U.S. Department of Labor

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Issue Date: 22 December 2004

Case No.: 2001-ERA-00016

In the Matter of

WILLIAM D. HOOKER,
Complainant
v.

WESTINGHOUSE SAVANNAH RIVER CO,
Respondent

Appearances:
Robbie M. Nichols, for Complainant
Charles F. Thompson, Jr., Esq. for Respondent

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This case arises under the employee protection provision of the Energy Reorganization Act (ERA), as amended, 42 U.S.C. §5851 (1994). The Complainant filed a *pro se* complaint for whistleblower protection under the ERA by letter dated September 9, 2000, to the U.S. Department of Labor, OSHA, as an employee of Westinghouse Savannah River Company (WSRC). The Savannah River Site (SRS) is owned by the Department of Energy's Savannah River Operations Office (DOE)[1] and managed by WSRC. Complainant asserts that "he resigned his position as a Senior Work Control Planner with WSRC at the SRS due to intimidation and discrimination by WSRC Management."

Respondent, WSRC, filed a motion for summary judgment on July 2, 2001, asserting that the Complainant has failed to state a claim upon which relief can be granted. Respondent contended that there was no genuine issue of material fact to be resolved and sought summary judgment dismissing all claims.

A recommended decision and order dismissing the complaint was issued in this matter on December 3, 2002. On August 26, 2004, a "Final Decision and Order of Remand" was issued by the Administrative Review Board. On September 9, 2004, the Respondent renewed its earlier motion for summary decision reasserting the same legal arguments and admissions, and also attached a copy of a reply brief that it had submitted to the Board.

[1] Under the 1992 Amendments to the ERA, claims may be brought through the Department of Labor against contractors for the Department of Energy. *See* 42 U.S.C. § 5851(a)(2)(D)(1994).

On September 14, 2004, a Notice was issued to advise Complainant of his right to file a response to the motion for summary decision, in accord with the decision of the United States Court of Appeals for the Fourth Circuit in *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), even though Complainant was now represented by Attorney Robbie M. Nichols.[2] The Notice advised the parties that the circumstances of this remand require that the Respondent's original July 2, 2001, motion for summary decision be reconsidered after giving the Complainant a new opportunity to reply to the motion with the benefit of the *Roseboro* notice and the representation by Counsel. The Notice provided that the Complainant should file a response within 30 days of the Notice.

In response to the *Roseboro* Notice, Counsel for Complainant filed a very brief "Motion in Opposition to Respondent's Motion for Summary Judgment" on September 20, 2004. The "Motion" included as attachments two affidavits and three pages of information, whose relevance was unexplained. The motion read in its entirety:

> William D. Hooker, the Complainant, through his undersigned attorney, submits this response to Respondent's Motion for Summary Decision and based on supporting affidavits and memorandum previously filed, requests that this Court deny Respondent's Motion for Summary Decision.

The Complainant's response, with the attachments was apparently intended by Counsel for the Complainant to be Complainant's response to the July 2, 2001, motion for summary decision. However, the "motion" did not include a brief addressing the legal issues raised by the brief submitted by the Respondent in support of the July 2, 2001, motion for summary decision, nor did it identify the facts asserted in the motion for summary decision with which Complainant disagreed. Instead, it vaguely referred to unidentified "supporting affidavits and memorandum previously filed." Therefore, on September 22, 2004, a second order was issued requiring the Complainant to file a brief in reply to the brief submitted by the Respondent with its July 2, 2001 motion for summary decision, which **shall**, identify all facts stated by the Respondent with which the Complainant disagrees and **shall** set forth the Complainant's version of the facts by specifically identifying any affidavits, sworn statements or documents relied upon to establish the existence of a genuine issue of material fact regarding those facts.

In response to the September 22, 2004, Counsel for the Complainant filed a reply brief to Respondent's July 2, 2001, motion for summary judgment on October 18, 2004. Respondent filed a reply to Complainant's response on November 15, 2004. This decision represents reconsideration of the July 2, 2001 motion for summary decision with the benefit of the Complainant's response, this time represented by Counsel.

[2] The Board remanded the case on technical grounds that the *Roseboro* notice had not been given prior to the consideration of the Respondent's motion for summary decision. While Complainant was pro se at the time of the consideration of the motion for summary decision, he is subsequently represented by Counsel. Nevertheless, the Roseboro notice was given to the Complainant, even though he was no longer pro se, out of an abundance of caution.

Summary Judgment Standard

The standard for granting summary decision is set forth at 20 C.F.R. § 18.40(d)(1994). The regulations provide that either party is entitled to summary decision where "there is no genuine issue as to any material fact." 29 C.F.R. § 18.40(d). A party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). Affidavits, pleadings, and discovery materials shall be considered in determining whether or not a material issue of fact is disputed. 29 C.F.R. § 18.40(d). It is enough that the evidence consist of the party's own affidavit, or sworn deposition testimony and declaration in opposition to the motion for summary judgment. *Carteret Sav. Bank, P.A. v. Compton, Luther & Sons, Inc.*, 899 F.2d 340, 344 (4th Cir. 1990). The determination of whether a genuine issue of material fact exists must be made in the light most favorable to the non-moving party. *See Hasan v. Burns & Roe Enterprises, Inc*., ARB No. 00-080, ALJ No. 2000 ERA 6,6 (citing *Troy Chemical Corp. V. Teamsters Union Local No. 408*, 37 F.3d 123 (3d Cir. 1994)).

The summary decision regulations set forth at 29 CFR § 18.40 are substantially the same as the summary judgment standard established by Rule 56 of the Federal Rules of Civil Procedure (FRCP). *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA 6 (ARB Jan. 30, 2001); *Flor v. United States Department of Energy,* 93 TSC 1 (Sec'y Dec. 9.1994). Therefore, cases decided under the FRCP are instructive. The existence of an alleged factual dispute between the parties will not defeat a properly supported motion for summary judgment, unless the disputed fact is one that might affect the outcome of the litigation. *Hooven-Lewis v. Caldera*, 249 F.3d 259, 265 (4th Cir. 2001). Mere speculation by the complainant cannot create a genuine issue of material fact. *Cox v. County of Prince William*, 249 F.3d 295, 299 (4th Cir. 2001). A material fact is one where its existence or non-existence could result in a different jury verdict. *See Anderson v. Liberty Lobby*, 477 U.S. 242(1986).

Whistleblower Protection under the ERA

In order to establish a *prima facie* case for whistleblower protection under the ERA, Complainant must show that he engaged in a protected activity, employer knew about that activity, adverse action was taken as a result of Complainant's protected activity, and there is sufficient evidence to raise an inference that the protected activity was the likely reason for the adverse action. *See Hasan v. Commonwealth Edison Co.*, ARB No. 2000-ERA-1 (ARB Dec. 29, 2000); *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA 6 (ARB Jan. 30, 2001); *Caroll v. Bechtel Power Corp*., Case No. 91 ERA 46, Sec'y Final Dec. and Ord., February 15, 1995, slip op. at 9, *aff'd sub nom. Caroll v. Dep't of Labor*, 78 F.3d 352 (8th Cir. 1996)(citing *Darety v. Zack Co. of Chicago*, Case No. 82 ERA 2, Sec. Dec. April 25, 1983, slip op. at 7-8); *McCuistion v. TVA*, Case No. 89-ERA 6, Sec. Dec., November 13, 1991, slip op. at 5-6; *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1162 (6th Cir. 1983).

In the instant case, Complainant has alleged constructive discharge on the part of WSRC, including: hostile work environment, name-calling, harassment and discrimination by his supervisor, refusal to grant request for time off, intimidation during the NIOSH investigation, and failure to receive permission for a hardship withdrawal from his retirement fund.

Complainant also alleges he was blacklisted in the industry due to his report to the CDC.[3] Any of these adverse actions are sufficient to invoke whistleblower protection under the ERA.

Protected Activity

It is undisputed that Complainant reported exposure concerns to OSHA. Respondent concedes for the purposes of this motion that Complainant engaged in protected activity. (Respondent's Motion for Summary Judgment p.13). Respondent defines Complainant's protected activity as the January 6, 2000 letter to the CDC. *Id.* This is consistent with the protected activities specifically defined in the ERA: commencing litigation under the ERA, testifying in an ERA action, or participating in any manner in a proceeding to carry out the purposes of the ERA. *See* 42 U.S.C. § 5851.

Employer Awareness of Protected Activity

According to Complainant's own deposition testimony, WSRC had no knowledge of his exposure concerns before he finished his letter to the CDC, dated January 6, 2000. (Cmp. Depo. at 76-78). On January 12, 2000 Complainant gave his supervisor, Mr. Bumpus, a copy of his letter to the CDC. (Cmp. Depo. at 76). Complainant testified that, prior to January 12, 2000, Mr. Bumpus had not seen the letter to the CDC and was unaware of his complaints or concerns about exposure. (Cmp. Depo. at 76-77). [4]

Constructive Discharge

The issue in constructive discharge cases is whether Complainant was forced to resign or whether he quit voluntarily. A finding of constructive discharge requires proving that working conditions were rendered so difficult, unpleasant, unattractive or unsafe that a reasonable person would have felt compelled to resign. *See Mintzmyer v. Dept. of Interior*, 84 F.3d 419, 423 (Fed. Cir. 1996); *Dobreuenaski v. Associated Universities, Inc.,* 96 ERA 44 (ARB June 18, 1998); *Talbert v. Washington Public Power Supply System*, ARB Case No. 96-023, ALJ Case No. 93 ERA 35, ARB Fin. Dec. and Ord., Sept. 27, 1996, slip op. at 10; *Nathanial v. Westinghouse Hanford Co.*, Case No. 91-SWD 2, Sec. Dec. and Ord., Feb. 1, 1995, slip op. at 20; *Johnson v. Old Dominion Security*, 86 CAA 3-5 (Sec'y 1991)(slip op. at 19-22 and n. 11). Thus the adverse consequences flowing from an adverse employment action generally are insufficient to substantiate a finding of constructive discharge. Rather, the presence of "aggravating factors" is required. *Clark v. Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981). The adverse employment actions must be *because of* or in response to the protected activity. *See Hooven-Lewis v. Caldera*, 249 F.3d 259 (4th Cir. 2001)(emphasis added). In addition, the Fourth Circuit requires Complainant to show that the employer acted with the intent of inducing the complainant to resign. *See Burns v. AAF-McQuay, Inc*., 96 F.3d 728 (4th Cir. 1996); *Bristow v. Daily Press, Inc*., 770 F.2d 1251, 1255(4th Cir. 1985), *cert. denied*, 475 U.S. 1082(1986).

[3] The allegation of blacklisting was first made by the Complainant in his discovery deposition.

[4] It is noted that the ARB has affirmed the finding that Respondent's hostile or otherwise adverse actions prior to January 12, 2000 were not relevant to Complainant's constructive discharge claim.

Because Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq*., and the language of the whistleblower protection provided under the ERA is virtually the same, Title VII caselaw is instructive in interpreting the meaning of the phrase "otherwise discriminate [. . .] with respect to [. . .] compensation, terms, conditions, or privileges of employment." *See English v. Whitfield*, 858 F.2d 957, 963-964 (4th Cir. 1988); *Martin v. Dept. of the Army*, ARB No. 96-131, ALJ No. 1993 SDW 1 (ARB July 30, 1999).

In *Burns*, the Fourth Circuit held that a supervisor's "alleged arrogance, disrespect, unkindness, and hostility," when other employees testified that supervisor acted arrogantly toward them, was not sufficient to make a case for constructive discharge. *Burns*, 96 F.3d at 733. The Court held that a jury could not reasonably make the same assumption that the employee had made, that the supervisor intended her to resign. *Id.* In the Sixth Circuit, the Court held that "[e]vidence of a racially-charged letter and offensive phone messages on an employee's answering machine is insufficient to show a subjectively hostile work environment where the employee did not consider the racially-charged letter a 'big deal' and did not 'lose sleep' over the message." *See Newman v. Fed. Express Corp*., No 99-6412 (6th Cir. September 27, 2001). The Sixth Circuit has also held that "[t]he plaintiff must show more than a violation to prove constructive discharge, so the fact that the plaintiff may have proven a hostile work environment is not enough by itself to prove constructive discharge also." *Moore v. KUKA Welding Systems*, 171 F.3d 1073, 1080 (6th Cir. 1999)(citing *Jenkins v. Southeastern Mich. Chapter, Am. Red Cross*, 369 N.W.2d 223, 229(1985)).

Looking to Title VII case law for guidance, the ARB in *Martin v. Department of the Army,* observed that the Fourth Circuit, the circuit in which this case arose, applies a minority "subjective"" standard for constructive discharge. Under the "subjective" standard, a constructive discharge occurs when an employer intentionally renders an employee's working conditions intolerable, whereas the majority of circuits use an "objective" standard, which asks only whether, in response to the employer's actions a reasonable person in the employee's position would have felt compelled to resign. *Martin v. Dept. of the Army*, ARB No. 96-131, ALJ No. 1993 SDW 1, at 7-8 (ARB July 30, 1999). According to the Board in *Martin*, courts using the subjective standard have found that:

> [A] complainant may prove an employer's 'intent' by establishing either (1) that the employer *consciously intended* to coerce the employee's resignation, or (2) that resignation was the *reasonably foreseeable consequence* of the employer's actions. Thus, even under the subjective standard it ultimately is not necessary to prove specific intent. *Id.* at 8.

The ARB concluded that, as applied by the courts, the distinction between the two standards is minimal and is in fact irrelevant where the complainant fails to prove that the working conditions were rendered so intolerable that the employee was compelled to resign. *Id.* Intolerability of working conditions is judged objectively, using a reasonable person standard. Thus, the conditions created by the employer must be sufficiently severe or pervasive that a reasonable person would find them intolerable. *Martin,* ARB No. 96-131 at 8 (citing *Bristow*, 770 F.2d at 1255). Finally in *Bristow*, the Fourth Circuit held that a constructive discharge claim is

undermined by an employee's requests to be transferred to his old job. *Bristow*, 770 F.2d at 1256.

In this case, Complainant need not carry his burden of proof to prevail in this motion, he must merely demonstrate that there is a dispute over a material issue of fact. Complainant listed several allegations of discrimination and hostility leading to his resignation, including: WSRC manager not allowing him to have his SIP money(hardship withdrawal)[5]; not giving him credit for his M/K Ferguson retirement time[6]; WSRC managers asking him to perform E & I planning when he had no background as an E & I planner[7]; not giving him a raise due to walking around too much[8]; and telling him he would be the one to "come off shift."[9] See Complaint.[10] However, all of these actions and events occurred prior to Complainant's protected activity, thus, they can not be considered as part of his constructive discharge claim. As they happened before he reported his concerns to the CDC they could not have been in response to or because of that complaint or report.

Complainant also heavily focuses on his last day of employment as evidence of a hostile work environment that prompted his resignation. Complainant specifically claims in his affidavit that he was laughed at and humiliated by Respondent's management during the NOISH presentation held in March of 2000, at which Complainant outlined his contamination concerns. (Aff. Of William D. Hooker). Complainant also offers the affidavit of his employee, Andy Cromer, which simply states, "Laughing at Mr. Hooker during the presentations, after he ask for samples to be taken out of the sites hooker had worked us in." (Aff. Of Andy Cromer). It is unclear from Mr. Cromer's affidavit who precisely was laughing at Complainant during the presentation.

Additionally, Complainant's assertions in his affidavit conflict with his prior deposition testimony. Specifically, when discussing the NIOSH presentation during his previous deposition, Complainant was unable to identify anyone specifically who ridiculed his concerns.

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[5] Exhibit 13 of the Complainant's deposition is the letter he received regarding his application for SIP, dated December 21, 1999. That letter states that Complainant's request was denied due to IRS rules regarding withdrawal of funds, not employer's. Further, Complainant testified in his deposition that his supervisors do not have a role in hardship applications. (Cmp. Depo. at 75).

[6] M/K Ferguson was Complainant's previous employer. Complainant later testified that if he got that time he would drop the issue. (Cmp. Depo. at 128). Further, this too occurred prior to Complainant's protected activity as it was a retirement package from his previous employer.

[7] Complainant stated this practice began in January of 1999. (Cmp. Depo. at 124). Further, Respondent introduced an affidavit from a co-worker of Complainant stating that this was a regular practice in Mr. Bumpus' department. *See* Affidavit of Stephen J. Phillips, dated June 18, 2001 (hereinafter Phillips Affidavit).

[8] Complainant testified that this was a yearly raise in 1998. (Cmp. Depo. at 86).

[9] Complainant testified that this occurred in October of 1999, but that he was never taken off shift. (Cmp. Depo. at 139).

[10] In this case, Complainant's initial letter to Mr. Johannes of the U.S. Department of Labor, OSHA dated September 7, 2000, serves as his complaint.

Complainant previously testified under oath in his deposition, "I can't tell you who all laughed. It was a roomful...." (Cmp. Depo. at 89-90). This directly counters Complainant's assertions in his affidavit, in which he specifically accused Respondent's management in general as the ones who ridiculed him. Complainant was also unaware of whether his supervisor was present in the meeting, and acknowledged that if he was, he was neither rude nor discourteous to Complainant during the meeting.

Complainant additionally stated in his deposition that those in attendance " work[ed] for Westinghouse and D.O.E. Just like one guy reached over like this and grabbed me like that (indicating), grabbed my Westinghouse badge and said you're Rad Worker II trained. I didn't need that." (Cmp. Depo. at 87-88). Andy Cromer agreed in his affidavit that a "WSCR manger grab[bed] [Complainant's] Badge's telling him you Rad II trained at the NISOH meeting." (Aff. Of Andy Cromer). However, although Complainant thought that this man was a Westinghouse manager, he could not conclusively state that this was true. (Cmp. Depo. at 91.) To the best of his knowledge, this man was not in his chain of command. (Cmp. Depo. at 91). Similarly, Mr. Cromer failed to reveal the name of this manager, and it remains unknown of whether this person who grabbed Complainant's badge is in his chain of command.

On his way to the NIOSH presentation, Complainant alleged that he was intimidated by some attorneys. Complainant testified that one attorney "hollered out," thus prompting other attorneys to come to the hallway as Complainant made his way to the meeting. Complainant stated that "four of five attorneys on each hallway come to the doors like they was a bunch of little puppets." (Cmp. Depo. at 121). However, Complainant could not identify for whom these attorneys worked, and Respondent asserts that they worked for the DOE, not WSRC. In any event, no evidence has been presented that these attorneys were involved in Complainant's employment with WSRC. Rather, quite to the contrary, evidence tends to suggest that these attorneys actually represented the D.O.E. Specifically because Joe Shaffer from the D.O.E. apologized for the behavior of these attorneys during the said incident. (Cmp. Depo. at 123).

Complainant also alleges that general verbal abuse from his supervisor created a hostile work environment and made it impossible for him to remain at his employment. Complainant worked for WSRC at SRS as a senior work control planner (mechanical) on shift. (Cmp. Depo. at 12-13). Complainant's immediate supervisor at the time he left WSRC was Kevin Bumpus. (Cmp. Depo. at 14). Two other WSRC supervisors were identified as being in Complainant's chain of command, Mr. Handfinger and Mr. Wilkerson. (Cmp. Depo. at 14; Cmp. Depo. at 92). Complainant also stated that, as he understood it, Mr. Jahn (industrial hygiene) and Ms. Hyman (employee concerns) both worked for WSRC but knew of no connection with the managers in his chain of command. (Cmp. Depo. at 116).

Mr. Bumpus was Complainant's supervisor for the fourteen months prior to Complainant's resignation. (Cmp. Depo. at 14). In describing his employment history, Complainant testified that he went on loan from a different employer to WSRC and that in 1998, Mr. Bumpus "treated [Complainant] pretty good." (Cmp. Depo. at 14). Subsequently, Complainant applied for a full time position with Mr. Bumpus' department and was hired around January of 1999. (Cmp. Depo. at 20). Complainant worked with Mr. Bumpus from January of 1999 until his resignation in March of 2000. (Cmp. Depo. at 20).

Complainant testified that not everyone got along with Mr. Bumpus because "he ain't got no tact." (Cmp. Depo. at 21). Complainant specifically named Steve Phillips and Lyman Pittman as employees that had a problem with Mr. Bumpus. (Cmp. Depo. at 20-21). Complainant also testified that Mr. Bumpus was a "joker" but that Mr. Bumpus had never tried his temper out on Complainant. When Complainant was asked if he could handle Mr. Bumpus' type of abrasive conduct, he answered:

> I've worked around a lot of people that's arrogant type, I would say. In the construction trade, you meet all walks of life. Each person is different in management. I couldn't see going to HR [Human Resources] on this man, because he'd already been to HR, other people had already taken this man to HR, and nothing had been done to him. So I couldn't believe HR would do anything. I'd only be hurting myself if I went to HR. (Cmp. Depo. at 28).

Aside from these general complaints about Mr. Bumpus' aggressive leadership style, Complainant identified three times in when he was singled out by Mr. Bumpus. First, Mr. Bumpus called Complainant an offensive name. Second, Mr. Bumpus wrote a letter criticizing Complainant's work and circulated that letter among Complainant's co-workers. Finally, Complainant testified that Mr. Bumpus uncharacteristically refused to let him take time off on March 24, 2000.

Complainant testified that Mr. Bumpus called him a "stupid son of a bitch." (Cmp. Depo. at 25). Complainant explained that Mr. Bumpus called him this name after he failed a Rad Worker II test for the second time in September of 1999. (Cmp. Depo. at 26-27.) As Complainant's protected activity occurred in January of 2000, this incident will not be considered evidence of a hostile environment because it did not occur as a result of Complainant's protected activity. (Cmp. Depo. at 27.)

Complainant also alleges Mr. Bumpus' refusal to let him have time off on March 24, 2000 evidences hostile working conditions. In order to attend the NIOSH presentation, Complainant asked for and received vacation time off on March 19th and 20th. (Cmp. Depo. at 106). On the 24th of March, Complainant wanted that day off as well, and asked for leave eighteen hours before he was scheduled to work. (Cmp. Depo. at 106). Complainant alleges that he asked for this additional time off because he was humiliated during the NIOSH presentation.

Company policy states that employees must ask for vacation time off twenty-four hours in advance. *Id.* Complainant describe his reason for asking for the additional time off work as: "Presentation, work environment. It was all coming to a head[. . .]" (Cmp. Depo. at 109). Complainant's request was denied and he was told by Mr. Bumpus that the denial was due to Complainant's failure to abide by the twenty-four hour advance notice policy. (Cmp. Depo. at 110).

Complainant stated that the 24 hour policy had not been strictly enforced by Mr. Bumpus in the past. When explaining the typical way in which time off is handled in Mr. Bumpus' department, Complainant testified:

The four men on shift, we have swapped out time. All he [Bumpus] had to say was, yeah, you can be off, but get one of these other guys to work. Robert would have worked for me, Steve Phillips would have worked for me. We all three swapped out time whenever we wanted to.

Q: Now, if they would have swapped with you on the 24th, that would have been overtime for them, wouldn't it?

A: No. You're supposed to do it by policy, but we don't do that. We just swap out as hours.

Q: Did you tell Mr. Bumpus that one of those two would work for you?

A: He know that. He's the one that approves it. No, I did not tell him that. But he knows that. ...

Q: Mr. Hooker, what did Mr. Bumpus tell you was the reason he wasn't going to allow you to have the 24th off?

A: It wasn't per policy to give 24 hours' notice.

Q: Did he give any other reason?

A: That's it.

Q: Now, he's denied time off for other people before hasn't he?

A: Not to my knowledge.

Q: To your knowledge, he's never told anybody they couldn't have time off?

A: I've never heard him say it. I've heard people walk up to him and say I need to be off, and he'd give them off.

Q: How about on short notice like that? Can you think of any times he's given somebody time off when they asked the day before?

A: I'd asked him one particular time to knock off in the morning. And five minutes later, another man come in –Bumpus wouldn't give me off. Another man come in within 5 minutes. I'm inside my booth. Bumpus and that man is outside the booth. Bumpus and that man is outside the booth. That man said he needed to be off and Bumpus said yeah.

Q: And when was that?

A: 2000

Q: Are you talking about March 24th?

A: No. Just in them months of January, February, March.

(Cmp. Depo. at 110-112). Though he did not follow standard company procedure, Complainant alleges that he was denied this time off in retaliation for his protected activity.

As discussed above, Complainant has alleged constructive discharge and listed a myriad of claims against Respondent, but it has been shown through his own testimony that only the events at the NIOSH presentation and Mr. Bumpus' letter and denial of time off occurred after Complainant's protected activity. The other incidents, as discussed *supra*, happened prior to the protected activity and thus could not have been *because of* that activity.

I find that Complainant has not raised an issue of material fact regarding his constructive discharge claim. Although Complainant alleges that it was Respondent who harassed him at the NIOSH meeting, thus creating a hostile work environment, this is directly contrary to his prior unrebutted sworn testimony and admissions. Complainant had previously testified in his deposition that he was unaware of who laughed at him at the NIOSH meeting. However, Complainant later changed the allegations in his affidavit to point the finger at Respondent's management, and specifically accuse Respondent of ridicule and harassment. Complainant cannot create a material issue of fact sufficient to avoid summary judgment by contradicting his prior deposition testimony and admissions. *See, e.g. Hernandez v. Trawler Miss Vertie Maw, Inc.,* 187 F.3d 432, 438 (4th Cir. 1999); *Rohrbough v. Wyeth Laboratories*, 916 F.2d 970, 975 (4th Cir. 1990); *Barwick v. Celotex Corp.*, 766 F.2d 946, 960 (4th Cir. 1984) (the utility of summary judgment would be greatly diminished "[i]f a party who has been examined at length in deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony.") Thus, Complainant's affidavit contradicting his prior sworn testimony fails to create a genuine issue of fact.

Further, Mr. Cromer's affidavit does not create a genuine issue of fact of a hostile work environment. It is unclear from Mr. Cromer's affidavit who precisely was laughing at Complainant during the presentation. Though he agreed with Complainant's assertion that someone grabbed Complainant's badge, Mr. Cromer failed to name this manager; and the person's identity and place, if any, in Complainant's chain of command remains unknown. Additionally, Complainant has offered no evidence that the attorneys who intimidated him represented Respondent, and if they did, whether they had any involvement in Complainant's work environment. Thus, there is no issue regarding the incidents occurring during the NIOSH presentation as creating a hostile work environment, because no evidence has been offered to show that these incidents involved Complainant's superiors or anyone that he knew was in his chain of command. These incidents most likely did not even involve employees of WSRC, and thus they cannot be considered as part of his claim for constructive discharge. Moreover, even if there were WSRC employees laughing during the presentation, such is not enough to make a reasonable person resign.

There is also no issue as to whether Complainant was specifically singled out by Mr. Bumpus because of his protected activity. In addition to Complainant's own testimony that Mr. Bumpus was a bad manager and treated everyone offensively, Respondent has introduced an affidavit from a co-worker stating that Complainant was not treated differently from other workers by Mr. Bumpus. As in *Burns*, discussed *supra*, a claim for constructive discharge cannot be supported by the offensive treatment of a supervisor when he treats all employees the same way because discrimination cannot be proven. Also, as in *Newman*, discussed *supra*, Complainant essentially testified that he did not consider Mr. Bumpus' behavior a big deal and did not lose sleep over it.

Mr. Bumpus' refusal to give Complainant time off on March 24, 2000 is also insufficient to support a constructive discharge claim. A reasonable person would not have quit due to that denial of time off, particularly considering the fact that Complainant had asked for and received time off subsequent to his superior's knowledge of his report to the CDC and NIOSH and his request was not in line with company policy.

Finally, the letter allegedly circulated by Mr. Bumpus criticizing Complainant's work is not enough alone to support his claim of constructive discharge. Even taking all that Complainant says as true, this letter is not enough to make a reasonable person resign. Further, Complainant apparently continued work after this incident, until he was refused time off on March 24, 2000. Thus, even taken in the light most favorable to Complainant, this allegation will not support a claim for constructive discharge.

Complainant's own testimony also tends to defeat any issue of fact regarding constructive discharge. For instance, when asked to explain the main purpose behind his letter to OSHA requesting whistleblower protection, Exhibit 3 in the deposition, specifically if the purpose was his exposure concerns, Complainant testified:

> No, sir. That was after I was laughed at, intimidated by Westinghouse, D.O.E. I just went ahead and wrote it. Some of the problems, I've had over with.
>
> Q: Now did Mr. Bumpus really care one way or another about your complaints of exposure?
>
> A: "No, sir. Same way I'm going to say to the doctors. The doctors thought it was a joke. He put down there possible chemical in work site. Inconclusive, further medical testings required. They hadn't done a thing for 2-1/2 months. Q: What about Mr. Handfinger? Do you think he'd care one way or the other about your complaints of exposure –
>
> A: I think Mr. Handfinger –
>
> Q: I just want to finish my question.
>
> A: I'm sorry.

Q: Did Mr. Handfinger, do you think he cared one way or the other about your complaints of exposure.

A: I think he had one mission in mind, and that was covering Westinghouse Savannah River's butt. That's the way I feel about it."

(Cmp. Depo. at 147).

In addition, Complainant was asked if any of his direct supervisors had done anything to make him resign after learning of his report to the CDC. Complainant testified that his supervisors were not concerned about his protected activity and did nothing to make him resign after the protected activity became known to them. Complainant testified specifically as follows:

Q: Any evidence that Mr. Bumpus did anything to get you to quit after that letter [CDC]?

A: No, other than just loading me up with work.

Q: And how about Mr. Handfinger? Is there anything evidence he did something after January of 2000 to try to get you to quit?

A: No, Sir.

Q: And how about Mr. Wilkerson? Anything he did?

A: No, Sir.

(Cmp. Depo. at 149).

Complainant was also asked to discuss his reasons for leaving WSRC. Complainant testified that had he merely taken a vacation, rather than resigned, things would have been fine in his employment. At the deposition, the following exchange occurred:

Q: Now, if you hadn't been under this stress in late March, do you think you could have kept on working at Westinghouse?

A: Yes. If the forestry wouldn't have done what they did, I'd have been all right. See, the forestry – and my problem with Bumpus. He's not going to sit there and tell me, oh, we've dumped stuff down that creek that would make stuff fall out of them trees and tell me not to say nothing....

Q: Do you think if instead of resigning you would have, say, taken a few days off, that you would have come back to work?

A: I believe I could have took some time off and probably been all right.

(Cmp. Depo. at 153-54).

In his deposition testimony, Complainant also failed to limit the stress that prompted his resignation to that caused by Respondent. Rather, it seems from Complainant's own testimony that the majority of his stress was caused by his interaction with the D.O.E. Additionally, Respondent attempted to contact Complainant following his resignation. Complainant testified:

> I was under so much stress with everything. Not just Westinghouse. The way I was doing with forestry, Wackenhut, everything. I just had Andy Cromer drive me out to the gate, and I give the guard my badge and told him to give my card to Dianne Saylor and told her to call me.
>
> Q: And that was on the 24th?
>
> A: Yes, sir. I just didn't need to be on the job. I just had that much on me.
>
> Q: Did Mr. Bumpus try to call you up to see what was going on?
>
> A: I want to say he did. I want to say he did.
>
> Q: Did you try to call him?
>
> A: Now, they said Harvey called me and left me a message, but I never got any messages from Harvey.
>
> Q: You got messages from Kevin?
>
> A: I think one time Kevin called me. I just had enough on me. I just got through hearing outsiders coming in and telling D.O.E. you don't know what your contractors are doing and Westinghouse and all that. I was sick, though. I'm telling you, I was sick. I needed time off. I'm serious, I needed time off.

Complainant has not alleged the facts necessary to support a claim of constructive discharge. More specifically, the facts alleged are not severe or pervasive enough to show that a reasonable person would have found the working conditions intolerable. Complainant even stated that he would like to return to work for WSRC, and has in fact attempted to the employ of Respondent. In October of 2000, Complainant applied for an estimator job with Respondent. The Fourth Circuit has previously noted that a constructive discharge claim was fatally undermined by the employee's request to be transferred to his old job. *Bristown v. Daily Press Inc.*, 770 F.2d 1251 (4th Cir. 1985). It simply highly unlikely that a reasonable person would have sought to return to working conditions he previously found to be so intolerable that he felt compelled to resign.

Complainant also raises for the first time in an affidavit dated September 15, 2004, that he believed a Westinghouse doctor change a diagnoses of "possible chemical contamination"

after enduring pressure from Respondent. Complainant sought medical treatment on January 12, 2000 for vision changes and joint pain. In support of his claim of incorrectly changed diagnoses, Complainant notes that the doctor made the diagnosis of "possible chemical contamination at work site" on the SRS Injury/Illness Report. Complainant states that a subsequent report changed the original diagnosis to "Inconclusive. Further medical evaluation required." Complainant understands this to mean the doctor was induced to change his diagnosis after the fact by Respondent. However, Complainant offers no evidence of interaction between the Respondent and the doctor. Additionally, Complainant's medical treatment is separate from Complainant's working conditions, and the doctor's recommendation that Complainant seek further medical evaluation is irrelevant in a determination of whether Complainant's working conditions were rendered so difficult, unpleasant, unattractive or unsafe that a reasonable person would have felt compelled to resign.

Therefore, I find that a genuine issue of material fact does not exist as to whether Complainant was constructively discharged due to his protected activity under the Act. Therefore, Respondent's motion for summary judgment on the issue of constructive discharge must be granted.

Blacklisting

The original complaint filed in this matter contains the following allegation of blacklisting,

> I know I have be[en] black ball by USFS (SRI), WSRC and DOE for standing up for the employee[s] that work for Georgia Bowhunters at [t]he SRS."

(September 9, 2000 complaint at page 3). During the Complainant's discovery deposition he asserts that he has been told by co-workers that he is "black balled." Further, as was noted by the Board in its remand decision, the Respondent has not specifically addressed the claim of blacklisting in its motion for summary decision. Instead, the Respondent seeks dismissal on "all claims." This is interpreted as including the Complainant's assertion that he has been "blackballed." However, because the Respondent has not affirmatively produced affidavits or other evidence in support of its motion for summary decision on the blacklisting claim, it is necessary to determine whether the Complainant's assertions taken in the light most favorable to the Complainant state a cause of action for blacklisting.

The Administrative Review Board discussed the elements of a blacklisting claim in *Pickett v. Tennessee Valley Authority*:

> Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. [. . .] In addition, blacklisting requires an objective action–there must be evidence that a specific act of blacklisting occurred. Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place.

ARB Nos. 02-056 and 02-059, ALJ No. 2001-CAA-18, slip op. at 8-9 (ARB Nov. 28, 2003). A blacklisting claim should set forth specific allegations of a "blacklist" document containing a list of persons marked out for special avoidance or any other source of communication distributed throughout the industry intended to preclude employment of complainant. *See Howard v. TVA*, Case No. 90 ERA 24 (Sec'y July 3, 1991). *See also Hasan v. Commonwealth Edison Co.,* 2000 ERA 1 (ALJ Jan. 10, 2000)(quoting *Howard*). In opposing this summary judgment motion, Complainant must establish that genuine issues of fact exist which could establish that Respondent blacklisted him.

Complainant argues in his October 11, 2004, brief that on September 5, 2001, a DOE Region 3 Radiological Assistance Program (RAP) Team Deployment was carried out on his residence. Complainant had previously placed "Caution: Radioactive Material" signs on his property that were seen by the Georgia Management Agency, thus prompting the RAP team's deployment to Complainant's property. He asserts that the RAP team's report regarding this deployment was later posted on the WSRC internal website (ShRINE), and was available to all of Respondent's employees. Complainant stated in his affidavit that this posting was "caused" by Respondent. (Aff. Of William D. Hooker). Complainant objected to the posting via a letter to the DOE, and as a result of this objection, the DOE removed this report from its intranet. (Exhibit 3 to October 11, 2004, brief).

Complainant additionally asserts that he was later told by a few of his former co-workers that he had been blacklisted, and that he would never be re-hired. (Aff. Of William D. Hooker). When Complainant was asked about his claim of blacklisting during his deposition, the following exchange occurred:

> Q: Do you have any evidence that any of these groups blackballed you?
>
> A: Well, I called this guy back about putting another job in and he said he don't remember my resume. I also put in a job with Westinghouse on October 16th. I had it stamped at the South Carolina employment office and told that disabled veteran representative that I wanted that job right there with Westinghouse and I wanted it sent out there and I wanted it stamped with a stamp [. . .][11] I've had two people call me. Keith Paulis called – Keith called about trying to find a job with the workshop, and he said watch your ass, they out to get you. Okay? The Westinghouse manager. Keith is not a supervisor or manager, just a former coworker. And he didn't tell me why he thought that. Steve Phillips also told me to watch myself. He said watch your ass. But Steve is right there with Bumpus and them.
>
> Q: Do you have any direct evidence that Mr. Bumpus or anybody else with Westinghouse has blackballed you when you were trying to get work?

[11] This is a reference to the Complainant's complaint the Respondent refused to rehire him. That complaint was rejected as there was no evidence that the Respondent ever knew he had applied for a job. That finding has been affirmed by the Board.

> Q: I'm talking about after you left in 2000. Do you have any evidence of anybody other than what we've already talked about, anybody at WSRC that's blackballed you when you were trying to get a job?
>
> A: No sir. I talked to one of the men that worked for me, a guy named Brook Bryan. I said I guess I won't be coming back out here. And he said, yep, you're blackballed. That's been recently.

(Cmp. Depo. 141-44).

Respondent argues that it is entitled to summary decision on Complainant's blacklisting claim. Respondent first argues that the report offered as evidence in Complainant's response was completed by the DOE, not Respondent, and is thus irrelevant in a blacklisting claim against Respondent. Respondent additionally argues that no evidence has been presented to suggest that this report was disseminated with the intention of preventing Complainant from obtaining employment.

The Complainant's exhibit 3 to his brief is a letter dated January 8, 2002, which he received from the Department of Energy, in response to his complaint to them about the RAP team document being on the Respondent's website. The DOE letter states,

> Although the report by the Radiological Assistance Program (RAP) Team documenting a September 6, 2001, visit to your property was not located on the SRS Lessons Learned webpage, as alleged, it was, in fact, located on the RAP Team's webpage on the ShRINE intranet server, which was accessible to site employees with general computer access to ShRINE. Since that time, however, the RAP Team's webpage has been removed from general access to site employees and is currently limited to RAP Team members only. A review of provisions of the Privacy Act determined that this posting did not violate the Privacy Act.

The DOE letter regarding the RAD report, even taken in the light most favorable to the Complainant is insufficient to raise an issue of fact as to whether he was blacklisted by Respondent. The action of DOE in posting the "Lessons learned" document is not attributable to the Respondent. When it was discovered that it was erroneously able to be seen from Respondent's internal computer system, the error was corrected. There is no indication of any action with regard to this document by the Respondent. Moreover, Complainant merely offers the report without explanation and provides nothing to indicate any connection to this report by Respondent. If the report was not completed by Respondent or posted on its website, it cannot constitute evidence of blacklisting by the Respondent. Complainant's allegation that Respondent "caused" the report it be posted on the ShRINE Network is only speculation which is contradicted by the letter from DOE indicating that it had corrected the problem. Moreover, there is no indication that this report was disseminated with the purpose of preventing Complainant from obtaining other employment or that it prevented Complainant from obtaining other employment.

Further, Respondent correctly argues that the blacklisting rumors Complainant heard from his co-workers are merely speculation, and thus are insufficient to create an issue of material fact. Brook Bryan was a co-worker of Complainant's, not a supervisor. (Cmp. Depo. at 144). He did not tell Complainant why he thought he was blackballed. Further, the statements of Keith Paulis and Steve Phillips that Respondent is "out to get" Complainant do not support the blacklisting claim. These statements are pure speculation, and point to no objective action of blacklisting on the part of Respondent.

Finally, there has been no suggestion even in Complainant's own testimony that a "blacklist" document exists or was distributed throughout the industry (other than the RAD report rejected above). Thus, his assertion of blacklisting is mere speculation. Taken in the light most favorable to him, Complainant has offered nothing more than mere speculation that he has been blacklisted. In a motion for summary judgment, mere speculation will not suffice.

Accordingly, I find that the facts alleged by Complainant, are not sufficient to establish that any individual or group of individuals acting in concert on behalf of the Respondent has disseminated damaging information that affirmatively prevents Complainant from finding employment. Instead, accepting the facts alleged in the light most favorable to the Complainant, they establish only that the Complainant subjectively feels that he has been blacklisted. Therefore Respondent's motion for summary judgment on the claim of blacklisting must be granted.

Conclusion

Complainant in this case is obviously very concerned over his claims of exposure to toxic substances while performing his subcontracts with the USFS. However, the issue of whether he was so exposed is not a matter within the jurisdiction of this action for whistleblower protection. To survive a motion for summary judgment, Complainant must allege certain facts, that if proven could support his claim for relief. *See Gizzard v. Tennessee Valley Auth*., 90 ERA 52 (Sec'y Sept 26, 1991).

There are no facts alleged which support Complainant's charge of constructive discharge by Respondent. Only two of the incidents reported by Complainant even occurred after his protected activity. Neither of those two incidents alone or together are such that a reasonable person would have found the working conditions intolerable. Therefore, Respondent's motion for summary decision must be granted on Complainant's constructive discharge claim.

Similarly, there is only speculation, but no facts are alleged which support Complainant's charge of blacklisting, including the Complainant's own deposition testimony. As the allegation of blacklisting is based upon mere speculation, the Respondent's motion for summary decision must be granted on Complainant's blacklisting claim.

ORDER

Accordingly, it is Ordered that:

1. Respondent's motion for summary judgment as to the issues of construction discharge and blacklisting will be granted and the complaint is dismissed.

2. 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.

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RICHARD E. HUDDLESTON
Administrative Law Judge