U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

IN THE MATTER OF

RAYMOND J. MASEK, **ARB CASE NO. 97-069**

COMPLAINANT, **ALJ CASE NO. 95-WPC-1**

v. **DATE: April 28, 2000**

THE CADLE COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Raymond J. Masek, Esq., *Pro Se*, *Warren, Ohio*

For the Respondent:
John M. Manos, Esq., *Manos, Pappas, Stefanski, Co. L.P.A., Willoughby Hills, Ohio*

DECISION AND ORDER

This case was brought pursuant to the employee protection ("whistleblower") provisions of four of the Federal environmental statutes, namely, the Federal Water Pollution Control Act ("FWPCA"), the Clean Air Act ("CAA"), the Toxic Substances Control Act ("TSCA"), and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"). 33 U.S.C.A. §1367 (1986), 42 U.S.C.A. §7622 (1995), 15 U.S.C.A. §2622 (1998), and 42 U.S.C.A. §9610 (1995).[1/] The whistleblower provisions make it unlawful for an employer to retaliate against an employee because the employee "commenced" or "testified in" a proceeding for the enforcement

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[1/] The ALJ failed to list one of the environmental statutes under which Masek brought suit, CERCLA. Recommended Decision on Liability Only at 1; see Letter from Masek to Secretary of Labor, Robert Reich, September 21, 1994. This omission did not affect the ALJ's analysis and resulting decision, however, as the omitted statute is governed by the same regulatory requirements as the three included statutes. 29 C.F.R. §24.2 (1999).

of the environmental statutes or "assisted in" any other action to carry out the purposes of the statutes. 29 C.F.R. §24.2.

Raymond J. Masek alleged that he was terminated by The Cadle Company ("Company") in retaliation for having provided Company documents regarding environmental hazards to a local government official. After a hearing, a Department of Labor Administrative Law Judge ("ALJ") issued a Recommended Decision and Order on Liability Only[2/] ("R. D. & O. Liab.") finding that the Company's termination of Masek violated the whistleblower statutes. For the reasons discussed below, we decline to adopt the ALJ's ruling and dismiss the complaint.

BACKGROUND

I. Procedural History

Masek filed a complaint with the Secretary of Labor on September 21, 1994, alleging that he was fired for engaging in activity protected by the environmental whistleblower provisions.[3/] On November 30, 1994, the Administrator of the Wage and Hour Division notified the Company that the "weight of the evidence to date indicates" that "discrimination as defined and prohibited by the [whistleblower] statutes was a factor in the actions" taken by the Company against Masek. The Company requested a hearing before an ALJ, and a hearing on liability was held June 20 and 21, 1995, in Warren, Ohio.

On March 11, 1996, the ALJ issued his recommended decision finding the Company liable. The damages hearing was held on October 29, 1996, and the ALJ issued a recommended decision on March 7, 1997, in which he ordered the Company to pay back wages, attorney's fees, and costs to Masek. This Board issued a Notice of Review on March 14, 1997,[4/] and the parties filed timely briefs.[5/]

II. Facts

[2/] The ALJ bifurcated the case, held two hearings -- one on liability and the other on damages -- and issued two decisions: the Recommended Decision and Order on Liability Only and the Recommended Decision and Order on Damages.

[3/] Masek simultaneously filed a complaint with the EEOC alleging age discrimination as the basis for his termination. The EEOC investigated Masek's complaint and subsequently issued a "no action" letter (Charge No. 22A955356).

[4/] This Board's review of the ALJ's decision was automatic at the time this case was heard. 29 C.F.R. §24.6(b) (1997).

[5/] This abbreviated history should not obscure the fact that this was a very contentiousness proceeding which included motions to recuse the ALJ as well as allegations of perjury, falsification of records, forgery, and attorney misconduct.

The Cadle Company is a liquidation firm for non-performing bank assets. The Company purchases non-performing loans and attempts to collect on the unpaid debts. The Company also acquires real property ("real estate owned" or "REO") in settlement of outstanding debts or through foreclosure. It employs approximately 50 people, is headed by its president, Daniel C. Cadle, and is located in Newton Falls, Ohio.

The Underground Storage Tanks - In 1991 the Company, under the name of its affiliate, Gamed Investments Company, acquired a truck terminal located at 4041 Jennings Road in Cleveland.[6/] On December 15, 1992, Lt. Ollie Zahorodnij of the Cleveland Fire Department inspected the Jennings Road site, notified Gamed that the presence of abandoned underground storage tanks at the location violated the law, and ordered the tanks removed within thirty days. Gamed appealed to the Board of Building Standards and Appeals, and after a public hearing, was granted a one year extension of time in which to remove the tanks from the property. The new deadline for removal was March 31, 1994.

Masek's Employment - The Company hired Masek as an account officer in January 1994. Initially, the Company obtained his services through a temporary employment agency, Cencor Services; however, beginning on May 1, 1994, the Company employed Masek directly. As an account officer, Masek reviewed loan files, contacted the debtors, and arranged payment plans. Masek was also given responsibility for REO accounts. In this capacity, he attempted to sell or lease the REO properties or, when necessary, he would manage them. Masek has a law degree.

In early February 1994, Masek was assigned the Jennings Road REO and was instructed to have the underground storage tanks removed from that property. Specifically, he was to obtain a fixed price quotation for removal of the tanks.[7/] Masek failed to complete this assignment: he never located a contractor who would provide a capped or fixed price quotation for the work, and Daniel Cadle refused to accept those contractors found by Masek who refused to put a cap on the price. In July 1994, Vice President and Office Manager William Shaulis contacted the Cardamone Construction Company, which agreed to do the work for a fixed price. On the same day the price quote was received, Daniel Cadle hired them to remove the tanks.[8/]

Masek's performance was problematic in other ways as well. Masek refused to prepare leases, telling his supervisor, Denise Harkless, that at $10 per hour he was not being paid enough to do legal work. Masek alienated his fellow workers: Shaulis received complaints about Masek from coworkers in every department, including the collection team of which Masek was a member. He falsified time records: Masek's coworker complained, and management confirmed, that he was stretching his lunch breaks by recording that he returned to work earlier than he had. Furthermore, he was viewed as a non-producer. Masek himself testified that he was subjected to repeated

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[6/] Gamed is the owner of the Jennings Road property and it was under the Gamed name that Masek kept a record of the work he performed on that property.

[7/] At the hearing, Masek initially denied that he was told to get a fixed price to remove the tanks. Tr. at 72-73. He reversed his position, however, in subsequent testimony. *Id.* at 302.

[8/] Masek admitted that he had nothing to do with contacting or contracting with the Cardamone firm.

comments about his job performance such as "Ray's retired, he's really not working," and "before Dan hires anybody in the future, he ought to check their stamina."

Protected Activity - In his review of the file on the Jennings Road property, Masek found a 1991 Vadose Research Company cost proposal for removing the tanks which included a discussion of possible environmental problems at the site. After reading this material and talking with workers in the pollution monitoring business, such as Vadose President Bill Ullom, Masek came to believe that the Jennings Road site posed a serious environmental hazard.

Masek's concern for the potential environmental hazards prompted him on March 30, 1994, to contact Assistant U.S. Attorney Gregory Sasse,[9/] a person Masek knew to be interested in environmental matters,[10/] who put him in touch with Inspector David Barlow of the EPA criminal investigative services. Barlow referred Masek to Zahorodnij of the Cleveland Fire Department.

In addition to these contacts, Masek repeatedly complained within the office about the alleged environmental hazards and Daniel Cadle's refusal to fix them. Usually these complaints were made orally via telephone or face-to-face, but on June 21, 1994, Masek committed his concerns to writing. In a memorandum addressed to Harkless, Masek complained that the Jennings Road property had not yet been cleaned up and noted that, as a consequence, Gamed/Cadle was in violation of several state and Federal laws.

Masek also had various telephone conversations with Zahorodnij of the Fire Department concerning the Jennings Road site, and beginning in May 1994, telefaxed Company materials to Zahorodnij. On May 27, 1994, Masek sent Zahorodnij, *inter alia*, the 1991 Vadose cost proposal for removing the tanks and cleaning up the site. The cover note on the fax read: "Enclosed for your review w/Prosecutor's Office." On June 21, 1994, Masek faxed Zahorodnij the 1994 update of the Vadose cost proposal plus a copy of Masek's memo to Harkless of the same date (see above). Masek's message on this telefax read: "For your information re potential safety hazard."

Before receiving Masek's first fax, Zahorodnij, having determined that the Company had still not removed the tanks, asked the city prosecutor to schedule a hearing on the matter. At a hearing on August 10, 1994, Daniel Cadle was found guilty of failing to remove underground storage tanks, a violation of the Cleveland Municipal Code, and was ordered to pay a $5000 fine, payment of which was stayed pending removal of the tanks. The tanks were removed by the Cardamone Company in October 1994.

Masek's Termination - Masek was fired on August 26, 1994. He alleges he was fired because of his protected activity, namely, sending the 1994 cost update to Zahorodnij. The evidence is uncontradicted that on August 10, 1994, during the tank removal hearing, Daniel Cadle and the Company's General Counsel, Victor Buente, discovered that Masek had sent the 1994 Vadose cost

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[9/] In the hearing transcript, AUSA Sasse is incorrectly identified as U.S. Attorney Sassay.

[10/] Masek met Sasse at an EPA seminar on environmental laws which the Company paid for Masek to attend.

update to the Fire Department. Furthermore, Masek testified that on August 22, 1994, Daniel Cadle called and asked if Masek had forwarded the Vadose update to Zahorodnij. When Masek answered in the affirmative, Cadle reportedly threatened to fire him.

According to the Company, Masek was terminated by William Shaulis with the concurrence of Masek's immediate supervisor, Denise Harkless. Shaulis testified that he terminated Masek because he failed to get a fixed price contract for the tank removal; was arrogant and rude to customers on the telephone; refused to make decisions or take action on his accounts; refused to do work he considered "legal," despite his legal training; neglected his collection responsibilities; falsified his time records; and alienated coworkers. However, the proximate cause of the firing -- the "nail in the coffin" as Shaulis put it -- was the discovery that Masek used the Company's credit report system for unauthorized purposes.

Masek was working at a computer on August 25, 1994, when a secretary reported to Harkless that Masek had "done something" to the credit check computer because it was spewing out copies of all the credit reports stored in its memory. When gathering the erroneously printed reports, Harkless noticed that Masek's own credit report was among them. Harkless took this matter to Shaulis, who immediately confronted Masek about running his own credit report. Masek denied any involvement in the matter. Later that evening, or the following morning, Harkless and Shaulis analyzed the reports further. Using old billing records, Harkless found that, in addition to credit reports on Masek, the system also contained credit reports on a woman named Lynn K. Ramsey, who happened to be Masek's ex-wife. Harkless and Shaulis believed, but could not prove, that these reports also were run by Masek. Company policy and the contract between the Company and the credit bureaus prohibited running credit checks on people other than the Company's debtors, and neither Masek nor his ex-wife were debtors of the Company. After much discussion, and with Harkless' agreement, on August 26, 1994, Shaulis called Masek into Shaulis' office and fired him.

Masek denied he ever used the credit report system for personal reasons, and furthermore, believed he was a satisfactory employee because he was never given a written reprimand or told by any supervisors that they did not like the way he was collecting accounts and performing other tasks. Masek also testified that he was doing everything the way the Company wanted it done with the exception of his handling of the Jennings Road property.

III. ALJ's Decision

In his recommended decision on liability, the ALJ described the exhibits he thought relevant and recounted serially the testimony of the witnesses.[11/] *See* R. D. & O. Liab. at 2-15. He also discussed the merits of the complaint using a burden-shifting framework based upon the elements

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[11/] The ALJ's 20-page recommended decision contains 14 pages captioned "Summary of the Testimony and Other Evidence at Trial," which merely recites the testimony of each witness as it was given. The section of the recommended decision captioned "Findings of Fact and Conclusions of Law" in turn contains a few bare findings. Although a summary of the transcript and exhibits provides a useful index to the record, it is not an adequate substitute for findings of fact. Fortunately, because the Board's review is *de novo*, the lack of findings in the ALJ's decision does not prevent us from deciding this case.

of a *prima facie* case and respondent's proffer of nondiscriminatory reasons for the adverse action. *Id*. at 16-17, *citing Scerbo v. Consolidated Edison Co. of New York, Inc.,* Case No. 89-CAA-2, Sec'y Dec. and Ord., November 13, 1992.

The ALJ determined that Masek had "established a *prima facie* case" as follows: (1) Masek had engaged in protected activity by providing information and assistance on potential environmental hazards to the Fire Department's Zahorodnij;[12/] (2) the Company had terminated Masek; and (3) the phone call in which Daniel Cadle allegedly threatened to fire Masek, and the proximity of that call to Masek's termination, raised the inference that Masek's protected activity was the likely reason for his termination. *Id.* at 18.

The critical issue for the ALJ was whether Masek was fired because of the protected activity. Shaulis, the firing official, denied he had been directed to fire Masek by Daniel Cadle or by anyone else, and further testified that, when he fired Masek, he was not aware that Masek had complained to any authority regarding potential environmental hazards. *Id.* at 18-19. However, the ALJ found Shaulis' testimony incredible based upon the post-hearing deposition testimony of David Rodenhausen, the Wage and Hour Division investigator assigned to the Masek complaint. *Id.* at 19.

In answer to questions posed by the ALJ at the liability hearing, Shaulis had testified that he had fired Masek "on his own initiative." Tr. at 306. However, in his post-hearing deposition, Rodenhausen contradicted Shaulis on this point by saying Shaulis had told him that he had *not* terminated Masek solely on his own initiative. Rodenhausen Dep. at 10. Based on this apparent discrepancy, the ALJ ruled that "Shaulis' testimony in court [was] untrue." R. D. & O. Liab. at 19. Moreover, because Rodenhausen testified that Shaulis had told him that Cadle had "*allowed"* him to terminate Masek, the ALJ found that Shaulis' denial that Cadle had *directed* the firing was not "worthy of belief." *Id.* Because he viewed Rodenhausen's testimony as impeaching Shaulis on these two points, the ALJ concluded that the Company's explanation for terminating Masek was "pretext and untrue," and accordingly, that the Company had violated the environmental whistleblower statutes. *Id*. at 19-20. However, the ALJ did not explicitly find that Masek had proven that he was terminated because of his protected activity. He simply concluded: "[O]n the issue of liability only, I find for the Complainant, Raymond Masek, and against the Respondent, the Cadle Company." *Id.* at 20.

As we discuss below, the ALJ erred in both his methodology and his conclusion. Accordingly, we reverse the finding of liability.

DISCUSSION

I. Scope of Review and Standard of Proof

[12/] The ALJ also found that Masek's internal complaints constituted protected activity. R. D. & O. Liab. at 18. We agree. This Board, and previously the Secretary, has consistently held that internal complaints constitute protected activity. *Jones v. Tennessee Valley Auth.*, 948 F.2d 258, 264 (6th Cir. 1991); *Passaic Valley Sewerage Comm'rs v. U. S. Dep't of Labor*, 992 F.2d 474, 478 (3d Cir. 1993); *Mackowiak v. Univ. Nuclear Sys., Inc.* 735 F.2d 1159, 1163 (9th Cir. 1984).

The Board has jurisdiction to decide appeals from recommended decisions arising under the whistleblower provisions of the Federal environmental statutes. Secretary's Order No. 2-96, 61 Fed. Reg. 19,978 (May 3, 1996). As the designee of the Secretary of Labor, the Board is not bound by the decision of the ALJ, but rather retains complete freedom of decision.

> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision -- as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. [Citation omitted.] Similarly, [Section 557(b) of the Administra-tive Procedure Act] provides that "On appeal from or review of the initial decisions of such . . . officers, the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision."

Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII §8, pp. 83-84 (1947); *see also Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951). Accordingly, the Board is not bound by either the ALJ's findings of fact or conclusions of law, but reviews both *de novo*.

In reviewing an ALJ recommended decision under the whistleblower provisions of the environmental statutes, we apply the APA's "preponderance of the evidence standard." *Martin v. Dep't of Army*, Case No. 96-131, Dec. and Ord., July 30, 1999, slip op. at 4. *See Steadman v. Sec. and Exch. Comm'n*, 450 U.S. 91, 101-102 (1981)(holding that, under the provision of 5 U.S.C.A. §556(d), the proponent of a rule or order has to meet his burden by a preponderance of the evidence); *Dir., Office of Workers' Comp. Programs v. Greenwich Colleries*, 512 U.S. 267, 277 (1994) (reaffirming *Steadman*). Evidence meets the "preponderance of the evidence" standard when it is more likely than not that a certain proposition is true. *Fischl v. Armitage*, 128 F.3d 50, 55 (2d Cir. 1997); *see also United States v. Gibbs*, 182 F.3d 408, 445 (6th Cir. 1999).

II. Whether Masek was Retaliated against for Engaging in Protected Activity

In order to prevail in an environmental whistleblower case, the employee must prove, by a preponderance of the evidence, that he engaged in protected conduct, and that the employer took some adverse action against him because of that protected conduct. *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec'y Dec. and Fin. Ord., April 25, 1983, slip op. at 5-9; *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46, Sec'y Fin. Dec. and Ord., February 15, 1995, slip op. at 11, n.9, *aff'd* 78 F.3d 352 (8th Cir. 1996).

Masek engaged in protected activity by providing the 1994 cost update regarding the Jennings Road property to the Cleveland Fire Department.[13/] R. D. & O. Liab. at 18-19. Complaints

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[13/] Masek did not argue, and the ALJ did not find, that complaints to the Assistant U.S. Attorney and the EPA investigator caused the Company to fire Masek because there is no evidence that anyone at the (continued...)

to and cooperation with local authorities are protected under the whistleblower provisions. *Ivory* v. *Evans Cooperage, Inc.*, 88-WPC-2, Sec'y Fin. Dec. and Ord., February 22, 1991; *Helmstetter* v. *Pacific Gas and Electric Company*, 91-TSC-1, Sec'y Fin. Dec. and Ord., January 13, 1993. And it is undeniable that Masek was terminated. The outcome of this case turns entirely on the issue of causation -- whether the Company terminated Masek because of his protected activity.

Proof of causation for the ALJ depended on the credibility of the Office Manager, William Shaulis, and the ALJ based this critical credibility determination upon his reading of the post-hearing Rodenhausen deposition transcript. As we discuss below, the ALJ erroneously admitted that deposition after the hearing record was closed. Evaluation of the evidence without the Rodenhausen deposition leads us to conclude that Masek failed to prove that he was terminated because of his protected activity.

In order to understand the nature of the ALJ's evidentiary error, it is necessary to recount some of the events which occurred during and after the hearing. A few days before the liability hearing in June 1995, the Solicitor of Labor informed the parties and the ALJ that its regulations would not permit Wage and Hour investigator Rodenhausen to testify at the hearing. On the same day, the Solicitor's Office forwarded Rodenhausen's investigation report (also referred to as the "Whistleblower Narrative") to Masek. However, when Masek proffered it at trial, the ALJ refused to admit it.[14/] Tr. 291.

The record was closed at the end of the liability hearing pursuant to 29 C.F.R. §18.54(a) (1999). Two months later, on August 21, 1995, Masek submitted his post-hearing brief to the ALJ and served it upon opposing counsel. In an *ex parte* cover letter,[15/] Masek compared passages from the excluded investigation report to passages from Shaulis' hearing testimony, and argued that the quoted material indicated that Shaulis lied regarding whether Daniel Cadle had ordered Masek's termination.[16/] On September 6, 1995, Masek moved to reopen the record for purposes of rebuttal

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[13/](...continued)
Company knew of these contacts. Nor does the evidence show that Masek was retaliated against because of the May telefax to Zahorodnij or because of his repeated protestations to his colleagues and supervisors. Apparently no Company official knew of the May telefax and the office complaints produced no reaction from his supervisors and colleagues.

[14/] The ALJ excluded the report stating: "Basically, it doesn't matter what this investigator determined. I'm the one who's making the conclusions." *Id.* at 291. The ALJ restated his intention not to consider the report in an Order issued in January 1996: "I will disregard any references to Mr. Rodenhausen's investigative report and conclusions contained in the transcript." Order Denying Respondent's Motion to Strike the Deposition of Investigator David Rodenhausen, January 11, 1996.

[15/] Masek expressly stated that he had not served the cover letter on the Company. Letter from Masek to ALJ Lesniak, August 21, 1995. Nothing in the record indicates that the ALJ informed the Company of the letter or its contents or that he sanctioned Masek for making this *ex parte* communication. *See* 29 C.F.R. §18.38.

[16/] The letter provided in pertinent part:

(continued...)

and to permit the taking of Rodenhausen's deposition. Although Masek attached a certificate of service to his motion indicating that the Company's attorney had been served, the Company did not respond to the motion. Noting that fact, and without further order, the ALJ granted Masek's motion on October 13, 1995, and allowed the taking and submission of the deposition transcript. The ALJ

[16/](...continued)

> I want to advise Your Honor of a serious problem regarding sworn testimony in your Court; [sic] On June 21, 1995, Cadle Company V.P. Office Manager William E. Shaulis, in response to direct questioning from this Court, swore on his oath as follows (Tr. 305-306).
>
> ADMINISTRATIVE LAW JUDGE: Did Mr. Cadle ever tell you to terminate Mr. Masek?
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> MR. SHAULIS: No. I terminated him and, you know, I had no knowledge whatsoever. I terminated based on his ability to collect which was not satisfactory.
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> ADMINISTRATIVE LAW JUDGE: Did you ever have conversations with Mr. Masek–excuse me, with Mr. Cadle where he directed you to terminate Mr. Masek.
>
> MR. SHAULIS: No, never.
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> ADMINISTRATIVE LAW JUDGE: You did it solely on your own initiative?
>
> MR. SHAULIS: That's my job.
>
> ADMINISTRATIVE LAW JUDGE: Is that a yes?
>
> MR. SHAULIS: Yes, sir, that's. . . .
>
> See also Shaulis sworn testimony Tr. 251 "I do the hiring, the firing", [sic]
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> As Your Honor is aware, Complainant received a copy of U.S. Labor Wage & Hour Investigator, David Rodenhausen's Whistleblower Narrative by agreement with U.S. Labor Trial Attorney Sandra B. Kramer.
>
> On page 2 of his Narrative, Investigator Rodenhausen states "Shaulis (see exhibit B-6), although acknowledging that Cadle gave the order to terminate Masek, is unclear about when the call actually came to him." Also, on page 3 "Masek was terminated on August 26, 1994 by William Shaulis/VP-Office Manager, after receiving instructions from Dan Cadle to terminate Masek."
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> It is clear that VP-Office Manager William Shaulis lied either to the Court or to a federal investigator on a critical part of Complainant's case. I respectfully ask for a review of this matter.

Letter from Masek to ALJ Lesniak, August 21, 1995.

then gave great weight to the Rodenhausen deposition in ruling that Shaulis' testimony was not credible.[17/] We quote this critical portion of the ALJ's decision in full:

> Whether Respondent's Reason for Masek's Termination was the True Reason
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> I find that Respondent's explanation for Masek's termina-tion to be [sic] a pretext and untrue. I base my finding on the testimony of Investigator David Rodenhausen. I give greater weight to Rodenhausen's testimony than to the testimony of William Shaulis and Denise Harkless. Rodenhausen has no interest in the outcome of this litigation, whereas, Harkless and Shaulis work for Dan Cadle and the Cadle Company and obviously do have an interest in the litigation.
>
> In the course of Rodenhausen's investigation, Rodenhausen interviewed Dan Cadle and William Shaulis. Shaulis told Rodenhausen that he did not terminate Masek solely on his own initiative, therefore, I find that Shaulis' testimony in court untrue [sic]. Shaulis told Rodenhausen that he was "allowed" to terminate Masek. Mr. Cadle gave Shaulis the authorization to terminate Masek. I find that Shaulis' statement to Rodenhausen to be [sic] inconsistent with his testimony in court that Cadle did not tell Shaulis to terminate Masek, that he did it upon his own initiative, and that Shaulis does the hiring and the firing. Mr. Shaulis told me in court (TR 306) that it was his job to fire Mr. Masek. I asked Mr. Shaulis whether he terminated Mr. Masek on his own initiative and Mr. Shaulis responded, "that's my job". I find Mr. Shaulis' testimony on this point to be impeached by Investigator Rodenhausen and not worthy of belief.

R. D. and O. Liab. at 19.

There are two errors embedded in this portion of the recommended decision. First, the ALJ failed to apply the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges. 29 C.F.R. Part 18. Rule 18.54(a) provides that "[w]hen there is a hearing, the record shall be closed at the conclusion of the hearing unless the administrative law judge directs otherwise." 29 C.F.R. §18.54(a). The ALJ did not direct that the record remain open at the end of the hearing on liability; therefore by operation of Rule 18.54(a), the record closed on June 21, 1995. Rule 18.54(c) restricts the evidence which may be accepted after the close of the

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[17/] Rodenhausen was instructed to base his answers only on his memory of what Shaulis told him during an interview a year earlier; however, the investigation report was used to refresh Rodenhausen's memory during the deposition and was made an exhibit to the deposition transcript even though the ALJ had ruled it was inadmissible. Rodenhausen Dep. at 8-11.

record: "Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that *new* and *material evidence* has become available which was not readily available prior to the closing of the record." *Id*. at 18.54(c)(emphasis added). As we discuss below, Masek did not demonstrate that Rodenhausen's testimony met the requirements of Rule 18.54(c), and the ALJ therefore erred in allowing the deposition and admitting the testimony.

Masek's September 6, 1995 Motion to Reopen the Record stated in its entirety:

> Complainant respectfully moves this Court for permission to re-open the record for the purpose of rebuttal and permit [sic] the deposition of Investigator David Rodenhausen as to interviews with Cadle VP Office-Manager William E. Shaulis and determination as to the cause of Complainant's firing. For his [sic] reason, Complainant states that Investigator Rodenhausen has information critical to Complainant's case and in direct contradiction to Mr. Shaulis's sworn testimony.

Masek did not assert, and the ALJ did not determine, that Masek possessed new and material evidence which was not readily available prior to the close of the record as required by Rule 18.54(c). Indeed, as Masek's *ex parte* letter to the ALJ, submitted with his post-hearing brief, makes abundantly clear, Masek's basis for requesting the deposition was Rodenhausen's written narrative. The narrative was provided to Masek prior to the hearing before the ALJ, Masek moved to have it admitted at the hearing, and the ALJ denied that motion.

The Board and the Secretary on numerous occasions have denied requests to reopen the record where there has been no showing of compliance with Rule 18.54(c). *See Foley v. Boston Edison Co.*, Case No. 99-022, Ord. Deny. Mot. to Reopen Rec. and Admit New Evid., February 2, 1999, slip op. at 2 (ARB and ALJ rely on same standard when considering motion to reopen record); *Doyle v. Hydro Nuclear Services*, Case No. 89-ERA-22, Fin. Dec. and Ord., September 6, 1996, slip op. at 2 (no showing that proffered evidence could not have been obtained prior to close of hearing); *Bassett v. Niagara Mohawk Power Corp.*, Case No. 85-ERA-34, Sec'y Fin. Dec. and Ord., September 28, 1993, slip op. at n.3 (noting that evidence proffered post-hearing did not qualify as newly discovered). The ALJ's failure to invoke Rule 18.54(c) in this case was error. Accordingly, we reverse the ALJ's order allowing the taking of Rodenhausen's deposition and strike the deposition from the record.[18/]

[18/] Even if we were to accept the Rodenhausen testimony as part of the record, we would not conclude that it demonstrates that Shaulis lied regarding Cadle's role in Masek's firing. For example, Rodenhausen in answer to Masek's questioning testified as follows:

> Q: Were there conversations held prior to the termination of Masek between Mr. Shaulis and Mr. Cadle relating to that termination?
> A: I don't know.
> Q: Based on your investigation, did Mr. Cadle ever tell Mr. Shaulis to terminate Masek?
> A: I don't know that.

(continued...)

We perceive a second error in the ALJ's analysis. The ALJ based his conclusion that Masek had been illegally terminated solely on his determination that Shaulis was not a credible witness. The Supreme Court has explained why such an analytical leap is inappropriate. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993):

> The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race . . . . [T]he Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of Rule 301 [of the Federal Rules of Evidence] that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."

St. Mary's Honor Center v. Hicks, 509 U.S. at 511 (emphasis added). The Court noted that "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *Id.* at 515. "It is not enough . . . to disbelieve the employer . . . ." *Id.* at 519.

Because the ALJ proceeded, without further analysis, from a finding that Shaulis was not a credible witness to a conclusion that the Company retaliated against Masek, we believe that he did not engage in an evaluation of the ultimate question whether Masek was retaliated against for engaging in protected activity. We now engage in such an evaluation having excluded Rodenhausen's deposition.

The record in this case is anything but clear. There are internal inconsistencies in the testimony of almost all of the significant witnesses, and the transcript is filled with unfocussed squabbling among the parties, and ambiguous answers which are not clarified. However, the testimony of Masek's immediate supervisor, Harkless, is neither inconsistent nor ambiguous, and in large part, we base our conclusions regarding the details of Masek's firing on it.[19/]

[18/](...continued)
Rodenhausen Dep. at 11. In addition, Rodenhausen stated that Shaulis never said that he had been told to fire Masek. *Id.* at 17-18. The totality of Rodenhausen's testimony does not support the ALJ's finding that Shaulis lied or his conclusion that the Company's explanation for the termination was "pretext and untrue."

[19/] Indeed, Harkless' testimony is completely lacking in artifice. For example, when questioned by Masek regarding a memo he faxed to the Fire Department, Harkless berated Masek, not for sending the document, but for failing to abide by the appropriate office protocol. Harkless: "I don't know it was sent, no. You didn't ever tell me you sent it. In fact, if you were going to send this memo to some person, then you should have directed it on our letterhead to that individual and signed it in a formal letter. That's the way work is done at our company." Tr. at 229.

Without the Rodenhausen testimony, the state of the record on causation is as follows: (1) Masek testified that Daniel Cadle had threatened to fire him because of his protected activity; and (2) Shaulis testified that he did not know of the protected activity when he fired Masek, and that he had not been directed to fire Masek by Daniel Cadle or anyone else.

Specifically, Masek testified that on August 22 Daniel Cadle called and threatened to fire him because he provided the 1994 Vadose cost update to Zahorodnij. Tr. 31-32, 49. Masek supported his contention that Daniel Cadle threatened to fire him by introducing into evidence a document which he alleged was a contemporaneous writing: the REO ledger on the Gamed property, which contains Masek's notation that he received a call from Cadle on August 22, 1994, and that in the call Cadle stated that he was considering firing Masek. *Id*., Compl. Exh. 1, p. 49. Daniel Cadle was never called as a witness at hearing; thus, Masek's testimony regarding the telephone call is uncontradicted.[20/] However, the Company alleged that the REO ledger on the Gamed property disappeared from the Company's records at the same time that Masek left the Company, and that it might have been tampered with. Tr. 246-247.

Although Daniel Cadle's threat to fire Masek remains uncontradicted, nothing indicates that Daniel Cadle communicated a desire to terminate Masek to Shaulis, the firing official. There is absolutely no evidence that either Shaulis or Harkless knew of the protected activity. Shaulis testified that he was not told of Masek's involvement in Daniel Cadle's citation for failing to remove the Jennings Road tanks. And both Shaulis and Harkless testified that, prior to terminating Masek, they did not know about the results of the tank hearing or of Masek's transmittal to Zahorodnij. Victor Buente testified that, although he learned of Masek's protected activity during the tank removal hearing, he did not tell Shaulis about what transpired at the hearing or about Masek's protected activity, and he did not believe that Shaulis was aware of the fact that the document had been presented at the hearing. Nor is there evidence that Shaulis was directed to fire Masek by those who knew about Masek's transmittal of the cost update to Zahorodnij. Shaulis specifically denied receiving such direction, and Buente testified that he had nothing to do with Masek's termination.[21/]

The fact that Masek was terminated shortly after he engaged in protected activity was sufficient to raise an inference that the protected activity caused the Company to terminate him. However, that inference does not compel a decision in Masek's favor. In light of all of the evidence in the record -- including the testimony of Shaulis, Harkless and Buente -- we conclude that Shaulis did not know of Masek's protected activity, and did not act on instructions from Cadle (who did know of the protected activity) when he terminated Masek.

[20/] In a short colloquy, Masek alleged that a subpoena for Daniel Cadle's appearance was served on the Company's attorney. The attorney, however, denied ever receiving it. Tr. 117-118.

[21/] After the ALJ's finding of liability, Daniel Cadle's deposition was taken by Masek in preparation for the hearing on damages. At the deposition, Cadle testified that he did not cause Masek's firing. Cadle Dep. at 10. Before completion of the direct testimony, Masek abruptly ended the deposition, stating that Cadle was guilty of perjury. Cadle Dep. at 31.

For this reason we conclude that Masek failed to prove that he was terminated because he engaged in protected activity. However, even if we were to find that Daniel Cadle's displeasure with Masek's protected activity played a part in Shaulis' decision to terminate Masek, we would conclude that the Company proved that it would have fired Masek even in the absence of his protected activity. The evidence establishes that Shaulis terminated Masek because they believed he had run credit reports on his ex-wife in violation of Company policy.

Under a "dual motive" analysis, when a complainant proves, by a preponderance of the evidence, that a respondent took adverse action against him *in part* because he engaged in protected activity, the burden of persuasion shifts to the respondent to prove, by a preponderance of the evidence, that it would have taken the adverse action against complainant *even if* he had not engaged in the protected activity. *See Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995); *Pogue v. U.S. Dep't of Labor,* 940 F.2d 1287, 1289-1290 (9th Cir. 1991) (dual motive test set forth in *Mt. Healthy*); *Passaic Valley Sewerage v. United States Dep't of Labor,* 992 F.2d at 481; *Mackowiak v. Univ. Nuclear Sys., Inc.,* 735 F.2d at 1163-1164.

We conclude that the credit report incident was the immediate reason for Masek's termination, and that Masek would have been terminated for that reason even in the absence of his protected activity. It is unrebutted that on August 25 credit reports on Masek's ex-wife, Lynn K. Ramsey,[22/] were found in the memory of the credit check computer. Harkless and Shaulis determined that those reports were ordered during the time period in which Masek worked at the Company, and that Ramsey was not a debtor of the Company, a prerequisite for an authorized inquiry into her credit history. Moreover, although Masek denied that he had caused the credit report

[22/] One report was in the name of Ramsy, Lynn K. The other was in the name of Masek, NKA Ramsey, Lynn K. It is undisputed that this person is Masek's ex-wife.

machine to disgorge the contents of its hard drive,[23/] he could not explain the presence of his ex-wife's credit report among those in the computer memory. Tr. 96.

The credit check incident occurred the day before the termination, and according to Shaulis, was the "nail in the coffin." Harkless confirmed the seriousness of Masek's offense, and the fact that within hours it precipitated the decision to terminate Masek. The Company proved by a preponderance of the evidence that Shaulis would have fired Masek even if Masek had not engaged in protected activity.

CONCLUSION

For the foregoing reasons, the decision of the ALJ is reversed and the complaint is dismissed.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member

[23/] Although Masek testified that he had nothing to do with the credit machine incident, his testimony was undercut by a statement he made in his role as his own attorney. The following colloquy occurred during Harkless' testimony regarding Masek's misuse of the credit check computer on August 25:

> MS. HARKLESS:
>
> He [Masek] had been on the computer, and he was back there entering information to pull different reports like atlases, credit bureaus, and so forth in order to get some of the work done on the collection accounts,
>
> and . . .
>
> MR. MASEK:
>
> I object, Your Honor. Did you physically see Masek at the computer? I . . .
>
> * * * * * *
>
> ADMINISTRATIVE LAW JUDGE:
>
> What are you objecting to?
>
> MR. MASEK:
>
> Well, objection, Your Honor, *in terms of she was nowhere in site [sic].* Lay a foundation or something. She's saying I was working on the computer which . . . .

Tr. 195-196 (*emphasis supplied*). We read this statement as an indirect admission that Masek was, in fact, at the credit report computer on the day in question.