



Issue Date: 07 December 2005

CASE NOS. 2005-TSC-00001
2005-ERA-00015

In the Matter of:

Maurice Rosen,
Complainant

vs.

Fluor Hanford, Inc.,
Respondent

Order Denying Summary Judgment

I. Introduction

On June 6, 2003, Maurice Rosen (“the Complainant”) filed a complaint alleging that his employer, Fluor Hanford Inc. (“the Respondent”) suspended and later terminated him from his position as an electrician because he reported environmental hazards and unsafe conditions to his supervisors, the Washington Department of Ecology (“DOE”), and the federal Environmental Protection Agency (“EPA”). He claimed employment protection under five whistleblower statutes (“the Acts”).¹ The Respondent moved for summary judgment on the grounds that the Complainant can neither establish a *prima facie* case of retaliation nor show that the Respondent’s reasons for termination were merely pretext. Respondent submitted declarations (“RD”) to support its motion; the Complainant responded directly to them with exhibits 1-60 (“CX”), and appendices A-J (“CA”) in opposition to the motion. On October 11, 2005, the Respondent filed a reply.

Factual disputes preclude summary disposition of these claims.

II. Background

The Respondent is a contractor for the United States Department of Energy at the Hanford Nuclear Reservation. RD Blankenship. The Hanford site includes an area where

¹ The Energy Reorganization Act (ERA) 42 U.S.C. § 5851; the Safe Drinking Water Act (SDWA) 42 U.S.C. § 300j-9(i); the Water Pollution Control Act (FWPCA) 33 U.S.C. § 1367; the Toxic Substances Control Act (TSCA) 15 U.S.C. § 2622; and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610.

nuclear production reactors were located and operated for several decades, that resulted in radiological and chemical contaminant plumes that have threatened to contaminate the Columbia River and aquifers in the area. *Id.* The efforts of the Groundwater Remediation Project (“GRP”) encompass the operation of pump-and-treat systems that pump contaminated groundwater from the chromium and other plumes, treat it to remove contaminants, and inject the clean water back into the aquifer. *Id.*

The Complainant was a journeyman electrician at Hanford GRP from September 2003, until he was terminated on December 7, 2004. CA I. In the spring of 2004, he alleges he reported two different safety concerns. *Id.* First, he called a stop work after he was directed to “cut 75% of the strands off of a new wire installation in order to fit an existing lug terminal.”² CA J at 68-69. Second, he reported that diesel forklifts were operated in an unventilated warehouse. CA J 57-61.

Also in the spring of 2004, the Respondent’s employee concerns coordinator, the union’s safety representative, and an independent mentor assigned by the GRP project director conducted an investigation into a series of employee complaints that had not been resolved satisfactorily. CX 38. Some of them were “fear of reprisal for using stop work” and for “bringing up safety issues.” CX 1.

The Complainant injured his back at work on April 21, 2004 when he tripped over a PVC cover over some electrical wires. CX 8. He alleges he complained that this pipe was a tripping hazard before his accident, but no action was taken, which left him upset that management failed to heed the warning. *Id.* He filed a workers’ compensation injury claim and took medical leave until he returned to light duty work on July 7, 2004. CX 12. On August 6, 2004, the Complainant was suspended without pay for one working day because he admitted using his government cell phone for personal use. CX 11.

On October 19, 2004, the Compliance Inspector for the Washington DOE, Bob Wilson, received an anonymous call that releases of groundwater contaminated with chromium had occurred at the Respondent’s site.³ CX 60. The caller said the releases had been small over a period of years.⁴ *Id.* The caller also claimed that this had been reported to a member of the Respondent’s Human Resources department, Nancy Conrad, and to a Bargaining Unit Representative, Hans Showalter. *Id.* On November 2, 2004, the Respondent received notice that

² Based on an e-mail sent from one of the engineers at Hanford on March 17, 2004, this was a safety issue because the cables then could overheat. CX 7.

³ The Complainant’s First Complaint that he filed with OSHA explains that in July 2004 – rather than October – he contacted Bob Wilson at the Washington Department of Ecology and reported “an intentional release of chromated contaminated water to the environment . . . This was done several times between 1999 to 2002.” This Complaint explains that he contacted Bob Wilson sometime in August, and that the discharges occurred between “1999 and 2001.”

⁴ The parties dispute whether the Complainant reported releases from 1999 to 2001 or from 1999 to 2002. *See* fn 3, above.

Bob Wilson requested a meeting with the Respondent and the Department of Energy to discuss a phone call concerning “possible leakage to the ground of liquid.” CX 31.

The Complainant missed work on November 3, 4, and 8, 2004. RD Brasker at 2. He wanted that time to be classified under “plant injury” rather than personal (vacation) time. *Id.* On November 11, 2004, the Complainant confronted the Respondent’s Senior Safety Specialist, Cheryl Brasker, because she would not change the time classification. *Id.* Ms. Brasker says the Complainant screamed at her and pounded his finger on a paper on her desk, behavior she found aggressive, intimidating, and abusive, so she reported it to Marilyn Strankman, the Workforce Services Manger. *Id.* The Complainant concedes that he may have spoken loudly, but he did not believe he had done anything wrong. CA A. The Respondent suspended the Complainant for five days for this incident. RD Strankman, Exh 5.

On November 23, 2004, the Complainant called the Respondent’s Senior Clerk, Heather Guillen, to open a short-term disability claim. RD Guillen. When she explained why she could not do so, he yelled at her and used profanity. *Id.* She reported this incident to Marilyn Strankman. *Id.* On November 29, 2004, Marilyn Strankman, James Hanna and Frank Blowe decided that the Complainant should be terminated for extremely serious misconduct. RD Strankman. Marilyn Strankman prepared a disciplinary discharge letter on November 30, 2004. *Id.*

Later that day the Respondent’s management met with the Complainant’s union representative, who requested that the discharge be postponed to give the union time to persuade the Complainant to retire rather than face termination. *Id.* The management agreed, but the Complainant rejected the retirement offer. *Id.*

On December 6, 2004, the Complainant submitted employee concern # 20040122.02 to the DOE that explained he had gone to “B. Wilson of the DOE and talked to D. Faulk of the EPA, both about a month ago, concerning contaminated chromated water having been released by the FHI groundwater group....” CX 56. He conceded in this writing that the Respondent told him the previous Thursday that he might be fired, but he believed this threat was retaliation for his disclosures to the Washington DOE and the federal EPA. *Id.*

December 7, 2004, the Respondent sent the Complainant the disciplinary discharge letter. Complainant’s First Amended Complaint. On January 5, 2005, the Complainant filed his initial complaint under the employee protection provisions of TSCA, FWPCA, CAA and CERCLA. May 3, 2005 Letter from OSHA. On May 3, 2005, he filed an amended complaint that included a claim of protection under the ERA.⁵ *Id.* The amended complaint contains these allegations of safety violations:

1. The Complainant refused to do electrical work where 75% of the strand content had been removed so the wire would fit through a valve’s actuator lug, so he had ordered a “stop work” on this issue, and requested a meeting with the engineer in charge;

⁵ The ERA complaint has the same allegations as the EPA complaint. See May 4, 2005 letter from OSHA.

2. He reported a tripping hazard at a portable electrical supply trailer, over which the Complainant later tripped and sustained a back injury.
3. He served on the Employee Zero Accident Council and reported the improper operation of diesel equipment in an enclosed warehouse, the use of improper high voltage electrical safety tape warnings, and non-compliance with control of hazardous energy protocols (“lock and tag violations”);⁶ and
4. He reported illegal discharges of chromium contaminated water between 1999 and 2001 or 2002 to the DOE.

III. Analysis

A. Legal Standard for Granting Summary Judgment

A summary decision may be entered if the pleadings, affidavits, and other evidence show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. 29 C.F.R. § 18.40(d); *Friday v. Northwest Airlines, Inc.*, 2005 WL 1827745 *2, ARB No. 03-132, ALJ No. 2003 AIR 19 (July 29, 2005) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). The rule on summary decisions mirrors Rule 56 of the Federal Rules of Civil Procedure. *Mehen v. Delta Air Lines*, Case No. 03-070 (ARB Feb. 24, 2005).

The proof must be grounded in affidavits, declarations, and answers to discovery from the complainant and (or) other witnesses. 29 C.F.R. § 18.40(d). Affidavits must be made on personal knowledge, setting forth facts that would be admissible in evidence and show affirmatively that the witness is competent to testify to the matters stated. 29 C.F.R. § 18.40(c) and Fed. R. Civ. P. 56(e). The judge weighs none of this evidence, and indulges reasonable inferences in the complainant’s favor. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

B. Burden of Proof

The burden first is on the moving party to explain why there is no genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also Matsushita*, 475 U.S. at 587 (finding no genuine issue for trial when the record as a whole could not lead a trier of fact to find for the non-moving party). Once this burden is met, the “adverse party must set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 250. The non-moving party cannot rest upon “mere allegations, speculation, or denials of the moving party’s pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof.” *Id.* at 256. If the non-moving party fails to establish an element essential to his case, there can be “no genuine issue as to any material fact since a

⁶ The Complainant explains that all of these conditions can potentially require system shutdowns as well as damage to equipment and operations critical to Hanford projects. *See* Complainant’s Opposition to the Motion for Summary Judgment (“Opposition”) at 6.

complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322-23.

The complainant in a whistleblower protection proceeding may survive a motion for summary judgment in two ways. First he may offer "direct evidence" of discrimination or retaliation. *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004). Direct evidence is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997). When (as here) the non-moving party lacks evidence that clearly points to the presence of an illegal motive, he may avoid summary judgment by creating the requisite inference of unlawful discrimination using *McDonnell-Douglas* burden shifting. That requires a complainant to have sufficient evidence that the reason offered for his firing was pretextual, among other things.⁷ *Griffith, supra*, 387 F.3d at 736; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The Respondent emphasizes that the Complainant bears the "ultimate burden" of persuasion "at all times." See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). This is the burden required to prevail at trial. A summary judgment motion does not determine a prevailing party; it only precludes claims where there the absence of a genuine issue of material fact entitles the moving party to judgment as a matter of law. The Respondent shoulders the burden to establish the lack of a genuine issue of material fact for trial. The Complainant must counter with circumstantial evidence that, *viewed in the light most favorable to him as the non-moving party*, supports an inference that he was intentionally fired in retaliation for whistleblowing. If he adduces sufficient evidence, the motion is denied, but at trial I may not be persuaded to accept those inferences. To avoid summary judgment, the Complainant need not prove he will win his case.

C. Prima facie case

The essential *McDonnell-Douglas* elements retaliatory intent are: 1) the Complainant must be an employee covered by the relevant statute; 2) the Complainant engaged in protected activity; 3) the Respondent took an adverse employment action against the Complainant; and 4) a causal nexus may be inferred between the protected activity and the adverse action. See, *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46, slip op. at 11 n.9 (Sec'y Feb. 15, 1995), *aff'd sub nom.*, *Carroll v. United States Department of Labor*, 78 F.3d 352, 356 (8th Cir. 1996).

Here, the elements at issue for the *prima facie* case are whether the Complainant engaged in protected activity, the type of adverse action taken, and whether the Respondent knew of the protected activity so that the causal nexus could be inferred.

⁷ The *McDonnell-Douglas* framework "is designed to give the [complainant] a boost when he has no actual evidence of discrimination but just some suspicious circumstances." *Stone v. City of Indianapolis Public Utilities Division*, 281 F.3d 640, 643 (7th Cir. 2002).

1. Protected Activity

An employee engages in protected activity when he notifies his employer, or a state or the federal government of a violation of the relevant environmental protection acts. 29 C.F.R. § 24.2(c). The protection encompasses internal safety and quality control complaints. *See, e.g. Passaic Valley Sewerage Commissioner v. Department of Labor*, 992 F.2d 474 (3rd Cir. 1993); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985); *Mackowiak, supra*, 735 F.2d at 1163.

The employee must subjectively believe that the employer violated the Acts, and that belief must be objectively reasonable. *Melendez v. Exxon Chemicals Americas*, ARB No. 1996-051, ALJ No. 1993-ERA-6, slip. op. at 20 (ARB July 14, 2000); *Minard v. Nerco Delamar Co.*, 92-SWD-1, (Sec’y Dec., Jan. 25, 1994) slip op. at 7-16 (finding it unreasonable to expect the average lay person to know what is on TSCA’s hazardous waste list). The employee need not show that any actual violation occurred. *See Diaz-Robainas v. Florida Power & Light Co.*, 92-ERA-10, (Sec’y Dec., Jan 19, 1996) slip op. at 11 & n. 7.

a. Reporting faulty valve wiring for groundwater contaminate pumping operations, the “stop work,” and demands for engineering oversight

Whistleblower protection does not apply where the complaint deals with a purely occupational hazard. *See Minard, supra* 92-SWD-1. Complaints that encompass both occupational and environmental concerns, however, can trigger the employee protection provisions of the environmental statutes. *Melendez, supra* 1993-ERA-6 at 11.

The Complainant contends that he used his “stop work” authority to counter a directive that he should cut 75% of the strands off of a new wire installation in order to fit an existing lug terminal. He believed it was an NEC code violation and could lead to possible electrical failure, which would impact nuclear and environmental safety. He testified that the wiring work involved a particular valve that was a “motor operated valve” rather than a manual valve. CA J at 69-71. He believed the valve in question served to filter chromium from groundwater.⁸ *Id.* He did not believe there was a manual operation to override that valve in the case of electrical failure. *Id.* Consequently, the Complainant explained, “my contention is that if something happened there and that valve malfunctioned, you could possibly have released the contaminated water into the facility.... or the contaminant would run right off of the floor and down the gravel road into the Columbia River” *Id.* Moreover, the location of the valve was in an area that required workers to have a Radiological Work Permit and dress in anti-contamination gear. CA I.

The Respondent contends this was a complaint of an occupational hazard, not a nuclear or environmental one. It argues that the valve in question is located in an area that controls post-treatment, uncontaminated water. RD Blankenship. If the valve were to fail, then only clean water would be released, and the only detrimental effect would be a plant shut-down. *Id.* The

⁸ The Complainant asserts that chromium is a byproduct of nuclear operations, which implicates coverage under the ERA. Opposition, at 8.

Respondent also contends that this allegation is not protected activity under TSCA or CERCLA because those acts specifically exclude hazardous substances such as chromium, which is a byproduct of nuclear operations at Hanford. *See* 15 U.S.C.A. § 2602 (2)(B)(iv); 42 U.S.C.A. § 9601 (22)(C).⁹

While it is likely that no actual contamination would have occurred, it is reasonable to believe that an environmental detriment would result when a system designed to remove contamination from nuclear operations malfunctions. The Complainant's subjective belief is supported by the type of motorized valve involved, and the risks that required employees working in that area to wear anti-contamination gear. Further, the activity in question need not qualify for protection under all of the Acts to survive summary judgment. Even though TSCA and CERCLA may not apply, an issue of fact remains whether this activity is protected under the ERA, SDWA, and FWPCA.

b. Reporting a tripping hazard at a portable electrical supply trailer, over which the Complainant later tripped and sustained a back injury

The Complainant alleges that the placement of the electrical cable and cord cover that were part of a carbon tetrachloride vapor extraction unit presented safety issues. CX 22. He says he informed the Respondent about a tripping hazard – the electrical cord cover – at this unit, but that nothing was done. CA J at 65. Later he tripped over the cord cover and injured his back while working around the unit. *Id.* When he received first aid, the Complainant said “that he was so mad that this happened that he should file a suite (sic).” CX 22. At that time he called a stop work on this unit because of “numerous safety deficiencies” found at the unit including the tripping hazard, and the need for “thorough cleaning of the electrical components, replacement of frayed unsafe cords, and removal of standing water through which FHI had electrical cords running.” CA I.

The Respondent again argues that this complaint is limited to an occupational hazard. The Complainant's proof fails to link these safety issues to environment or to nuclear hazards. On this evidence, it is not objectively reasonable to believe that complaining about a tripping hazard, dirty electrical components, frayed cords, and standing water constitute protected activities under the relevant Acts. These conditions may have been dangerous, but they were purely occupational concerns remediable under §§ 5 and 11 of the Occupational Safety and Health Act of 1970 (OSHA Act), 29 U.S.C.A. § 651 *et seq.* (West 1999).

c. Serving on the Employee Zero Accident Council and reporting the improper operation of diesel equipment in an enclosed warehouse, the use of improper high voltage electrical safety tape warnings, and non-compliance with control of hazardous energy protocols (“lock and tag violations”)

⁹ TSCA excludes from the definition of chemical substance “any source material, special nuclear material, or byproduct material as such terms are defined in the Atomic Energy Act of 1954, 42 U.S.C.A. § 2011.” 15 U.S.C.A. 2602(2)(B)(iv). CERCLA excludes from the definition of releases “source, byproduct or special nuclear material form a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954.” 42 U.S.C.A. § 9601(22)(C).

The diesel equipment

The Complainant alleges the Respondent operated a diesel forklift inside an inadequately ventilated warehouse. CA I at 55-57. He claims that this is protected activity under the Acts because outside vendors “could possibly have been into the building at the time this was happening.” CA I at 57. The Respondent argues that the Complainant concedes in his deposition that the operation of diesel forklifts raised an issue of workplace, not public, safety. *Id.*

Operating a diesel forklift in an unventilated building compromises the building’s air quality. The contention that outside vendors “*could possibly*” be in the building along side the Respondent’s employees is insufficient to support a reasonable belief that the general public was placed at risk. This allegation does not qualify as a protected activity under the Acts, for it involved another purely occupational hazard.

The use of improper high voltage electrical safety tape warnings and the lock and tag violations.

Employee complaints filed under OSHA may constitute protected activity when they “touch on the concerns for the environment and public health and safety.” *Melendez, supra* 1993-ERA-6 at slip. op. 11. The Complainant explains that the minor violations above spoke volumes about the Respondent’s sloppy electrical practices. Taken together, such conditions could require system shutdowns as well as damage to equipment and operations critical to Hanford projects. The Respondent contends that the Complainant never alleged that these safety issues violated nuclear or environmental laws, ignored safety procedures, or presented unacceptable risks. Even when the Complainant was encouraged to disclose safety issues as a member of the Employee Zero Accident Control committee, he did not raise these violations.

The Complainant gives no evidence that he believed all of these safety issues collectively violated nuclear or environmental laws at the time he reported each of them individually. Considering all of the evidence in light most favorable to the Complainant, it is objectively unreasonable to believe that each of these minor occupational violations “touch on” matters of nuclear or environmental protection. These allegations do not qualify as protected activities under the relevant whistleblower protection statutes.

d. Reporting illegal discharges of chromium contaminated water between 1999 and 2001 or 2002 to the DOE

The Respondent emphasizes that the Complainant has given conflicting reports about when chromium-tainted water was discharged illegally. The Complainant’s First Complaint spoke of discharges between 1999 and 2002; his First Amended Complaint reported illegal discharges between 1999 and 2001. It is undisputed that the Respondent did not manage Hanford GRP until 2002. The Respondent therefore says the Complainant could not have reasonably believed it discharged the tainted water because it did not manage the site until after these alleged releases. Moreover, the Complainant testified that he heard all of the releases happened under Bechtel. *See* CA I at 22-27.

While the Complainant may have been aware that the Respondent did not control the site until 2002, he believed that those who ordered the releases while Bechtel controlled the site kept their positions under the Respondent's management. The name of the managing body may have changed, but many of the managers did not. See Complainant's First Amended Complaint. Even if the Respondent itself was not ultimately responsible for the discharges, the Complainant's reports created risks of liability to the individual managers who continued to work at Hanford GRP. It is objectively reasonable to believe that those managers would have an incentive to get rid of an employee who showed a propensity to expose their misdeeds. The Complainant's disclosures to the DOE and EPA, before he became aware of his termination, constitute protected activities. Although the Complainant's December 6, 2004 report to the DOE remains relevant evidence to the issue of causation, this report itself is not a protected activity because it occurred after the Complainant knew he would be terminated. Chronologically it could neither have caused nor contributed to an adverse employment action that had already happened.

2. Adverse Action

An actionable "tangible employment action" is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). *Jenkins v. United States Environmental Protection Agency*, ARB No. 98 146, ALJ No. 1988-SWD-2, slip. op. at 19 (ARB Feb. 28, 2003). The Complainant contends that the Respondent retaliated against him by: 1) failing to process his workers' compensation claim in a timely manner; 2) refusing to allow him to leave work for first aid; 3) suspending him for five days; and 4) terminating him. The parties concur that suspension and termination constitute adverse actions the whistleblowers Acts may reach.

Relief can extend to things like poor performance appraisals that are likely to dissuade others from whistleblowing and thereby stifle the types of employee disclosures Congress meant to encourage.¹⁰ *Daniel v. TIMCO Aviation Services, Inc.*, 2002-AIR-26 (ALJ June 11, 2003); *Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004). A failure to promptly process a workers' compensation claim and the refusal to allow the Complainant to seek prompt first aid do not qualify as tangible employment actions. They did not change the Complainant's employment position. The only adverse actions for which the Complainant could obtain relief are his suspension and termination.

A delay in processing his compensation claim and (or) a refusal to allow him to seek first aid are circumstances bearing on whether he was terminated in retaliation for protected activities. Admitting this type of proof is "consistent with the nature of the evidence presented in a circumstantial evidence case of retaliatory intent, some of which [evidence] may appear to be of little probative value until the evidence is considered as a whole. . . ." *Seater v. Southern California Edison Co.*, 1995-ERA-13 slip op. at 5 & n. 8 (ARB Sept. 27, 1996).

¹⁰ Decisions at DOL are not unanimous on the point, however. *Dolan v. EMC Corp.*, 2004-SOX-1, slip op. at 4 (ALJ March 24, 2004) states that an unfavorable performance evaluation that did not reduce the complainant's salary, directly jeopardized his job security, or caused any tangible job detriment was not an adverse employment action.

3. Causation

To establish causation, generally two requirements must be met. First, the protected activity must precede the adverse action. *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87 (2d Cir. 2001). Second, someone in a position to affect the Complainant's employment must have known of the protected activity (or suspected the Complainant of it) before the adverse action was taken. An employer must have acted from a retaliatory motive for the complainant to obtain relief. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 14 (ARB Jan. 30, 2004); *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 03-AIR-10, (ARB Dec. 30, 2004).

Under the ERA, however, the inquiry is whether a complainant can “demonstrate” that his protected activity was a “contributing factor” to the unfavorable employment action. 42 U.S.C.A. § 5851(b)(3)(C). In the context of similar whistleblower cases, “a contributing factor” means “any factor which, alone or in connection with other factors, tends to affect in any outcome of the decision.” *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (citations omitted) [defining “contributing factor” as applied to Whistleblower Protection Act for federal employees, 5 U.S.C.A. § 1221 (West 1996)]. For the ERA claim alone, a whistleblower is not required to prove that his protected conduct was a “significant,” “motivating,” “substantial,” or “predominant” factor in a personnel action in order to overturn that action. *Id.*

The Respondent argues that the causal nexus is absent because the protected activity occurred too far in advance of the adverse action, or too late. The Respondent also contends that those who suspended and terminated the Complainant had no knowledge of his protected activity. When the evidence is viewed in light most favorable to the Complainant, he has provided enough to give rise to an inference of causation.

a. Chronology

Temporal proximity is sufficient as a matter of law to establish causation. *Couty v. Dole* 886 F.2d 147, 148 (8th Cir. 1989). A long time between the protected activity and adverse action may defeat the *prima facie* case. *Scott v. Suncoast Beverage Sales, Ltd.*, 295 F.3d 1223 (11th Cir. 2002). The Respondent argues that most of the protected activity occurred too far in advance of the adverse action, while the December 6, 2004 report to the DOE occurred too late to support a causal link. All but one of the Complainant's allegations occurred in the spring of 2004. The Respondent terminated the Complainant between five and seven months later, on December 7, 2004. On December 6, 2004, after the Complainant was aware that the Respondent intended to terminate him, he contacted the DOE to report that he might be fired in retaliation for his prior disclosures to the DOE and the EPA.

The Complainant, however, provides evidence that his work environment was contentious, so that numerous, smaller events bridge the necessary time period. *See* CX 38. He includes an e-mail that implies some of the Respondent's managers did not want him to return to work after his injury. CX 36. He contends that the Respondent investigated his April 2004 accident because of rumors that he staged his injury, and that there was a second investigation into his cell phone usage that had led to a one-day suspension in August, 2004. CX 9-2 – 9-6;

CX 11. Finally, he believes that his accumulated safety concerns and stop work issues motivated management to monitor him in an effort to find some way to get rid of him. CX 14-2; CX 18; RD Saunders Ex 1 at 118.

Taken out of context, it appears that the link between the protected activity and adverse action is weak. Taken together, however, all of the evidence raises a factual dispute whether the minor hostilities directed toward the Complainant bridge the gap between his protected activity and his suspension and termination. *Seater v. Southern California Edison Co.*, 1995-ERA-13 slip op. at 5 & n. 8 (ARB Sept. 27, 1996).

b. Knowledge

Where a complainant's supervisor knows of the complainant's protected activity and has substantial input into the decision to fire him, that knowledge can be imputed to the manager who does the firing. *Kester v. Carolina Power and Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003); *Ezell v. Potter*, 400 F.3d 1041, 1051 (7th Cir. 2005); *see also Davis Supermarkets, Inc. v. National Labor Relations Board*, 2 F.3d 1162, 1168-69 (D.C. Cir. 1993) (explaining that the element of knowledge may be shown by circumstantial evidence).

The Respondent contends that it knew nothing of the Complainant's involvement in any protected activity until after he was terminated. The executives with the ultimate authority to terminate him were James Hanna, Frank Blowe, and Marilyn Strankman; each testified that he or she knew nothing about the Complainant's protected activity. DX Hanna; DX Blowe; DX Strankman. It argues that the Complainant therefore cannot demonstrate that the executives who terminated him had direct knowledge of his protected activity. What matters is knowledge, not "direct" knowledge. It can be imputed by circumstantial evidence. The Complainant provides circumstantial evidence that raises a factual dispute on the issue.

The Complainant alleges that he informed Nancy Conrad and Hans Showalter of his intent to report the chromium release to the DOE. CA J at 30-31. In her Retaliation Analysis report, Nancy Conrad found that Marilyn Strankman was at least "vaguely aware that [the Complainant] had raised employee concerns in the past." CX 8. Yet she also explained that Marilyn Strankman did not know that the Complainant raised a complaint with the DOE. *Id.* Additionally, Cheryl Brasker knew that the Complainant had "quite a few safety issues." CA D at 103. Darrell Henn, the GRP Project Coordinator, knew of the Complainant's report of the forklift operation inside the unventilated building. CA J. Art Garcia, the GRP Functional manager, knew of the Complainant's report of the tripping hazard and the forklift operation. CA E at 23. While none of these individuals – besides Marilyn Strankman – had the authority to fire the Complainant, the Complainant provides evidence that issues like the safety concerns he raised were likely discussed by upper management. CX 4-7; CX 15.

In August 2004, when the Complainant was investigated for improper cell-phone use, he told Curtis Fabre, Manager of Operations Management, that there were severe safety issues.¹¹ CX 13. A memorandum of this conversation was sent to Brian Von Barga, the Field Manager,

¹¹ This is shown by an e-mail addressed to Curt Fabre that includes a reference to Curt Larson in its text. It is unclear whether the Complainant told Curt Fabre or Curt Larson about the safety issues.

and to Dorman Blankenship, the GRP Manager. *Id.* Moreover, Marilyn Strankman had access to the Complainant's cell phone records. CX 11. They would have shown calls to Nancy Conrad and the DOE's Facility Representative, John Trevino. CX 20. Marilyn Strankman was also aware that the Complainant's immediate supervisors were reluctant to find work for him when he returned from his injury. CX 36. Finally, by November 3, 2004, many others within the management structure were notified that the DOE began investigations at Hanford due to a phone call from an unidentified individual of possible liquid leakage into the ground. CX 31, CA I.

With these facts there is a triable issue about whether those with the ultimate authority to terminate the Complainant can be charged with knowledge of his protected activities. Several managers were aware that the Complainant had made safety complaints, there was an active investigation of the site for evidence of past intentional releases of chromated water, and the work environment was contentious.

D. Legitimate non-discriminatory reason for the adverse action

Once the Complainant establishes a *prima facie* case, the Respondent may overcome a presumption of discriminatory retaliation by articulating a legitimate reason for the adverse action. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). This is countered by the Complainant's showing that the articulated reason is merely a pretext for retaliation. *Id.* at 515.

The Respondent has articulated a non-discriminatory reason for the adverse action. On November 11, 2004, the Complainant allegedly harassed Cheryl Brasker, and was suspended for it. Shortly after his return to work (on November 23, 2004), he allegedly used profanity and harassed another employee, Heather Guillen. The Respondent determined these repeated, recent instances of serious misconduct merited termination.

E. Pretext

When the Respondent produces evidence that the Complainant was terminated for a lawful reason, the issue presented is: "what was the true cause of discharge?" *Stone v. City of Indianapolis Public Utilities Division*, 281 F.3d 640, 643 (7th Cir. 2002). In response to the employer's version of the facts, the Complainant provides the testimony of James Hanna that it would be "ridiculous to assume the workforce does not cuss on a day-to-day basis." CA G at 24-25. Others who used inappropriate language and unprofessional conduct were given a disciplinary written warning. CX 48. Those who were terminated had committed grievous errors such as illegal drug use and assault. Whether it is credible that the use of profanity at the work site is "extremely serious misconduct" has been called into question.

Further, the Complainant argues that the Respondent violated its own discipline procedure when it terminated him. Tom McMahaon, the Assistant Business Manager of the International Brotherhood of Electrical Workers, testified that the Complainant's disciplinary process did not proceed in the normal way. CA A. For these two reasons, a triable dispute exists

about whether the reasons given for the Complainant's termination were merely pretexts. CX 50-2; CX 50-3.

The Complainant's allegations that he complained about safety issues at the carbon tetrachloride vapor extraction unit, his reports concerning the operation of the forklift in an unclosed area, the lock and tag violations, and his December 6, 2004 report to the DOE do not constitute protected activities. He has presented evidence that gives rise to a dispute of material fact over whether other alleged activities are protected. Further, there are too many disputes of material fact concerning the causal nexus between the alleged protected activity and the adverse action, including whether the reasons given for the firing are pretexts for retaliation for whistleblowing. The Respondent's motion for summary judgment is DENIED.

So Ordered.

A

William Dorsey
Administrative Law Judge