U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 October 2004

Case No.: 2004-CAA-00013

In the Matter of:

THOMAS SAPORITO,
Complainant,

v.

CENTRAL LOCATING SERVICE, LTD. And
ASPLUNDH TREE EXPERT COMPANY,
Respondents

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

Appearances:

For the Complainant:
Thomas Saporito, *pro se,* Jupiter, Florida

For the Respondents:
Steven R. Semler, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, DC

RECOMMENDED DECISION AND ORDER:
RESPONDENTS' MOTION FOR SUMMARY DECISION SHOULD BE GRANTED

This case arises under the employee protection provisions of several federal statutes: the Clean Air Act (CAA), 42 U.S.C. § 7622; the Solid Waste Disposal Act (SWD), as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 697l; the Safe Drinking Water Act (SDW), 42 U.S.C. § 300j - 9; the Federal Water Pollution Control Act (WPC), 33 U.S.C. § 1367; the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610; and the Toxic Substances Control Act (TSC), 15 U.S.C. § 2622. The Complainant, Thomas Saporito, filed his first complaint with the Occupational Health and Safety Administration, U.S. Department of Labor (OSHA), on December 13, 2003, alleging retaliation and discrimination by his employer, Central Locating Service, Ltd. (CLS). Complainant filed amended complaints on January 7 and January 12, 2004, alleging additional acts of retaliation and discrimination against him as a result of his engaging in protected activity. These

complaints were investigated by OSHA until May 8, 2004, when Complainant requested that OSHA make no further investigation and make a determination based on the evidence collected. OSHA dismissed the case, holding that the evidence did not support the Complainant's allegations that Respondents (CLS and Asplundh Tree Expert Company) violated the referenced Acts. Complainant subsequently appealed his case to the Office of Administrative Law Judges, U.S. Department of Labor.

Respondents filed its Motion for Summary Decision[1], with supporting memoranda, on August 30, 2004. Complainant's Opposition to Summary Decision, and accompanying attachments, were filed on September 8, 2004.[2] Respondents then submitted a Reply Brief to Complainant's Opposition to Motion for Summary Judgment on September 14, 2004, which was followed by Complainant's Answer to Respondents' Reply on September 23, 2004. Further proceedings have been stayed pending this ruling.

Summary of the Evidence

Complainant's Evidence

Complainant began working for CLS as a General Foreman on July 21, 2003. Tr. 10-11[3]. CLS serves utility companies by identifying and marking utility cables in the ground. CLS' parent company, Asplundh Tree Expert Company (ATEC), is an international company which serves as a full service utility contractor. ATEC acquired CLS in 1997. Com. Am. Comp. 3-4. Complainant contends that ATEC retains direct or indirect control of CLS operations, and as such, is directly involved in the work activities of CLS employees. Com. Am. Comp. 4.

As a general foreman, Complainant was responsible for overseeing locate ticket crews.[4] Com. Am. Comp. 3. On July 29, 2003, Complainant accompanied another General Foreman, Jim

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[1] The following will be used as citations to the record:
Res. Motion: Respondents' Motion for Summary Decision
Com. Opp. : Complainant's Opposition for Summary Decision
Com. Am. Comp.: Complainant's Supplemental Amended Complaint
Tr.: Transcript of Respondents' deposition of Complainant
Com. Att: Complainant's Opposition Attachments
Com. Aff: Complainant's Affidavit

[2] The Eleventh Circuit, under whose jurisdiction this case falls, has held that: "a motion for summary judgment should be granted against a litigant without counsel only if the court gives clear notice of the need to file affidavits or other responsive materials and of the consequences of default." *United States v. One Colt Python .357 Cal. Revolver*, 845 F.2d 287, 289 (11th Cir. 1992). This court has fulfilled this requirement through its Pre-Hearing Order # 14 (September 3, 2004), in which this Court informed the *pro se* Complainant of his right to file counter-affidavits or other responsive material. Also, this Court continued proceedings in this case until further notice, thus allowing the *pro se* Complainant sufficient opportunity to respond to Respondents' Motion.

[3] Complainant and Respondents submitted excerpts of the transcript of Respondents' deposition of Complainant. This decision will cite to the page numbers located at the upper right corner of each transcript page.

[4] A locator is responsible for locating underground utility cables and marking their location before any type of excavation occurs.

Davies, on a locate ticket job in Stuart, Florida. Complainant stated that at this particular locating job, Mr. Davies used a crowbar to open a manhole. Tr. 41. Complainant stated in his affidavit that the breach of the manhole by Mr. Davies violated OSHA regulations which require that manholes be tested for explosive gases prior to making such an entrance. Com. Aff. 2. Complainant states that he has many years of work experience and safety training around manholes. He notes that his work experience has impressed upon him the safe work practices which require testing for explosive gases before opening a manhole. Com. Aff. 3. According to Complainant, the manhole contained only BellSouth telephone cables; there were no natural gas cables in the manhole. Tr. 49.

Once the manhole was opened, Mr. Davies and Mr. Faircloth, another CLS employee, briefly stuck their heads into the manhole to place the tone-inducing device onto the individual cables. Tr. 41-43. The locators then began to mark the location of the cables on the sidewalk and street. *Id*. Complainant stated that a pedestrian then happened by the manhole. Mr. Davies walked over to his truck, which was parked approximately 10 feet away from the manhole, and pulled his truck onto the sidewalk and over the top of the manhole, in order to blockade the area around the manhole. Tr. 42-46. According to Complainant, the truck remained running, for approximately one hour, with the engine located above the manhole opening. *Id.*

Complainant believed that the location of the truck over the manhole could cause an explosion, as a result of gases that could be trapped in the manhole. Tr. 52. He believed that an explosion or fire could displace contents, such as water and oil pollutants, into the air, which would eventually come back down to earth and contaminate the water. Tr. 55. Complainant states that Rick Nolan, a Bell South manager, personally observed Mr. Davies' vehicle over the open manhole, and promptly alerted Mr. Davies about his concerns.[5] Tr. 48.

Complainant verbally communicated his environmental safety concerns to Rick Johnson, a CLS manager, in early August 2004. Com. Aff. 5. Complainant states that Mr. Johnson did not "receive Complainant's environmental safety concerns with any amount of pleasure." Com. Am. Comp. 8. He again expressed his safety and environmental concerns in an email to Mr. Johnson on August 30, 2004. Com. Att. 1. In this email, Complainant wrote:

> "[T]o the extent that CLS employees secure manhole entrances with their vehicles, this practice may cause an explosion due to the running engine of the vehicle coming into contact with gases within the manhole. Such an event would not only subject the employee to a safety hazard but could possibly violate state and federal laws which prohibit air and ground pollutants under the Clean Air Act and the Toxic Substances Control Act."

Com. Att. 1 at 1.

Complainant contends he was thereafter retaliated against for his whistleblower activity when Mr. Johnson demoted him from the salaried position of General Foreman, to the hourly position of Locator. Com. Opp. 7.

[5] The locate ticket job at issue was performed by CLS for Bell South.

Complainant then accompanied CLS locator James Hicks on a locate ticket job on November 19, 2003. Com. Opp. 8. While using a gasoline engine to pump water out of the hole, Complainant claims that Mr. Hicks approached the open manhole with a lit cigar. Tr. 95-96. Complainant quickly stopped the engine and instructed Mr. Hicks to leave the area. Com. Opp. 8. Complainant was concerned that Mr. Hicks' lit cigar could ignite an explosion that would result in pollutants entering the ambient air and into the ground water system. *Id.* Complainant asserts that Mr. Hicks rebuffed his environmental concerns, at which point Complainant threatened again to file an environmental safety claim with OSHA. Com. Aff. 18.

Complainant noticed his discrimination complaint to David Blount, Mr. Johnson's supervisor, in a letter dated December 1, 2004. Comp. Opp. 8. Complainant requested that Mr. Blount provide him with a "make whole remedy for retaliation," or else Complainant would file legal actions against CLS. Com. Opp. 9. Complainant then filed a discrimination complaint with OSHA on December 19, 2003, and amended complaints on January 7 and January 12, 2004. Com. Att. 6. In a disciplinary meeting on January 8, 2004, Complainant was terminated by Mr. Johnson. Com. Opp. 9. OSHA concluded its investigation of Complainant's complaint on May 17, 2004. OSHA dismissed Complainant's case because it found that CLS would have taken the same unfavorable personnel action against Complaintant even in the absence of any protected activity. Com. Att. 6.

Complainant submitted a letter written by Mr. Blount to OSHA, which responded to the allegations Complainant raised to OSHA. Com. Att. 13. Mr. Blount stated that it is not necessary for employees to break the plane of a manhole on "the majority of locates" provided by CLS. *Id.* He also stated that CLS does not enter any confined spaces requiring a permit. *Id*.

Complainant also submitted copies of CLS' safety manual pertaining to confined space entry. Section 8.01 lists the procedures and precautions to be taken by an employee "when performing a locate by <u>accessing</u> a manhole (non-entry):

(a) Remove the cover using a manhole lifter and/or hook.
(b) Place a guard around the manhole opening.
(c) Using an extension pole, place the transmitter clamp around the cable to be located.
(d) DO not extend arms or head into the manhole opening. If any part of the body breaks the plain of the manhole it is considered and [sic] entry. If entry is required then the procedure in paragraph 8.01 through paragraph 8.10 must be performed."

Com. Att. 10. (emphasis in original).

Sections 8.02 through 8.10 of the CLS safety manual list the procedures for entry into a manhole, including the requirement that the manhole be tested for gases and oxygen deficiency. *Id*.

Respondents' Evidence

Respondents argue that Complainant has not raised any environmental issues within the Board's jurisdiction, but rather only alleges violations of OSHA safety regulations. Specifically, Respondents contend that Complainant has failed to meet his burden of showing that he has engaged in protected activity under the environmental Acts.

Respondents cite to their deposition of Complainant, in which Complainant admits that there was no fire or explosion at the July 23, 2003 incident, nor did Complainant ever witness any fire or manhole explosion during his employment at CLS. Tr. 70. Complainant also acknowledged that a certain percentage mix of gas and oxygen are required in order for an explosion or fire to occur, but stated he "didn't know it off the top of my head." Tr. 68. Complainant stated that he did not know whether any gases were present in the subject manhole, because neither he nor any of the locators tested for gases before removing the manhole cover. Tr. 52-53. He also stated that to his knowledge, there were no natural gas lines running through the manhole. Tr. 66-67. He stated, however, that he was taught to "always assume the presence of gases when opening manholes." *Id.*

During his deposition, Complainant explained one method of the locating process. He stated that a CLS employee extends a fiberglass pole into the manhole in order to clamp the cable with the tone inducing device. Tr. 43. CLS employees are then able to locate and mark the cables above ground by following the tone. *Id.* Complainant remarked that the act of clamping the tone-inducing device onto the cables in the manhole is not an explosive hazard. Tr. 51-51. Complainant stated that Mr. Davies' head breached the manhole cover for less than a minute, and he further acknowledged that this act constituted an OSHA safety violation, but not an environmental violation or a fire hazard. Tr. 42, 64. He stated that neither Mr. Davies nor Mr. Faircloth climbed into the manhole. Tr. 51. Complainant also acknowledged that a permit was not required for the opening of this particular manhole. Tr. 73.

Respondents also submitted the report of a safety expert, Anthony Rago[6], who personally inspected the site of the subject manhole incident. Ex. Report 2. Mr. Rago noted that the manhole was covered by a heavy gage, vented steel lid.[7] Speaking to the issue of explosive gases, Mr. Rago concurred with Complainant's argument that confined spaces can contain gasoline or methane gas fumes. *Id*. However, he noted that there were neither reports of gasoline leaks nor complaints of gasoline odors in the vicinity of the manhole. Mr. Rago stated that there were no natural gas lines in the manhole. He stated that while methane gas can be formed from fossil fuels, there are no fossil fuel deposits in Stuart, Florida. Mr. Rago also explained that

[6] Mr. Rago has an industrial engineering degree, has worked as a safety engineer and/or safety consultant for over 30 years, and has taught courses in confined space entry at two colleges.

[7] Complainant acknowledges that the manhole lid contained access slots, but that there were no venting slots in the lid. Tr. 50-51. Later, in his affidavit, Complainant stated that these access slots are not venting slots, and may allow "gasoline and petroleum products to drain into the manhole." Com. Aff. 2. Complainant also opined that even if the manhole cover contained venting slots, it would not lessen the likelihood of an explosion. Tr. 54-55. The court credits the expert testimony of Mr. Rago, which was supported by the affidavits of Mr. Davies and Mr. Nolan, and acknowledges that the manhole's access slots also serve as venting slots.

methane gas can form from organic decaying matter, which usually occurs in swamps or bogs, but then noted that the nearest swamp was located 10 miles from the manhole, making the possibility of any methane gas very unlikely. Mr. Rago concluded that the "chance or exposure of explosive gases to be present or in the vicinity would be remote or non-existent." Lastly, Mr. Rago noted that OSHA regulations for telecommunications only require confined space testing if an employee will be entering the manhole, which, he notes, did not apply to the present case because no employees did or were ever going to enter the manhole. Ex. Rep. 2.

Respondents also submitted affidavits from Rick Nolan and James Davies. Mr. Nolan refutes Complainant's testimony that he [Mr. Nolan] instructed Mr. Davies to move his truck away from the manhole covering. Instead, Mr. Nolan asserts that his only communication to the locating crew was to be mindful of the traffic in the intersection. Nolan Aff. 2. Mr. Nolan stated that the manhole in question was vented, with four holes; he submitted a photograph of the manhole, which illustrated four slots in the cover. Mr. Nolan opined that the chance of a manhole explosion was "remote and farfetched"; in support of this contention, he cited the vented manhole lid, the amount of traffic in the area, and, even if explosive gas was proven to be present, the lack of an ignition source. *Id*. Lastly, he noted that Respondents and its contractors had never experienced any fire or explosion incident to manhole work in this particular area. *Id.*

In his affidavit, Mr. Davies states that he positioned his truck adjacent to the open manhole cover, but not over the open manhole. Davies Aff. 2. Mr. Davies acknowledged that this was a violation of OSHA and CLS safety rules, for which he was reprimanded. *Id.* He also stated that the manhole had four hook holes, which are used for opening the manhole and serve as vents for the manhole. *Id.*

DISCUSSION

Motions for summary decision are governed by 29 C.F.R. §§ 18.40 and 18.41. The Administrative Review Board applies the standards set forth by the United States Supreme Court in the cases of *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) to motions for summary decision. To prevail on a motion for summary decision, the moving party must show that the non-moving party "fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Id* .at 322 (1986). To defeat a properly supported motion for summary decision, the non-moving party must present affirmative evidence. The non-movant is not permitted to rest upon mere allegations or denials on his pleading, but must set forth specific facts showing that there is a genuine issue of fact for the hearing. *Id*. at 324. If the non-movant fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, there is no genuine issue of material fact and the movant is entitled to summary decision.

To meet his burden of proof in an environmental whistleblower case[8], a complainant must prove, by a preponderance of the evidence, that he was retaliated against for engaging in protected activity, of which the employer was aware; that he suffered adverse employment action, and that the protected activity was the reason for the adverse action, i.e. that a nexus existed between the protected activity and the adverse action. *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046; 00-CAA-20, at 6 (ARB June 30, 2004); *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, at 9 (ARB Feb. 28, 2003).

An employee will not receive protection under the environmental whistleblower laws for whistleblower complaints about occupational health and safety. Such complaints are governed instead by Section 11(c) of the Occupational and Safety and Health Act, 29 U.S.C. §§ 651-678 (1988), and are enforced not through the Department of Labor's administrative adjudicatory process, but rather in United States Federal District Courts. *M.C. Tucker v. Morrison and Knudson,* 94- CER-1 at 5 (ARB Feb. 28, 1997); *see also Minard v. Nerco Delamar Co.,* 92-SWD-1, Sec'y Dec. and Ord., Jan. 25, 1995, at 8; *Aurich v. Consolidated Edison Co. of New York, Inc.*, 86-CAA-2, Sec'y Dec. and Ord., Apr. 23, 1987, at 3-4. The Administrative Review Board has stated that "[t]he distinction between complaints about violations of environmental requirements and complaints about violations of occupational safety and health requirements is not a frivolous one." *M.C. Tucker*, slip op. at *5*. An employee who complains of occupational safety and health concerns will not receive environmental whistleblower protection unless his claims implicate environmental law as well, by "touch[ing] upon" public safety and health. *See Sawyers v. Baldwin Union Free School District***,** 85-TSC-1, Sec'y Dec. and Ord., Oct. 24, 1994, at note 12; *Scerbo v. Consolidated Edison Co. of New York, Inc.*, 89-CAA-2, Sec'y Dec. and Ord., Nov. 13, 1992, at 4.

The Administrative Review Board was recently faced with this same issue in *Culligan v. American Heavy Lifting Shipping Co.,* ARB No. 03-046, 00-CAA-20, 01-CAA-09, 01-CAA-11 (ARB June 30, 2004). To determine if the complainant met his burden of showing that he engaged in protected activity, the Board looked at whether the complainant's alleged activities

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[8] The environmental acts at issue contain similar statements of the activities that are protected. For example, the employee protection provision of the CAA, 42 U.S.C. § 7622(a)(1-3), provides:

> 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 the employee) -
>
> > (1) commenced, 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 this Act.

furthered the purposes of the environmental acts or related to their administration and enforcement. *Culligan* at 8. For example, the Board noted that "the purpose of the CAA is to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare …" *Culligan* at 9. Similarly, the Board remarked that the "SWDA serves to promote the reduction of hazardous waste . . . so as to minimize threats to human health and the environment." *Culligan*, at 9-10. The Board applied the complainant's allegations to the purpose of these acts, and determined that most of the complainant's allegations concerned occupational safety and health issues that did not relate to the environment or further the purpose of the environmental acts. *Cullligan* at 9.

Employees do not automatically receive whistleblower protection for alleging violations of the environmental laws. The Secretary of Labor has stated that while an employee need not prove that an *actual* violation of the environmental laws occurred, "an employee's complaints must be grounded in conditions constituting *reasonably perceived* violations of the environmental acts." *Crosby v. Hughes Aircraft Co*., 85-TSC-2, Sec'y Dec. and Ord. Aug.17, 1993 (Sec'y 1993) at 13-14 (emphasis added), *aff'd*, 1995 WL 234904 (9th Cir. Apr. 25, 1995), *citing Johnson v. Old Dominion Security*, 86-CAA-3, 86-CAA-4, and 86-CAA-5, Final Dec. and Order, May 29, 1991 at 15; *see also Kesterson v. Y-12 Nuclear Weapons Plan*, ARB 96-173, 95-CAA-0012 (ARB Apr. 8, 1997). In *Crosby*, the Secretary of Labor held that the connection between the complainant's complaints and the environmental acts was so remote as to not constitute protected activities under the Acts. The Secretary noted that numerous assumptions of various conditions were required in order for an actual environmental violation to occur.[9] Similarly, in *Kesterson*, the Administrative Review Board found that all but one of complainant's complaints were not protected under the acts, noting that an employee is not protected "simply because he subjectively thinks the complained-of employer conduct might affect the environment." *Kesterson*, 95-CAA-0012 at 3.

In this case, Complainant contends that he engaged in activity protected under the various environmental statutes. Com. Opp. 13. He argues that his complaints meet the test for protected activity because all that is required is that there is the "potential emission of a pollutant into the ambient air." Com. Opp. 14, citing *Stephenson v. NASA*, ARB No. 98-025, ALJ No. 94-TSC-5, at 15 (ARB July 18, 2000). Complainant believes that Respondents' activities could have "sparked a violent explosion expelling pollutants into the ambient air and into the ground water system." Com. Opp. 16.

Respondents contend that summary decision is proper because there is no genuine dispute of material fact that Complainant's allegations are not reasonably perceived violations of environmental law. Res. Motion 1. Respondents argue that Complainant has failed to "reasonably raise an environmental issue" within the Court's jurisdiction. *Id.*. Specifically, Respondents argue that the occurrence of any adverse consequence requires the "parlaying of

[9] In *Crosby*, the Secretary noted that in order for the complainant's alleged violation to occur, there would need to be "first, the emission of a harmful gas, second, the use of the PPUP program in a detection device deployed at the vicinity of the emitted gas, third, a bug in the PUPP program, fourth, a nearby human populace, fifth, a means to warn the populace, and sixth, a potential means to counteract the effects of the emitted chemical gas agent." The Secretary concluded that "[M]any or most of these assumptions might not occur." *Crosby*, slip op. at 15.

speculative contingent event upon speculative contingent event to such an extent as to render any environmental threat remote and hypothetical rather than reasonably perceived" under applicable case law. Res. Motion 15.

Complainant is correct, as noted above, that an actual violation of the environmental acts is not required for an employee to receive protection under the whistleblower acts. *See Crosby* at 13-14. However, contrary to Complainant's contentions, he is not protected under the environmental whistleblower acts merely because he complained of "potential emissions." Although the Administrative Review Board did use that particular phraseology in *Stephenson*, it also reiterated the requirement that the employee's complaints be grounded in "conditions constituting reasonably perceived violations of the environmental acts." *Stephenson* at 15. The issue, the Board emphasized, is "the reasonableness of the employee's belief." *Id.* The Board specifically noted that environmental statutes do not confer jurisdiction over whistleblower complaints arising purely from safety and health concerns. *Id.*

In applying this reasonableness standard, and viewing all the evidence and factual inferences in the light most favorable to the non-movant, the court finds that Complainant's allegations, like those in *Crosby* and *Ketterson*, do not constitute protected activities under the environmental acts. The facts in the record do not support a finding that Complainant's subjective beliefs about possible violations of the environmental acts were "reasonably perceived" as required by *Crosby*. As both parties acknowledged, in order for there to be an explosion resulting in violations of the environmental acts, numerous conditions would all have to be met. These conditions, like *Crosby*, require a tangential hierarchy for an explosion or fire to even occur: first, the presence of gas; second, the presence of oxygen; third, a particular proportion of gas to oxygen; fourth, an ignition source; fifth, a fire or explosion; and sixth, the emission of pollutants into the ambient air or ground water.

The court first emphasizes that the record is devoid of evidence that the manhole contained *any* type of gas. Complainant stated that no one tested for the presence of gas in the manhole and he confirmed that he was unaware of the presence of any gas in the particular manhole. Rather, his complaint rests completely on his assumption that gases *could* be present in the manhole. Respondents' expert explained that the presence of gases in this particular manhole, which could ultimately lead to an explosion, given other required conditions, was non-existent or extremely remote. Complainant admitted that there were no natural gas lines running through the manhole, which eliminates even the possibility of the presence of natural gas. The record indicates that this particular manhole only contained telephone cables.

Even if Complainant had established that gas was present in the manhole, Respondents' expert noted, and Complainant agreed, that the presence of gas and oxygen must be proportional to each other in order to create an explosion hazard. Complainant admitted that he did not know what the required mixture would be for an explosion to occur. Furthermore, even assuming gas and oxygen were present in the manhole in the correct percentages, Mr. Rago noted that a source of ignition was still necessary to create a spark or fire. Mr. Rago stated that a spark would not be caused by an already-running-truck, as Complainant has alleged.[10] Complainant asserted that an

[10] The Court finds the same tangential analysis applies to Complainant's allegations regarding the November 19, 2003 manhole incident. Once again, Complainant offered no evidence that the manhole contained gas of any kind.

open manhole could explode merely by opening it without testing, or "certainly … by driving your truck over it with a running engine." However, Complainant fails to support this assertion with any credible evidence.

Complainant also repeatedly stated that CLS was required to test for gas before opening the manhole. The court first notes that both the OSHA telecommunications regulations and CLS' safety guide require the testing for gas in manholes and confined spaces only when the manhole is to be *entered*. In this case, the weight of the evidence suggests that the locate ticket job at issue did not require the entry of an employee into the manhole.[11] CLS manager David Blount indicated in his response to OSHA that the majority of locate ticket jobs do not require breaking the plane of the manhole. Thus, neither OSHA regulations nor CLS required Complainant or any other employee to test the manhole for gases prior to opening it. Complainant noted that Mr. Davies and Mr. Faircloth both briefly stuck their heads into the manhole, which, in Complainant's opinion, constituted an "entry". However, Complainant acknowledged that even if the act of sticking one's head briefly inside the manhole constituted a technical breach of company policy or OSHA safety requirements, such an act did not constitute an environmental violation.

Respondents have established that there exists no genuine issue of material fact as to whether Complainant engaged in protected activity. Although Complainant submitted memoranda in support of his Opposition to Summary Decision, he has failed to put forth specific facts that would show an issue of fact exists as to the reasonableness of his perception regarding Respondents' alleged activity. The weight of the evidence fully supports a finding that Complainant's allegations are too tangential and remote to merit protection under the environmental whistleblower acts. These acts exist to protect and promote the public health and welfare, yet Complainant has failed to allege activities which further those purposes. Instead, Complainant's allegations appear to be violations of occupational safety regulations, for which Complainant may seek redress under the applicable OSHA statutes; however, whistleblower claims for occupational safety and health are not within the jurisdiction of this court.

CONCLUSION

Respondents have met their burden of showing that Complainant has not engaged in protected activity, which is a required element of Complainant's prima facie case under the environmental whistleblower statutes, and which Complainant bears the burden of proving at

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Instead, this allegation of a potential environmental violation is similarly based on Complainant's subjective and unsupported belief that Mr. Elmore's lit cigar could lead to an explosion.

[11] The court's holding in this case would be the same even if this particular locate ticket job conclusively required the entry of an individual into the manhole. Although OSHA requires testing for gases prior to *entry* into a confined space, there is no evidence in the record that this testing is related to the risk of an explosion leading to violations of environmental laws. Rather, it seems that these testing requirements exist to ensure adequate atmospheric conditions for individuals entering the manhole. Therefore, this fact would not alter the court's conclusion that Complainant's allegations are too speculative and remote to constitute a reasonable perception of an environmental violation.

trial. For these reasons, I find that summary decision is proper because there exists no genuine issue of material fact, and Respondents are entitled to judgment as a matter of law.

ORDER

It is hereby RECOMMENDED that the Respondents' motion for summary decision be GRANTED.

A

Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/JRR

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.