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Issue Date: 15 July 2008

CASE NO.: 2007-CAA-00003

In the Matter of:

RICHARD BURNETT,
Complainant,

vs.

PPL MONTANA, LLC.,
Respondent.

Appearances: Richard Burnett, pro se
For the Complainant

Richard Mandelson, Esquire,
Damon Obie, Esquire,
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

INTRODUCTION

This case arises under the employee protection provisions of six environmental statutes: the Clean Air Act ("CAA"), 42 U.S.C. § 7622; Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9610; Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1367; Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-9; Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971; and Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622. The enforcing regulations are at 29 C.F.R. Part 24.

For the reasons stated below, the Complainant's complaint is DISMISSED.

STATEMENT OF THE ISSUES

1. Did the Complainant engage in activity protected under the CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA?

2. Was the Respondent aware of the Complainant's protected activity?

3. Did the Respondent retaliate against the Complainant for his protected activity by denying access to the Respondent's Colstrip facility on September 4, 2006?

FACTUAL FINDINGS

Procedural Background

The Complainant filed a request for a hearing on March 8, 2007. (ALJX 2.) The Respondent filed a Motion for Summary Decision on July 13, 2007, which was denied in an Order Denying Motion for Summary Decision ("Order") issued on August 23, 2007. The Complainant made a Motion to Compel Delivery of Discovery on September 4, 2007, which was granted in part in an order issued on September 14, 2007.

I held a pre-hearing conference on October 2, 2007, where the parties agreed on the issues to be discussed at the hearing.

The Respondent made a Motion In Limine on October 4, 2007, to exclude the Complainant's exhibits 2 through 11, which was denied in an Order issued on October 15, 2007.

I conducted a hearing on this matter on October 17, 2006, in the Yellowstone County Courthouse in Billings, Montana. The Complainant and Respondent's counsel participated in the hearing. At the hearing, ALJ exhibits ("ALJX") 1 and 2 were admitted, Complainant's exhibits ("CX") 1 through 15 were admitted, and Respondent's exhibits ("EX") A through G were admitted.

The Respondent filed a Motion to Strike the Complainant's closing brief on December 27, 2007, which was denied in an order issued on January 11, 2008. That order also granted the Respondent's motion to exclude the attachments to the Complainant's closing brief that were not part of the record or exhibits admitted at the hearing.

Factual Background

Stipulations

At the beginning of the hearing, the parties agreed to the following stipulations:

1. On June 19, 2002, the Complainant filed a Complaint and Demand for Jury Trial in the Montana Thirteenth District, Yellowstone County, Cause No. DV-02-535 alleging claims for emotional distress and punitive damages related to circumstances surrounding his termination from employment with the Respondent in January 2002. (HT, p. 25.)

2. On March 5, 2003, the Complainant was given a letter from Larry J. McGinley terminating the Claimant's employment with the Respondent. (HT, pp. 25-26.)

3. On March 29, 2004, the Complainant executed an order stipulating settlement resolving the grievance regarding his termination from employment by the Respondent on March 5, 2003, as well as his civil action. (HT, p. 26.)

4. Crane Valve was a subcontractor that performed work for the Respondent's Colstrip facility in September of 2006. (HT, p. 26.)

5. On September 4, 2006, the Complainant was working for Crane Valve. (HT, p. 26.)

6. On September 4, 2006, the Complainant was denied access to the Respondent's Colstrip facility while working for Crane Valve. (HT, p. 28.)

The Complainant was employed by the Respondent for approximately 15 years before his first termination on January 18, 2002. (HT, p. 98.) His supervisors were Lloyd Breyer and Peter Simonich, who was the Plant Manager of the Respondent's facility in Colstrip, Montana from 1999 to 2004, and thereafter Hydro Manager-Fossil Generating Assets. (HT, p. 169.)

Some time shortly before December 6, 1999, the Complainant was moved from his previous assignment of calibrating environmental equipment. (See HT, pp. 51, 60, 124.)

On December 6, 1999, Mr. Simonich, Mr. Breyer, and Ron Chase, the Complainant's union representative, met with the Complainant as part of an investigation of rumors about him that were circulating around the plant. One was that the Complainant was on site on a day he was not scheduled to work; another was that he had told co-workers that he had faxed company information to an unnamed government agency. (HT, pp. 73, 83; CX 12.) During the meeting, Mr. Simonich admonished the Complainant for violating the Respondent's Code of Business Conduct, which addresses the proper process for distributing company information. When Mr. Simonich attempted to determine whether the Complainant's actions constituted theft of company property, the Complainant did not offer any information, citing his status as a whistleblower protected under the Clean Air Act. (CX 12; HT, p. 73.) The Complainant also said that he took the meeting as a threat under the Whistleblower Protection Act. Mr. Simonich did not ask the Complainant to whom or what agency he transmitted the documents. In a letter dated December 8, 1999, Mr. Simonich explained to the Complainant that he did not hold the meeting as a threat but to clarify company policy. (CX 1; HT, pp. 44-46.)

Some time in 1999, the Complainant purchased a trailer court and some apartments from Montana Power Company, the Respondent's predecessor company. (HT, pp. 32, 61.) The properties were located near the Respondent's Colstrip power plant. During 2001 and 2002, he discovered that leaks from the Respondent's power plant had caused foundation problems in the buildings he owned. (HT, p. 61.)

On July 24, 2001, the Complainant filed a complaint to OSHA by phone alleging that he was being discriminated against due to filing an OSHA complaint. (EX B.) This complaint was later withdrawn by the Complainant, and the Respondent was notified of the withdrawal in a letter dated October 17, 2001. (EX A.)

On August 2, 2001, the Complainant wrote a complaint addressed to OSHA with four items pertaining to workplace safety. (EX 13.)

The Complainant was terminated twice by the Respondent: on January 18, 2002 and, after reinstatement, on March 6, 2003. Due to the circumstances surrounding his second

termination, detailed below, the Complainant did not work as an employee at Colstrip after his first termination on January 18, 2002, despite his reinstatement. (HT, p. 72.)

The Complainant was first terminated on January 18, 2002. (HT, pp. 33.) The Respondent's stated reason for termination at the time was that the Complainant had inappropriately used his sick leave to work on his private business. (HT, pp. 45-46.) The Complainant filed a grievance under the Collective Bargaining Agreement challenging his termination, and the matter was set to go to arbitration in December 2002. (HT, p. 33.)

On April 23, 2002, the Complainant wrote a complaint addressed to OSHA regarding water leaks near electrical facilities. (CX 14.)

On May 30, 2002, the Complainant filed a citizen complaint with the Montana Department of Environmental Quality ("MDEQ") regarding contamination of surface and groundwater from chemicals used at the Colstrip plant. (CX 3 & 4.) The Respondent was notified of this complaint in a letter from MDEQ dated June 17, 2002. (*See* CX 3.) The Respondent replied in a letter dated July 22, 2002, describing the Complainant's termination by the Respondent and his subsequent actions against the Respondent. In the letter, the Respondent stated that the citizen complaint made "unfounded accusations." (CX 3, p. 2.) The letter went on to propose parameters for a testing program that would address the alleged contamination.

On June 19, 2002, the Complainant also filed a Complaint and Demand for Jury Trial in the Montana Thirteenth Judicial District, Yellowstone County, alleging claims for emotional distress and punitive damages related to his termination from employment with the Respondent in January 2002. (HT, p. 25; EX D.) This civil action was dismissed on summary judgment, but the Complainant and his counsel were considering an appeal or re-filing the matter in Federal court.

On August 7, 2002, the Complainant e-mailed Mr. Simonich about the same concerns contained in his citizen complaint to MDEQ of May 30, 2002. (*See* CX 6.) Mr. Simonich replied to the Complainant in a letter dated August 21, 2002, saying that the Respondent was working with MDEQ to address the Complainant's concerns. (CX 6.)

In September 2002 Kim Waples, a friend of the Complainant, contacted Mr. Simonich and told him that she had information concerning the Complainant that she wanted to get off her chest. (HT, p. 33.) Mr. Simonich and Ruth Springer, the Human Resources Manager at the Colstrip facility, met with Ms. Waples. (HT, p. 172.) Ms. Waples told Mr. Simonich that one day when the Complainant came home from work, he told her that he had "tripped" the plant. This is a procedure that causes the plant to go off the generation grid and one which Mr. Simonich deemed to be an act of sabotage. (HT, p. 172-173.) Ms. Waples also said that the Complainant told her that he had stolen a variety of tools from Respondent's facility. She added that she had seen the tools. Finally, she informed Mr. Simonich that she was willing to speak with others about her information. After meeting with Ms. Waples, Mr. Simonich passed the information to the Respondent's Human Resources office. The Respondent hired Raleigh Port, a private investigator, to investigate Ms. Waples' claims. (HT, p. 33.)

In December 2002, the Complainant's grievance of his January 2002 termination went to arbitration. The arbitrator ruled in the Complainant's favor and ordered that he be reinstated with full back pay. (HT, p. 33.)

When the Complainant reported to work on December 30, 2002, pursuant to the arbitrator's decision, the Respondent met with the Complainant in the presence of a union representative and questioned him about Ms. Waples' allegations concerning the theft of company tools. The Complainant refused to answer the questions and insisted that he would only answer the questions after they were put in writing. When he refused to answer the questions, the Complainant was placed on crisis suspension pending the outcome of the Respondent's investigation into the allegations, pursuant to the Collective Bargaining Agreement. (HT, p. 175.) Mr. Port also attempted to interview the Complainant about the allegations, but the Complainant again refused to answer his questions because of the ground rules established by his union representative. (EX C; HT, p. 34.) Mr. Simonich notified the leadership team at the Colstrip facility, including Security Manager Michael Ames, that the Complainant was on crisis suspension and that he would not be allowed back on the plant unless escorted. (HT, p. 176.)

On March 5, 2003, the Complainant was given a letter from Larry J. McGinley terminating the Claimant's employment with Respondent for theft of company tools. (EX C.) He was terminated effective March 6, 2003. Mr. Simonich again notified the leadership team, which included Manager Bill Monahan, that the Complainant would not be allowed on the plant. (HT, p. 177.) The Complainant filed a grievance with his union challenging his termination, and the matter was set to go to arbitration on March 29, 2004.

In May 2003, the Complainant was one of 50 plaintiffs in a civil law suit against the Respondent, claiming that the Respondent's Colstrip power plant was polluting their drinking water and damaging their homes and businesses. (CX 10.) The lawsuit was the subject of an e-mail dated May 7, 2003, from a PPL employee to several other PPL employees. (CX 11, p. 2.) In an e-mail dated June 2, 2003, Mr. Simonich notified several PPL employees, including Colstrip Managers Mr. Monahan and Neil Dennehy, of the lawsuit. (CX 2.) The e-mail contained an article published in the Allentown Morning Call identifying the Complainant as a plaintiff in the lawsuit.

On December 3, 2003, the Complainant wrote a letter to MDEQ complaining that the Colstrip power plants allowed waste water to leak into drinking water wells. (CX 5.) MDEQ received his letter on December 4, 2003.

On March 29, 2004, the arbitration regarding the Complainant's termination of March 6, 2003 was held. The Complainant was represented by an attorney retained by his union. At the beginning of the arbitration, the arbitrator suggested that the parties confer about possible settlement. The Respondent's counsel informed the Complainant that if they were to enter into a settlement, the Respondent wanted a settlement which would encompass the civil action that the Complainant was still considering pursuing. The Complainant contacted his attorney in the civil action, Brad Arndorfer, who joined in the negotiations. The parties were able to reach a settlement that resolved the Complainant's grievance as well as his civil action. (EX E; HT, pp. 36, 94.) The terms provided a monetary settlement to the Complainant, the Complainant's

agreement to drop his grievance and his civil action, and the Complainant's agreement that he would not seek future employment with the Respondent. The settlement was approved by the arbitrator on March 29, 2004. (*See* EX F.) The terms of the settlement were confidential, known only to the parties to the settlement: the Complainant, the union representative, the Respondent's Vice President, and the Respondent's counsel. (*See* EX E, p. 6.)

Throughout 2005, the Complainant made written complaints to Tom Ring, Environmental Sciences Specialist at MDEQ, about potential cooling tower leaks and oil spills in Colstrip. (*See* CX 7, 8, 15.) These complaints were later made known to various employees of PPL, including Mr. Monahan and Mr. Simonich, through an e-mail from Michael Holzwarth dated June 21, 2005. (CX 9, 11.) The e-mail forwarded a copy of MDEQ's response to the Complainant's concerns about cooling tower water. MDEQ's response was dated June 17, 2005 and reported results from water samples. (CX 15; HT, p. 187.)

In September 2006, the Complainant was working for Crane Valve, a subcontractor that was hired by the Respondent to do some work at the Colstrip facility beginning September 4, 2006. Randall Smith, Manager of Financial and Fuel Contracts for the Respondent, was responsible for monitoring subcontractors who worked at the Colstrip facility. He required all contractors to provide a list of the employees who would be working at Colstrip before the employees reported for work, so that the security staff could be notified to allow these individuals on the facility and access badges could be prepared for the contractor's employees. (HT, pp. 38, 151-152.) On or about September 3, 2006, Mr. Smith received a list of Crane Valve's workers who would be reporting for work on September 4, 2006, from Irwin Nicholas, the on-site manager for Crane Valve. (EX G.) Mr. Smith recognized the Complainant's name when he saw it on Mr. Nicholas' list. He recalled that he had had a conversation with Mr. Simonich about sabotage that had taken place at the plant in which the Complainant might have been involved. He had also heard that the Complainant was involved in the theft of tools. (HT, pp. 156, 177.) Based on this, he wrote "no" next to the Complainant's name on the list, indicating that the Complainant was not to be allowed access to the Colstrip facility. (HT, p. 38.) Mr. Smith notified Mr. Nicholas that the Complainant would not be allowed access to the facility and asked Mr. Nicholas to notify the Complainant so that he would not report for work the next day. Mr. Nicholas failed to do so, and the Complainant reported for work at the Colstrip security gate on September 4, 2006.

When the Complainant arrived, the security gate personnel contacted Mr. Smith and asked about granting the Complainant access to the facility. Mr. Smith consulted with Mr. Monahan, his supervisor, to confirm that the Complainant should not be granted access because he posed a security risk to the plant given his termination for the theft of tools. Mr. Monahan confirmed Mr. Smith's decision and the Complainant was denied access to the facility. (HT, pp. 39, 158.) Mr. Monahan, in turn, confirmed his decision with his supervisor, Neil Dennehy. (HT, p. 39.) Mr. Nicholas informed the Complainant that management at the Colstrip facility had decided that the Complainant was to be denied access. (HT, p. 100.)

The Complainant filed a complaint with OSHA, alleging that he had been denied access in retaliation for his protected activity. On February 26, 2007, the OSHA Administrator issued a decision notifying the Complainant that his complaint had been dismissed. (ALJX 1.) The Complainant filed a timely request for a hearing before the OALJ on March 8, 2007. (ALJX 2.)

DISCUSSION

Applicable Law

The employee protection provisions of the SDWA, FWPCA, and TSCA prohibit an employer from firing or discriminating against an employee for engaging in a protected activity under the particular statute. Protected activities include assisting or participating in any action for the purposes of carrying out the intent of the statute. 29 C.F.R. § 24.102.

Claims that a covered employer retaliated against an employee's protected activity are evaluated under the framework used in cases arising under Title VII of the Civil Rights Act of 1964 and other employment discrimination laws. *See St. Mary's Honor CHT v. Hicks*, 509 U.S. 502 (1993). The complainant must first establish a *prima facie* case by showing that: (1) the employer is covered by the particular statute, (2) the complainant engaged in a protected activity, (3) the employer had knowledge, actual or constructive, of the protected activity, (4) the employer took some type of adverse action against the employee, and (5) there is evidence sufficient to at least raise an inference that the protected activity was the reason for the adverse action. *See Macktal v. U.S. Dept. of Labor*, 171 F.3d 323, 327 (5th Cir. 1999). Temporal proximity between the protected activity and the adverse action may raise such an inference. 29 C.F.R. § 24.104(d)(3).

The *prima facie* case creates a presumption of retaliation, which the respondent overcomes by producing a legitimate, non-retaliatory reason for the adverse action. The complainant must then establish by a preponderance of the evidence that the employer's explanation was a pretext, and that the protected activity was the actual reason. At that point, the respondent may escape liability if it shows, by a preponderance of the evidence, either that it was not motivated in whole or in part by the protected activity, or that even if it was motivated in part by the protected activity, it would have reached the same decision even in the absence of protected activity. *See Dartey v. Zack Co. of Chicago*, No. 82-ERA-2, slip op. at 6 (Sec'y Apr. 25, 1983).

Where a case has been fully tried on the merits, the relevant inquiry is whether the complainant established by a preponderance of the evidence that the adverse action was in reprisal for the protected activity. *See Martin v. Azko Nobel Chemicals*, ARB No. 02-031, ALJ No. 01-CAA-16, slip op. at 3-4 (July 31, 2003).

Analysis

Employee-Employer Relationship

The Complainant is covered by the employee protection provisions of the six environmental acts as an "employee" of the Respondent, even though he was not a direct employee of the Respondent at the time of the adverse action. The Secretary has held that he would apply the common law master-servant relationship test for "employee" used in *Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344 (1992), to cases involving the whistleblower provisions of the CAA, CERCLA, FWPCA, SDWA, SWDA, and the TSCA. *Reid v. Methodist Medical Center of Oak Ridge*, 93-CAA-4 (Sec'y Apr. 3, 1995). The master-servant test examines the degree to which the Respondent exercises "everyday control" over the

Complainant's employment during the relevant time period. *Landers v. Commonwealth-Lord Joint Venture*, 83-ERA-5 (ALJ May 11, 1983), adopted (Sec'y Sept. 9, 1983). In the present case, the Respondent's unilateral denial of access to the Complainant demonstrates that it exercised "everyday control" over the Complainant, making him an "employee" under the common law test and therefore under the six environmental acts.

Protected Activity

The six environmental acts each contain a standard provision that protects employees who believe they have been discriminated against as a result of their testimony, evidence or other involvement in a proceeding against their employer under the acts. The employee protection provisions were included to further the purposes of these acts, which are to create incentives and uniform regulation for controlling sources of air pollution (CAA), hazardous waste (CERCLA), water pollution (FWPCA), drinking water supplies (SDWA), waste disposal (SWDA), and chemical substances (TSCA). The meaning of "protected activity" under the acts is broad enough to include threatening to enforce the acts, *Crosby v. Hughes Aircraft Co.*, 85-TSC-2 (Sec'y Aug. 1, 1993), as well as other preliminary steps to commencing or participating in a proceeding when those steps "could result in exposure of employer wrongdoing," *Poulos v. Ambassador Fuel Oil Co.*, 86-CAA-1 (Sec'y Apr. 27, 1987), slip op. at 6.

The Complainant's alleged protected activity, such as "reporting of chemical leaks, oil leaks, drinking water pollution, air quality pollution, [and] false reporting of tons per year of particulate up the stack" (HT, p. 102) to state and federal agencies, are therefore covered under the six environmental acts. The Complainant alleged that he was engaged in protected activity on at least eight occasions before the alleged adverse action: (1) complaint to OSHA on July 24, 2001 (EX B); (2) complaint to OSHA on August 2, 2001 (CX 13); (3) complaint to OSHA on April 23, 2002 (CX 14); (4) complaint to MDEQ on May 30, 2002 (CX 3 & 4); (5) complaint to Mr. Simonich on August 7, 2002 (CX 6); (6) civil lawsuit against the Respondent filed by 50 plaintiffs in May 2003 (CX 10); (7) complaint to MDEQ on December 3, 2003 (CX 5); and (8) several complaints to MDEQ throughout 2005 (See CX 7, 8, 15).

Whether each of the alleged protected activities is corroborated by the record is a separate question. I find that the Complainant was engaged in protected activity in six of the occasions alleged above. However, he has failed to establish that he made complaints to OSHA on August 2, 2001, and on April 23, 2002, since he merely presented documents that appear to be his original letters addressed to OSHA without any evidence that OSHA ever received them. (See EX 13, 14.) He has also failed to establish all but one occasion of protected activity in 2005: an e-mail complaint dated January 11, 2005, to MDEQ which is acknowledged in a reply letter from MDEQ. (See CX 15.) The Complainant testified that he made "numerous reporting[s]" to MDEQ and the EPA from the time of the March 29, 2004, settlement agreement to the September 4, 2006, denial of access. (HT, p. 119.) However, the Complainant offered no evidence besides his bare testimony to corroborate this claim.

At the hearing, the Complainant said that he assumed that the Respondent's counsel already had the corroborating documents, or that the Complainant's attorney from his previous civil suit would pass them along to the Respondent's counsel. (HT, pp. 108, 120.) Permitting some leeway for the pro se Complainant, I nonetheless find that he was unreasonable in making

such assumptions. It was the Complainant's responsibility to provide the documents necessary to corroborate his claims. Furthermore, the Complainant gave no reason why his attorney from his previous civil suit, which was settled in 2004, would have had in his possession documents resulting from the Complainant's actions after the settlement. Therefore, I find that the Complainant did not establish that he made the complaints to OSHA on August 2, 2001 and on April 23, 2002, as well as any complaints during 2005 (excluding the complaint to MDEQ on January 11, 2005). *See Crosier v. Westinghouse Hanford Co.*, 92-CAA-3 (Sec'y Jan. 12, 1994) (complainant failed to show his protected activities when he did not offer corroborating documents into evidence).

In sum, I find that the Complainant was engaged in protected activity on the following six occasions: (1) complaint to OSHA on July 24, 2001; (2) complaint to MDEQ on May 30, 2002; (3) complaint to Mr. Simonich on August 7, 2002; (4) civil lawsuit against the Respondent filed by 50 plaintiffs in May 2003; (5) complaint to MDEQ on December 3, 2003; and (6) complaint to MDEQ on January 11, 2005.

Adverse Action

To be actionable, the Respondent's action must constitute a "tangible employment action" or "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). Less obvious actions such as "stripping an employee of job duties or altering the quality of an employee's duties, if they have tangible effects" are also actionable. *Jenkins v. United States Environmental Protection Agency*, ARB No. 98 146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003). For example, a transfer to a less desirable position even when it involves no loss in salary may be an adverse action. *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 13-14 and n.13.

The Respondent took adverse action against the Complainant when it denied him access to the Colstrip facility without prior notice, when he was scheduled to perform work as a subcontractor. The denial of access stripped the Complainant of job duties for a three- to four-week period, with tangible effects for the Complainant. The Complainant decided that the three- to four-week interim until his next assignment in Texas would not allow him to seek other employment (HT, p. 136), a decision that I find was reasonable under the circumstances. As a result of the Respondent's action, the Complainant lost three to four weeks of pay. (HT, p. 135.)

Respondent's Knowledge of Protected Activity

In General

I find that the Complainant showed that the Respondent had knowledge of the following instances of his protected activity: (1) complaint to OSHA on July 24, 2001 (EX B); (2) complaint to MDEQ on May 30, 2002 (CX 3 & 4); (3) complaint to Mr. Simonich on August 7, 2002 (CX 6; HT, p. 55); (4) civil lawsuit against the Respondent filed by 50 plaintiffs in May 2003 (CX 2 & 10); (5) complaint to MDEQ on December 3, 2003 (CX 5); and (6) complaint to

MDEQ on January 11, 2005 (CX 15). The documents that showed that these instances were protected activities in the first place also show that the Respondent was aware of them.

As for the other alleged occasions of protected activity, I find that the Complainant failed to show that the Respondent knew of them for the same reasons he failed to show that he was engaged in them in the first place. He has not provided any documentation that shows that the Respondent knew of the particular complaints he allegedly made to OSHA on August 2, 2001 and April 23, 2002, and to MDEQ between his March 6, 2003 termination and the September 4, 2006, denial of access (HT, p. 102). My analysis of the Complainant's use of uncorroborated testimony to establish protected activity, above, applies equally here.

It is well established that knowledge of protected activity may be inferred from the record as a whole, including either direct or circumstantial evidence. *Bartlik v. Tennessee Valley Authority*, 88-ERA-15 (Sec'y June 24, 1992), slip op. at 3. Circumstantial evidence of the Respondent's knowledge requires an inferential step, while direct evidence does not. *See Hall v. United States Dept. of Labor, Administrative Review Board* (10th Cir. 2007). Therefore, the fact that the Complainant did not present direct evidence, for example, that a MDEQ employee called the Respondent about his complaint does not *preclude* the Complainant from showing the Respondent's knowledge of his complaint. (*See* HT, p. 110.) However, where the *only* evidence presented to show the Respondent's knowledge of a particular protected activity is a vague, speculative statement like "knowledge is fairly well-communicated within a community," the Complainant does not meet his burden. *Howard v. Quadrex Energy Servs.*, 91-ERA-38 (ALJ June 18, 1991), *aff'd* (Sec'y Dec. 10, 1991).

At the hearing, the Complainant made such blanket statements as "I think it was well-known that I had filed OSHA charges for years" (HT, p. 77); "I don't see how they could not know" (HT, p. 119); and "There is nobody downtown that would call and report chemicals under my trailer court other than myself, or complain about an oil plume that was on its way to my trailer court" (HT, p. 119). While circumstantial evidence can create an inference that the Respondent knew of the Complainant's protected activity, I find that the Complainant's statements do not create a strong enough inference. Nor can such a weak inference of generalized "knowledge" compensate for the Complainant's failure to show that he engaged in particular alleged protected activities.

The Respondent's counsel made much of the fact that the Respondent never verified that the Complainant had in fact made the complaints as claimed. (HT, pp. 131-132.) However, this argument does nothing to counter a showing of "knowledge" under the employment protection provisions. Even a manager's mere suspicion that the Complainant filed complaints with government agencies may be sufficient to show the Respondent's knowledge. *See Pillow v. Bechtel Construction, Inc.*, 87-ERA-311 (Sec'y July 19, 1993), citing *Williams v. TIW Fabrication Machining, Inc.*, 88-SWD-3 (Sec'y June 23, 1992), slip op. at 6. Therefore, the Complainant failed to establish the Respondent's knowledge not because he failed to show that the Respondent verified the truthfulness of his claims, but because he presented weak circumstantial evidence of such knowledge.

At Time of Adverse Action

With regard to the Respondent's adverse action on September 4, 2006 in particular, the question is whether the Complainant has established that an employee of the Respondent who had *substantial input into the adverse action* had knowledge of the protected activity at the time the action was taken. *Frady v. Tennessee Valley Authority*, 92-ERA-19 and 34 (Sec'y Oct. 23, 1995). Thus, the knowledge of an employee who has input into the adverse action may be imputed to the employee who ultimately takes action. *Thompson v. Tennessee Valley Authority*, 89-ERA-14 (Sec'y July 19, 1993).

In the present case, the Complainant has shown that at least one employee of the Respondent who had input into the decision to deny him access to the Colstrip facility on September 4, 2006 knew of the Complainant's protected activity. The PPL employees who had input into the decision were Randall Smith, Bill Monahan, and Neil Dennehy. Although I find that Mr. Smith, who was not involved with safety as part of his job responsibilities, did not know of the Complainant's protected activity (HT, pp. 158-159), Mr. Monahan and Mr. Dennehy did know. Through forwarded e-mails, Mr. Monahan and Mr. Dennehy knew of the Complainant's involvement in a lawsuit against the Respondent (CX 2; HT, p. 166) and his January 11, 2005, complaint to MDEQ (CX 11 & 15).

Since Mr. Simonich, Mr. Breyer, and other PPL employees did not participate in the decision-making process behind the adverse action, their knowledge of the Complainant's protected activity is not relevant. In sum, the knowledge of Mr. Monahan and Mr. Dennehy is sufficient to establish the Respondent's knowledge with regard to (1) the civil lawsuit against the Respondent filed by 50 plaintiffs in May 2003 (CX 2 & 10) and (2) complaint to MDEQ on January 11, 2005 (CX 15).

No Nexus Between Protected Activity and Adverse Action

Inference of Nexus in prima facie *case*

The Complainant presented evidence sufficient to at least raise an inference that the protected activity was the reason for the Respondent's adverse action, as is required for a *prima facie* case. *See Macktal v. U.S. Department of Labor*, 171 F.3d 323. 327 (5th Cir. 1999). First, the Respondent knew about the Complainant's protected activity on six separate occasions from 2001 to 2005. Second, the Complainant offered uncontroverted testimony that his regular reporting of environmental violations from 1999 to 2006 led to costly cleanups for the Respondent. (HT, p. 62.) Third, the Complainant offered uncontroverted testimony that his activities as a whistleblower were well known in his small work environment. Although such testimony cannot support a finding that the Respondent knew of any *given* protected activity, it is sufficient to raise at least a weak inference that the Respondent knew of (or suspected) his protected activities and that this knowledge was a contributing factor in denying access to the Colstrip facility in 2006.

At the *prima facie* stage, temporal proximity between the protected activity and the adverse action is sufficient but not necessary to raise an inference of a nexus. While it is true that if the events are distant in time, "doubt arises as to whether the alleged retaliator could have

still been acting out of retaliatory motives," *Varnadore v. Oak Ridge National Laboratory*, 92-CAA-2 and 5 and 93-CAA-1 (Sec'y Jan. 26, 1996), slip op. at 86-87, an inference may still be raised. The Complainant's last protected activity was on January 11, 2005, over a year before the adverse action on September 4, 2006. In view of the record as a whole, I find that the gap in time between the events is not so distant so as to preclude an inference of a nexus at the *prima facie* stage.

Respondent's Articulated Nondiscriminatory Reasons

The Respondent articulated two nondiscriminatory reasons for its adverse action, thereby overcoming any presumption of retaliatory motive created by the Complainant's *prima facie* case. *Dartey v. Zack Company of Chicago*, 82-ERA-2 (Sec'y Apr. 25, 1983), slip op. at 8. The Respondent stated that the Complainant was denied access to the Colstrip facility on September 4, 2006, because it believed that the Complainant had stolen company tools and sabotaged the plant. (HT, p. 40.) In the alternative, the Respondent argued that it acted out of the belief that by entering the settlement of March 29, 2004 with the Complainant, it was entitled to deny him access to company property. (HT, p. 41.) I find that the Respondent met its burden of production through the testimony of its witnesses, who said that there were rumors and suspicions among plant employees that the Complainant had stolen tools and was involved in sabotaging the plant. (See HT, pp. 156, 162.)

Articulated Reasons Were Not Pretextual

Respondent's Genuine Belief

The Complainant failed to show that the Respondent's articulated reasons were pretextual and that its adverse action was motivated by retaliatory animus. The Respondent presented evidence that it genuinely believed Complainant to be a security threat, and the Complainant did not show otherwise. The Respondent need not show that its articulated reasons were supported by the facts, but only that it believed them at the time. *See Morgan v. Massachusetts General Hospital*, 901 F.2d 186, 191 (1st Cir. 1990); *Pignato v. Am. Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994) ("[I]t is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible . . . [rather] he must show that the explanation is a 'phony reason.'").

The Respondent genuinely believed that the Complainant stole company tools and was involved in a sabotage of the plant. The Respondent hired a private investigator to investigate the allegations which came from someone who knew the Complainant and claimed first hand knowledge of the Complainant's actions. The Complainant refused to answer the verbal questions posed to him, and then settled the grievance he filed over his firing by the Respondent for theft of company tools. By entering into the settlement agreement in 2004, the Complainant waived his right to challenge the basis for his firing. Since the terms of the settlement were confidential and not known to the Respondent's employees at the Colstrip plant, I find it plausible that the employees at the Colstrip plant still suspected that the Complainant was fired for stealing tools. The Complainant denied at the hearing that he stole tools, but this does not show that the Respondent's belief that he did steal the tools was not in good faith.

Nor did the Complainant show that the Respondent acted on its suspicions about him in a way that supports a finding of pretext. The Complainant testified that Ms. Waples, his acquaintance who talked to Mr. Simonich about the Complainant's alleged theft and sabotage, acted out of revenge and was therefore not a reliable source of the Respondent's beliefs. (HT, p. 188.) As discussed above, the factual basis of the Respondent's good faith beliefs are irrelevant. They are relevant if the Respondent had known (or should have known) that the informant "clearly had his [or her] own ax to grind with the Complainant" while taking the informant's statements at face value and acting on them with haste. *White v. Osage Tribal Council*, 95-SDW-1 (ARB Aug. 8, 1997). In other words, it must be shown that the Respondent was willing to "blindly accept" a recommendation to take adverse action against the Complainant. *See Redweik v. Shell Exploration and Production Co.*, ARB No. 05-052, 2004-SWD-2 (ARB Dec. 21, 2007). I find that the Complainant has not shown this to be the case. The Respondent was justified in believing Ms. Waples, who simply told Mr. Simonich she had facts she wanted to "get off her chest," and Mr. Simonich did not take adverse action immediately but hired a private investigator to conduct a formal investigation of Ms. Waples' claims. (HT, p. 33.) Nothing in the record shows that the Respondent acted on Ms. Waples' statements as pretext for retaliation.

Respondent's Shifting Explanations

At the time of the initial Department of Labor investigations and in its Motion for Summary Decision before the OALJ, the Respondent claimed that the Complainant was denied access because of the terms of the settlement agreement signed in March 2004. (ALJX, 1; Order, p. 2.) In the order denying that motion on August 23, 2007, I found that the Respondent's argument left open a material factual dispute because "the settlement agreement in question merely provides that the Complainant agreed he would not apply for accept employment with the Respondent. There is no reference to access to Respondent's facility, nor is there, by implication, an agreement not to work for another employer who might subcontract for the Respondent." (Order, p. 2.) The Respondent then revised its argument to say that the Complainant was denied access primarily because he was still viewed as a security threat after the settlement agreement. The Respondent did not abandon its previous argument, however, and reasserted it as "an independent non-discriminatory reason" for denying access: "We thought we were done with Mr. Burnett when we settled this thing and paid him the [[1]sum of money] on March 29th." (HT, p. 41.)

At the hearing, the Complainant argued that the Respondent changed its explanation for its actions since the initial Department of Labor investigations, when it did not mention any fear of sabotage. (HT, pp. 142.) A respondent's shift in explanations may suggest that its action was motivated by retaliatory intent. *See Timmons v. Franklin Electric Coop.*, 1997-SWD-2 (ARB Dec. 1, 1998). For example, a shift in the theory of a respondent's case was found to show pretext when an employer told an employee he was being laid off because it was "getting out of the business," but later explained that it was restructuring. *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24 (Dep. Sec'y Feb. 14, 1996). A complainant also showed pretext when the respondent testified that the only reasons for firing the complainant were lack

[1] The parties to the settlement agreement agreed that the monetary terms of the settlement agreement would be confidential.

of work and low seniority, but then later introduced evidence to show that the complainant was also rude. *Hoffman v. Bossert*, 94-CAA-4 (Sec'y Sept. 19, 1995).

I do not find that the Respondent's shift in explanations merits a finding of pretext, because the Respondent has not shifted its theory of the case entirely, but has retained it and extended it. Instead of relying on the legal entitlements created by the settlement agreement, the Respondent has chosen to rely on its psychological effects on its employees instead. In the absence of a showing that the settlement agreement itself was coercive or retaliatory, the reasonable expectations flowing from the settlement agreement perform the same role in whistleblower cases as the terms of the settlement themselves.

No Pattern of Retaliation

The Complainant failed to show that there was a pattern of retaliation against the Complainant's or other employees' protected activity, making it less likely that the Respondent was motivated by retaliatory animus. I find many of the Complainant's allegations of past retaliation either uncorroborated or not credible due to internal inconsistency and inherent improbability. *See Frady v. Tennessee Valley Authority*, 92-ERA-19 and 34 (Sec'y Oct. 23, 1995). For example, he said that his first termination was "caused" by what he felt was close monitoring by his supervisors following his alleged protected activity that was the subject of the December 6, 1999, meeting. (HT, pp. 60, 70.) But it is clear from the record that he was in fact found to have been violating company policy, a fact he does not deny even though he prevailed on the grievance against the discharge on procedural grounds. The Complainant did not submit evidence to show that the cited cause for discharge itself was pretextual. *See Lockert v. United States Dept. of Labor*, 867 F.2d 513 (9th Cir. 1989) (employee was terminated for violation of rules, not for protected activity).

Furthermore, there are numerous employees of the Respondent who, like the Complainant, were plaintiffs in the lawsuit against the Respondent but are still working for the Respondent. (HT, p. 114.) The Respondent showed that there were around nine employees still working, while the Complainant said that one may have been fired for involvement in the lawsuit. Finally, the Complainant failed to corroborate his claim that another employee was fired in retaliation for protected activity. (HT, p. 52.)

ORDER

Accordingly, it is ordered that the Complainant's claims be DISMISSED.

A

JENNIFER GEE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).