active ingredients of the product.

Finally, Lange stated that he first became aware of problems with the Mark E II product "sometime after October of 1999 or early 2000." (T 235) Lange testified that subsequently he was given the responsibility of evaluating the product. (T 225 – 235)

Juareen Castillo

Juareen Castillo testified that she has been an assistant principal at Western High School since August 2002, and was Complainant's supervisor.

Castillo testified that on May 7, 2003 Complainant brought her the C-1 injury reports in RX 12. Castillo was unable to recall what happened to the forms after she signed them. Castillo stated that while her usual procedure was to give the forms to Haddad to send to the Risk Management Department, Castillo was unsure whether she had given them to Haddad. Further, Castillo was unable to remember if Everett Shipler was with Complainant when he gave the reports to her.

Castillo testified that she issued the 10-day suspension of Complainant on June 13, 2003 based on progressive discipline problems with him and because he refused to open the home-side restrooms at the track event. (RX 27) Castillo stated that the track coach, Ms. Evans, would have been Complainant's designated supervisor at the track event and that Complainant should have opened the home-side restrooms upon Evans' request. However, Castillo also stated that teachers such as Evans are not usually authorized to give directions to custodians, and she did not know if an administrator had designated Evans to act as Complainant's supervisor for the track event.

Castillo testified that she issued the recommendation for Complainant's dismissal on August 13, 2003 based on Complainant's harassment of Fox. (RX 28) Castillo stated that, based

[6] At the hearing, Lange stated that Complainant spoke with him in May 2002. However, the testimony of other witnesses and the documentary evidence suggest that Complainant began complaining about the cleaning products in April and May 2003. Therefore, I conclude that Lange was mistaken in stating that his conversation with Complainant occurred in 2002.

on her interpretation of the events, Fox felt intimidated by Complainant. Castillo noted that Fox cried when filling out the statement against Complainant because "she thought something would happen to her if she complained" about him. (T 275) Castillo stated that she had not considered demoting Complainant rather than discharging him because of the severity of his harassment of Fox. Castillo also noted that Everett Shipler, who dumped water on Fox, had only received a written reprimand. Castillo stated that her discipline decisions are made in conjunction with the District's Legal Department.

Castillo stated that she was unaware of Complainant's complaints about the Mark E II product, except for the C-1 injury reports he filed with her. According to Castillo, "I didn't even know what products he actually used." (T 253) Castillo also stated that she has nothing to do with the Operations Department and that she doesn't "tell them what products to use." (T 255)

Regarding Complainant's grievance against Castillo, Castillo denied ever verbally threatening to terminate Complainant. (T 237–77)

Jon Okazaki

Jon Okazaki testified that he has worked as an attorney for the District's Legal Department for approximately seven years. Okazaki has primarily worked on employee relations matters, focusing on disciplinary matters with the support staff employees.

Okazaki stated that the District uses a progressive discipline procedure in disciplining employees for misconduct. Generally, the first discipline problem will result in an oral warning being issued to the employee. For subsequent discipline problems, the District will gradually increase the penalties in the following order: written reprimand, short-term suspension (one to three days), long term suspension (four to ten days), demotion, and dismissal. Sometimes the District will skip levels of discipline, based on the severity of the employee's misconduct. An employee may file an appeal or grievance regarding any disciplinary action.

Okazaki assisted Castillo in making the decisions resulting in Complainant's three-day suspension in April 2002 and his 10-day suspension in June 2003. (RX 25, 27) In recommending Complainant's 10-day suspension to Castillo, Okazaki reviewed the employee statements contained in RX 40 and CX M regarding Complainant's refusal to open the restrooms at the track meet. Okazaki also reviewed Complainant's prior discipline record contained in RX 23–26. Okazaki testified that

> . . . based on the evidence and the nature of the conduct with regard to [Complainant's] attitude and conduct and statements toward [from?] his administrator, I felt that was something we had been addressing with him for quite some time through progressive steps, and it was getting more and more serious . . . I definitely felt that it merited the next level of discipline.

(T 287)

Regarding the decision to terminate Complainant, Okazaki testified that he reviewed the employee statements regarding the harassment of Fox contained in RX 29. Okazaki stated that he considered the several allegations that Complainant hit Fox and that Complainant told Fox that she could not report him because she was on probation at that time. Okazaki also considered Complainant's assertions that he did not hit Fox maliciously, and that the water dumped on Fox was done by Everett Shipler during horseplay. However, Okazaki stated that it was inappropriate for a head custodian such as Complainant to engage in any kind of hitting of custodians or horseplay with them. Consequently, Okazaki recommended that Castillo terminate Complainant's employment.

Okazaki testified that he became aware of problems with the Mark E II product when OSHA began an investigation based on Complainant's complaint filed with its office. (RX 2–11) Okazaki investigated the matter by interviewing Juareen Castillo, Alice Flavella, Eddie Giron, Rocky Lange, Terry Price, and Della Haddad. Okazaki stated that Giron and Lange, to whom Complainant complained about the Mark E II product, were not involved in any of the discipline proceedings against Complainant.

Okazaki also investigated why Risk Management never responded to the C-1 injury reports filed by Complainant regarding the Mark E II product. Okazaki stated that Risk Management did not receive Complainant's C-1 reports until August 6, 2003 because Haddad did not file the forms with Risk Management, apparently due to her oversight. However, Okazaki noted that Risk Management does not typically respond to C-1 injury reports unless a doctor's report accompanies them. (T 278–314) Okazaki noted that had doctor's reports been submitted with the C-1 injury reports, "then Operations would have become aware of it; that's why I surmise that no one, Alice Flavella, Eddie Giron, Rocky Lange, were aware of these C-1s because they had never reached a level of an actual claim." (T 312)

B. The Statutory Scheme

Under the Toxic Substances Control Act, an employer may not discharge or discriminate against an employee with regards to compensation, terms, conditions, or privileges of employment because the employee has:

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under the Act;

(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 purpose of the Act.

15 U.S.C. § 2622(a); 29 C.F.R. § 24.2(a). Further, an employee may not be discriminated against for notifying an employer of an alleged violation of the Act, refusing to engage in any practice that is unlawful under the Act, or testifying before a state or federal government body regarding a provision of the Act. 29 C.F.R. § 24.2(c)(1-3).

The Secretary of Labor has set forth the burdens of proof and production that apply to "whistleblower" proceedings in Dartey v. Zack Company of Chicago, 82-ERA-2, slip op. at 7-8 (Sec'y April 25, 1983). When, as is the case here, a complainant seeks to rely on circumstantial evidence of intentional discriminatory conduct, the burdens still apply. Zinn v. University of Missouri, 93-ERA-34 and 36, slip op. at 6-8 (Sec'y Jan. 18, 1996). The complainant employee's burden is to establish a prima facie case by showing that: (1) the complainant engaged in protected conduct; (2) the respondent employer was aware of that conduct; and (3) the employer took some adverse employment action against the complainant. Zinn, 93-ERA-34 and 36. The complainant must also present evidence sufficient to raise at least an inference that the protected activity was the likely reason for the adverse action. The respondent may rebut the complainant's prima facie case by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason for the action. The complainant may counter the respondent's evidence by proving that the legitimate reason proffered by the respondent is a pretext. Dartey, 82-ERA-2, slip op. at 6.

After weighing the evidence presented by all parties, the trier of fact may conclude that the employer was motivated by both prohibited and legitimate reasons. Dartey, 82-ERA-2, slip op. at 6. If this is the case, then the respondent's "dual motive" must be weighed. Id.; Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1987). In order to avoid liability in dual motive cases, the respondent has the burden of persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Mt. Healthy, 429 U.S. at 287; Dartey, 82-ERA-2, slip op. at 6. The employer bears the risk that the trier of fact may find that he or she is unable to separate the influence of the legal and illegal motives. Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 11159, 1164 (9th Cir. 1984); Mandreger v. Detroit Edison, 88-ERA-17 (Sec'y Mar. 30, 1994).

C. Analysis

1. Complainant Engaged in Protected Activity When He Complained to His Superiors About the Cleaning Product and When He Filed C-1 Injury Reports With Castillo

An activity is protected if it is in furtherance of the statutory objectives. Jenkins v. U.S. Environmental Protection Agency, 92-CAA-6 (Sec'y May 18, 1994). The Secretary in Minard v. Nerco DeLamar Co., 92-SWD-1 (Sec'y Jan. 25, 1994), held that the actions of a complainant should be subject to a reasonableness test. Specifically, the Secretary found that the activity of a complainant based on a reasonable belief that a substance is hazardous and subject to EPA regulation is protected by the Solid Waste Disposal Act. In Monteer v. Casey's General Stores, Inc., 88-SWD-1 (Sec'y Feb. 27, 1991), a complainant's internal complaints and expressed suspicions about a gasoline odor and leak were held to constitute protected conduct within the scope of that statute. See also Crosby v. Hughes Aircraft Company, 85-TSC-2 (Sec'y Aug. 17, 1993).

In the instant matter, I find that Complainant engaged in protected activity under the Act. One of the statutory objectives of the Act is to protect human beings and the environment from chemical substances which "may present an unreasonable risk of injury to health or the

environment." 15 U.S.C.A. § 2601(a). It is well-established that informal complaints to supervisors and management about a possible dangerous condition are well within the scope of protected employee activity. Nichols v. Bechtel Construction, Inc., 87-ERA-44 (Sec'y Oct. 26, 1992); Crosier v. Portland General Electric Co., 91-ERA-2 (Sec'y Jan. 5, 1994) (complainant's questioning his supervisor about an issue related to safety constituted protected activity). Moreover, the complaint need only "touch on" subjects that are covered by the pertinent statute or regulation. See Nathaniel v. Westinghouse Hanford Co., 91-SWD-2, slip op. at 8-9 (Sec'y Feb. 1, 1995). In the instant matter, Complainant furthered the purposes of the Act and engaged in protected activity when he filed C-1 injury reports in May 2003 with Castillo, his supervisor at Western High School. Complainant also engaged in protected activity in April and May 2003, when he orally complained to Price, Giron, and Lange, all of whom have supervisory authority over the District's custodians. The C-1 injury reports and his complaints to Giron and Lange about the Mark E II product described his and his co-workers' skin rashes that appeared when they used this product. (RX 12; T 55–57) I find that these C-1 injury reports and informal complaints notified Complainant's supervisors of a possibly unreasonable health risk to custodians employed by the District and furthered the purposes of the Act.

I also find that Complainant had both an actual and reasonable belief that the Mark E II product posed a possible health risk to himself and his custodial staff. In their C-1 injury reports Complainant and three other custodians at Western High School documented skin rashes that apparently developed after using the Mark E II product. (RX 12) Employees Sperling and Bassett both testified that, based on their experience using the Mark E II product, it caused skin rashes and irritation. (T 37–42) While it does not appear to me that the chemical composition of the Mark E II product is dangerous *per se*, the record shows that the custodians were trained to dilute Mark E II cleaning products according to a color-coding system. (T 207) Therefore, when the coloring of the products' packaging changed unexpectedly it caused some confusion among the custodial staff about how to properly dilute the cleaning product. (T 219) I find that when the Mark E II product was not properly diluted, the chemicals were likely strong enough to cause skin rashes and irritation on the arms of the custodians.

In sum, I find that Complainant engaged in protected activity under the Act by filing C-1 injury reports with Castillo in May 2003, and by complaining about the Mark E II product to Price, Giron, and Lange.[7]

[7] I note that Giron testified that custodians were warned about these packaging problems as early as October, 2001 - long before Complainant claimed he first noticed a change in packaging in April 2003. Additionally, the October 2001 and January 2002 newsletters issued to the custodians provided information about how to properly dilute the improperly packaged Mark E II product. Considered as a whole, this evidence could possibly lead to an inference that Complainant's complaints about the cleaning products in May 2003 were not genuine. However, I find that the record evidence does not support a finding that Complainant had any actual or constructive knowledge of the change in the product's packaging prior to April 2003, and that, as a result, his subsequent complaints were disingenuous.

2. No Nexus Exists Between Complainant's Protected Activity and the District's Adverse Employment Actions Against Him.

Although Complainant has shown that he engaged in protected activity, he has failed to establish a prima facie case that his protected activity was a motivating factor in the District's adverse actions against him. Rather, as discussed below, the evidence establishes that the District's suspension and termination of Complainant were for wholly legitimate reasons. Consequently, this is not a "dual motive" or "mixed motive" case in which the burden of proof shifts to the employer. Henrey v. Pullman Power Products Corp., 86-ERA-13 (Sec'y June 3, 1987; Hancock v. Nuclear Assurance Corp., 91-ERA-33, slip op. at n.2 (Sec'y Nov. 2, 1992).

The record shows Complainant caused the District continual disciplinary problems that began long before he first complained about the Mark E II product in April 2003. On September 6, 2001 Complainant was issued a written reprimand for refusing to clean classrooms that were used by the District police for a meeting. In this incident, Complainant also engaged in a verbal altercation with a District police officer. (RX 22) Complainant was next issued a written reprimand on November 6, 2001 for failing to submit inspection reports to District supervisors. (RX 23) On November 14, 2001 Complainant received a third written reprimand for failing to clean football field bleachers when he was asked to do so by his supervisor. (RX 24) On April 19, 2002 Complainant was suspended from work for three days for failing to clean graffiti off a wall as directed by his supervisor. (RX 25) Thus, in April 2003 when Complainant first complained to Price and Lange about the Mark E II product, he had already been issued three written reprimands, as well as a three-day suspension, for insubordinate actions.

On June 13, 2003 Complainant was issued a 10-day suspension for refusing to open the home-side restrooms at a track event after he was asked to do so by Evans. (RX 27) Complainant testified, in his defense, that he did not consider opening the home-side restrooms to be a priority since the school still needed to be cleaned and he was understaffed. Complainant also explained that he believed he did not have to take orders from a teacher. (T 69) On the other hand, Maestas testified that the Facilities Use Permit dated May 30, 2003 required Complainant to open all restrooms at the track and field facility for the track meet. (T 203) I give little weight to Complainant's testimony regarding this incident. While Complainant stated that he believed he was required to take orders only from administrative personnel, and not teachers, I note that Maestas credibly testified that she never told Complainant that it was inappropriate for teachers to make requests of custodians. (T 194–203) Based on the three written reprimands and the three-day suspension he had received prior to that time, I find that Complainant had a practice of refusing to honor requests he unilaterally deemed to be unwarranted or beyond the legitimate authority of the requester. I also note that at the hearing Complainant provided an additional reason for his refusal to open the home-side restrooms. Complainant testified that, in addition to being understaffed that day, he believed the home-side restrooms would not be usable even if cleaned since their water supply was not turned on. (T 135) However, Everett Shipler provided a statement which reveals that Complainant asked him to clean those very same restrooms the prior day. (CX M-6) Complainant's testimony about this incident is also undermined by the fact that if the restrooms had no water it would have been logical for him simply to have told Evans at the outset that the home-side restrooms were unusable. However, he did not testify that he did so. (T 133)

Finally, the District contends that it ultimately suspended Complainant and subsequently terminated his employment because of his conduct involving Karsha Fox. (Fox's written statement about this incident is set forth in full at page 5, above.) Price stated that Fox appeared to be very upset and she wept as she wrote her statement. Price testified that Fox told him she felt intimidated by Complainant. (T 13-15) Price investigated the incident and obtained several witness statements that confirmed Fox's account of events. Okazaki considered these written statements about Complainant's behavior and recommended to Castillo that she should discharge Complainant. Castillo issued the recommendation for Complainant's termination on August 12, 2003, citing Complainant's harassment of Fox as the cause. (RX 28) I find the testimony of Price, Castillo, and Okazaki to be credible and supported by the record evidence.

Based on the foregoing, there is every reason to conclude that the District's actions against Complainant were motivated by his on-the-job misconduct involving Fox and no reason to believe that his protected activity played any role in the District's actions. I find that this behavior amply warranted Complainant's discharge, especially in light of his prior insubordination and the disciplinary actions the District had meted out against him for that conduct. However, Complainant argues that the District's reliance on the events described above is pretextual. (Complainant's Brief, p. 1) I disagree.

First, I give little weight to Complainant's attempt to alter the character of the harassment incident. Complainant testified that rather than striking Fox, he "tapped" Fox on the head with his gloves, and that he "tapped" her on the shoulder. (T 78) Complainant also stated that Shipler dumped a bucket of water on Fox during an incident in which all of the custodians, including Fox, were engaged in horseplay. (T 73) However, I find that Price is credible in testifying that Fox was highly upset by Complainant's actions. Fox's voluntary statement and her unhappiness about being hit and kicked and having a bucket of water poured on her greatly undermine Complainant's self-serving version of these events. (RX 29)

Complainant also argues that the August 28, 2003 addendum to the August 13, 2003 termination notice was added after the District received notice of Complainant's whistleblower complaint. (Complainant's Brief, p. 5) Complainant argues: "The obvious inference is that upon receipt of the DOL complaint, the District reviewed the allegations against Complainant, realized they were extremely weak, and then sought to strengthen them by adding 'intimidation.'" (Complainant's Brief, p. 5) However, I find that the original termination notice of August 13, 2003 – which states that Complainant hit and kicked an employee – by itself sets forth ample justification for the decision to discharge Complainant. Further, Okazaki testified without contradiction that such conduct by a head custodian is not tolerated by the District. (T 297) Okazaki also stated that the District considered Complainant's extensive prior disciplinary record in the decision to terminate him. (T 217) Consequently, I find without merit Complainant's argument that the District used his behavior toward Fox as a pretext for discharging him for his protected activity.

Complainant additionally argues that the C-1 injury reports he submitted were intentionally suppressed by Castillo and that this raises the inference that Castillo attempted to protect the District from any liability that could arise from using the Mark E II product. (Complainant's Brief, p. 4) While, concededly, it initially appears suspicious that the C-1 injury

reports were not processed properly by Castillo's office, I find that Castillo and Haddad both testified credibly that the C-1 injury reports were not sent to the Risk Management Department due to oversight, rather than deliberately. Haddad stated that it was her usual practice to file such reports with Risk Management and retain copies in her office but that she could not recall why Complainant's C-1 injury reports were not sent to Risk Management. Castillo could not recall if she gave the forms to Haddad. Thus, I find no support in the record for a finding that Castillo deliberately lost or delayed the processing of the C-1 injury reports filed by Complainant.[8]

I also find that Complainant's argument regarding the C-1 injury reports is further undercut by the fact that the record does not contain any evidence that Castillo had any connection to the District's Operations Department. Based on the record evidence, I infer that the Operations Department and the administration at Western High School are separate entities that carry out separate missions for the District. The Operations Department supervises the custodians, provides custodians with cleaning products, and trains custodians in safely handling cleaning products. (T 7, 194–95, 205–24, 225–35) Consequently, I find that Castillo testified truthfully that she had no interaction with the Operations Department, nor any knowledge of the problems with the Mark E II product. (T 253–55)

I further note that the Operations Department had not concealed the problems with the Mark E II product prior to Complainant's complaints about it. In October 2001 and January 2002, the Operations Department provided the custodial staff at least two newsletters describing problems with the packaging and the directions about how to mix the product. The January 2002 newsletter specifically describes where custodians could obtain correctly packaged Mark E II product to avoid confusion. (RX 13) In addition, upon hearing Complainant's complaints about the product, Lange instructed him to file C-1 injury reports with the Western High School administration, essentially encouraging Complainant to come forward to the District with his concerns about the Mark E II product. I find that the District's efforts to address the problems with the Mark E II product indicate that it was not motivated to suppress Complainant's protected activity involving that product or to retaliate against him because he engaged in that activity.[9]

In sum, I find that the record evidence in its entirety establishes that the District's suspension of Complainant and termination of his employment were unrelated to and not motivated by his protected activity.

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[8] On the other hand, I find no support for the District's argument that Complainant retained the forms after Castillo signed them and that he fabricated a story that Haddad found the unfiled forms in her office. (Respondent's Brief, pp. 12–15)

[9] I do not give any weight to Complainant's argument that the Mark E II product was used illegally by the District. (Complainant's Brief, p. 2) Complainant has not cited any law, nor can I find any, that supports this proposition.

D. Conclusion

Based on the foregoing, I find that while Complainant engaged in protected activity, the District's adverse employment actions taken against him were unrelated to that protected activity. Consequently, the complaint that the District discriminated against Complaint under the Act must be denied.

ORDER

The complaint of Shawn Hand for relief under the whistleblower provisions of the Act is DENIED.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

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.