U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 October 2009

CASE NO.: 2009-SWD-00003

In the Matter of

JIMMY R. LEE, SR,
Complainant

v.

PARKER-HANNIFIN CORPORATION,
ADVANCE PRODUCTS BUSINESS UNIT,
Respondent

Appearances:

John M. Brown, Esq. (Law Office of John M. Brown),
Hartford, CT, for Complainant

Bruce G. Hearey, Esq. (Ogletree, Deakins, Nash, Smoark & Stewart, P.C.),
Cleveland, OH, for Respondent

Before: Daniel F. Sutton, Administrative Law Judge

DECISION AND ORDER GRANTING SUMMARY DECISION AND DISMISSING COMPLAINT

I. Introduction

The above matter arises from a complaint alleging a violation of the employee protection provisions of section 7001 of the Solid Waste Disposal Act (the "Act" or "SWDA") of 1976, codified at 42 U.S.C. § 6971 (2006), and the applicable regulations thereunder at 29 C.F.R. Part 24. This matter is before the administrative law judge ("ALJ") upon Respondent's, Parker-Hannifin Corporation, Advance Products Business Unit ("Parker-Hannifin"), motion for summary decision pursuant to 29 C.F.R. §§ 18.40-18.41.

The Complainant, Jimmy R. Lee, Sr. ("Mr. Lee"), alleges that Parker-Hannifin unlawfully terminated his employment on November 10, 2008 in retaliation for engaging in activities protected under 42 U.S.C. § 6971 and regulations promulgated thereunder, at 29 C.F.R. § 24.102. Upon consideration of the matter, the ALJ has concluded for the reasons set forth below that no genuine issue of material fact exists and Mr. Lee was not engaged in protected activity. As there is no issue of fact for trial and Parker-Hannifin is entitled to judgment as a

matter of law, the ALJ concludes that Parker-Hannifin is entitled to summary decision dismissing Mr. Lee's complaint alleging that his employment was terminated in violation of the Act.

II. Procedural History

The Complainant filed a complaint letter with the Secretary of Labor on November 8, 2008.[1] OSHA No. 1-0280-09-007 (June 16, 2009) (OSHA dismissal letter). On November 10, 2008, Parker-Hannifin terminated Mr. Lee. *Id.* Mr. Lee amended his complaint to include the dismissal on December 2, 2008. *Id.*

By letter dated June 16, 2009, the Regional Administrator for the Occupational Safety and Health Administration ("OSHA"), acting as agent for the Secretary of Labor ("Secretary"), notified the Complainant of the Secretary's preliminary finding that there was "no reasonable cause to believe that Respondent violated the SWDA." *Id.* In a letter faxed to the Office of the Chief Administrative Law Judge ("OALJ") on July 15, 2009, the Complainant filed a notice of objections and request for a *de novo* hearing before an ALJ pursuant to 29 C.F.R. § 1980.106.

On August 31, 2009, Parker-Hannifin filed a Motion for Summary Decision, supported by affidavits and other documents, in which it asserted that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Mr. Lee filed a Response, in Opposition to Parker-Hannifin's Motion for Summary Decision, on September 16, 2009, alleging that there was a genuine issue of material fact and that Parker-Hannifin is not entitled to judgment as a matter of law. Parker-Hannifin subsequently filed a Reply Brief in Support of its Motion for Summary Decision on September 23, 2009.[2]

III. Factual Background

Parker-Hannifin is a publicly-traded company with annual sales exceeding $12 Billion. Resp. Mot. Sum. Dec. Exh. #1 ¶ 3 (Mr. Lee's Complaint). Mr. Lee began working for Parker-Hannifin's Advance Products Business Unit in North Haven, Connecticut, on or about December 11, 2006. *Id.* at ¶¶ 2, 4, 6. Mr. Lee was the Environmental Health and Safety Coordinator/Facilities Lead. *Id.* at ¶ 7. Mr. Lee's position summary was as follows: "Overall responsibility for the efficient operation, maintenance, and coordination of all services, processes, facilities, systems and contracts involved with the site. Additionally performs and/or coordinates all Environmental, Health, and Safety (EHS) facility functions." *Id.* at Exh. #4A ¶ 1.

According to Mr. Lee, "[u]nder federal and state environmental health and safety regulations, silver is considered a hazardous waste material if it is present in waste rinse water at a concentration greater than 5 milligrams per liter." *Id.* at Exh. #1 ¶ 11. The United States Environmental Protection Agency ("EPA") and the Connecticut Department of Environmental Protection ("CT DEP") provide for certain exemptions for the reclamation of precious metal contained in hazardous waste rinse water. *Id.* at ¶ 12. If a company can demonstrate that the level

[1] The ALJ assumes that the alleged retaliation in the November 8, 2008 complaint was employment suspension, as the ALJ does not have a copy of this complaint. Mr. Lee was not terminated until November 10, 2008.

[2] In a telephone call on October 19, 2009, Mr. Lee's attorney, John Brown, Esq., indicated to the ALJ's clerk that he would not be filing a response to Parker-Hannifin's Reply Brief in Support of its Motion for Summary Decision.

of precious metals contained in the hazardous waste exceeds a certain minimum concentration level, then the exemption applies and the company may utilize a properly-documented reclamation process. *Id.* Parker-Hannifin's Evaporator No. 2 was used in that reclamation process. *Id.* at ¶¶ 15-16.

Around March 13, 2007, the CT DEP notified Parker-Hannifin of a concern that the concentration of precious metals in the waste water discharged into Evaporator No. 2 was not high enough to claim the exemption. *Id.* at ¶¶ 15-17. As the Environmental Health and Safety Coordinator, Mr. Lee was tasked with compiling the information required to appropriately respond to the CT DEP's concerns regarding Evaporator No. 2. *Id.* at ¶ 18. In that role, Mr. Lee requested that Apex Environmental ("Apex"), an environmental consulting firm, test the waste water streams that were discharged into Evaporator No. 2 in order to respond to CT DEP's concern. *Id.* at ¶¶ 19-20. On October 28, 2008, Mr. Lee received a final report from Apex indicating that the precious metals exemption previously asserted by Parker-Hannifin did not apply to the waste rinse water discharged into Evaporator No. 2. *Id.* at ¶ 21.

Mr. Lee raised his concerns regarding the hazardous waste treatment and its possibly culpable nature to several co-workers, including Sharon Chu ("Ms. Chu"), the highest-ranking officer at that Parker-Hannifin facility. *Id.* at ¶ 24. Management responded by scheduling a meeting no earlier than three weeks later to address the issue. *Id.* at ¶ 25. On October 30, 2008, Mr. Lee instructed Ms. Chu that Evaporator No. 2 be shut down in a letter stating "I now hereby order [t]he evaporator number 2 which is the Cyanide water evaporator to be shut down and not be used again unless approved by the State DEP, and the rinse waters be collected and managed as RCRA hazardous waste from this point forward." *Id.* at Exh. #4I (Letter from Mr. Lee to Rachel McCaul, Martha Connell, James Randall, and Sharon Chu, October 30, 2008); *id.* at Exh. #1 ¶ 26; *id.* at Exh. #4 ¶ 6 (Affidavit of Sharon Chu, August 28, 2009). Later that day, Ms. Chu met with Mr. Lee, together with other Parker-Hannifin representatives, and told Mr. Lee that he did not have the authority to shut down Evaporator No. 2; instructed him not to do so; and informed him that a Parker-Hannifin Environmental Services representative would be visiting the plant to conduct an investigation. *Id.* at Exh. #4 ¶ 6. On November 4, 2008, Mr. Lee shut down Evaporator No. 2. *Id.* at Exh. #1 ¶ 27. That day, Parker-Hannifin immediately suspended Mr. Lee without pay. *Id.* at ¶ 28.

As a result of Mr. Lee shutting down Evaporator No. 2, Parker-Hannifin began an alternative method for storing and processing the waste water that would have been processed by Evaporator No. 2. *Id.* at Exh. #4 ¶ 8. Parker-Hannifin alleges that the alternative method was in compliance with federal regulations, although it was in contravention with Parker-Hannifin's normal procedure. *Id.* Evaporator No. 2 was inoperative for several days until Chris Roman ("Mr. Roman"), Mr. Lee's direct supervisor, obtained authorization from Martha Connell ("Ms. Connell"), Parker-Hannifin's corporate Manager, Environmental Services, to remove the lock that Mr. Lee had put on it. *Id.* at ¶¶ 7-8. In an investigation on November 4, 2008, Ms. Connell found Mr. Lee's allegations to be without merit. *Id.* at ¶ 9. On November 10, 2008 Parker-Hannifin terminated Mr. Lee's employment. *Id.* at Exh. #1 ¶ 28; *id.* at Exh. #4 ¶ 10. Both Mr. Lee and Parker-Hannifin agree that Mr. Lee was terminated for shutting down Evaporator No. 2. *Id.* at Ex. #2 ¶ 2; *see also id.* at Exh. #4 ¶ 10.

IV. Discussion, Findings and Conclusions

A. Availability of Summary Decision

The regulations implementing the Act's employee protection provisions state that "[e]xcept as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, 29 CFR part 18." 29 C.F.R. § 24.107(a). 29 C.F.R. § 18.40 contains a summary decision procedure which is applicable in administrative proceedings conducted under the Act. *Friday v. Northwest Airlines, Inc*., USDOL/OALJ Reporter, ARB No. 03-132, ALJ Nos. 2003-AIR-19 & 2003-AIR-20 at 3-4 (ARB Jul. 29, 2005), *available at* 2005 WL 1827745, at *2-3.

The OALJ summary decision rule provides that "[a]ny party may . . . move with or without supporting affidavits for a summary decision on all or any part of the proceeding." 29 C.F.R. § 18.40(a). "[An] administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d). A "material fact" is one whose existence affects the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," *Anderson* at 248, "drawing all reasonable inferences in favor of that party." *Williams v. Utica College of Syracuse University*, 453 F.3d 112, 116 (2d Cir. 2006) (citing *Allen v. Coughlin,* 64 F.3d 77, 79 (2d Cir. 1995)). "The burden is on the moving party 'to demonstrate the absence of any material factual issue genuinely in dispute.'" *American Intern. Group, Inc. v. London American Intern. Corp. Ltd.*, 664 F.2d 348, 351 (2d Cir. 1981) (quoting *Heyman v. Commerce & Industry Insurance Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975)). When the party moving for summary judgment does not bear the ultimate burden of proof at trial, that party "need not prove a negative when it moves for summary judgment on an issue that the [nonmoving party] must prove at trial. It need only point to an absence of proof on [the nonmoving party's] part, and, at that point, [the nonmoving party] must 'designate specific facts showing that there is a genuine issue for trial.'" *Parker v. Sony Pictures Entertainment, Inc.*, 260 F.3d 100, 111 (2d Cir. 2001) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991).

B. The Act's Protection

The employee protection provision of the Solid Waste Disposal Act provides that:

> No person shall fire . . . or cause to be fired . . . any employee . . . by reason of the fact that such employee . . . has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

42 U.S.C. § 6971. The regulations promulgated under that statute further provide that "[n]o employer subject to the provisions of [the Solid Waste Disposal Act, 42 U.S.C. § 6971] . . . may discharge or otherwise retaliate against any employee . . . because the employee . . . engaged in any of the activities specified in this section." 29 C.F.R. § 24.102(a). Under 29 C.F.R. § 24.102(b)(3):

> It is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner retaliate against any employee because the employee has . . . . [a]ssisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such statute.

29 C.F.R. § 24.102(b)(3). However, the regulations further provide that a complaint will be dismissed "if the respondent demonstrates by a preponderance of the evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity." 29 C.F.R. § 24.104(d)(4).

To be successful on a retaliation claim, under 42 U.S.C. § 6971(a) and its applicable regulations, namely 29 C.F.R. § 24.102(b)(3), a complainant:

> must prove by a preponderance of the evidence [1] that he engaged in [SWDA] protected activity [2] of which [Employer] was aware, [3] that he suffered an adverse employment action, and [4] that the protected activity was the reason for the adverse action, i.e., that a nexus existed between the protected activity and the adverse action.

Redweik v. Shell Exploration and Production Co., USDOL/OALJ Reporter (HTML), ARB No. 05-052, ALJ No. 2004-SWD-2 at 8 (ARB Dec. 21, 2007) (citing *Schlagel v. Dow Corning Corp.*, ARB No. 02-092 ALJ No. 2001-CER-001, slip op. at 5 (ARB Apr. 30, 2004)); *see also Jenkins v. United States Environmental Protection Agency*, USDOL/OALJ Reporter (HTML), ARB No. 98-146, ALJ No. 1988-SWD-2 at 15 (ARB Feb. 28, 2003) (quoting *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-34 (11th Cir. 1995); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995)). Within this framework, the ALJ will now examine the record in the light most favorable to Mr. Lee to determine whether there is a genuine issue of material fact warranting a hearing on whether Parker-Hannifin is entitled to judgment as a matter of law.

Mr. Lee was not engaged in a protected activity when he unilaterally shut down the Evaporator No. 2 at the Parker-Hannifin facility. The SWDA prohibits employers from discharging employees for engaging in protected activity; however, employers have wide latitude to terminate employees for insubordinate behavior. *See* 29 C.F.R. § 24.102(b)(3); *Harrison v. Administrative Review Board, U.S. Department of Labor*, 390 F.3d 752, 759 (2d Cir. 2004) ("'Insubordination and conduct that disrupts the workplace are legitimate reasons for firing an employee,' and an employer may discharge an employee for inappropriate forms of complaint even if the complaint itself has substance.") (quoting *Matima v. Celli*, 228 F.3d 68, 79 (2d Cir.

2000)). Protected activity includes both internal and external complaints regarding public health or the environment. *Jenkins v. United States Environmental Protection Agency*, USDOL/OALJ Reporter (HTML), ARB No. 98-146, ALJ No. 1988-SWD-2 at 16 (ARB Feb. 28, 2003) (citations omitted). Internal complaints are generally reported up the management ladder, within the organization. *See Dodd v. Polysar Latex*, Case No. 1988-SWD-4 at 4 (Sec'y Sept. 22, 1994) ("[R]eporting safety and environmental concerns under . . . the SWDA internally to one's employer is protected activity."). On the other hand, external complaints are typically directed towards an outside regulatory body which promulgates rules governing the activity in question. *See, e.g. Harrison*, 390 F.3d at 754 (involving a situation where "petitioner filed a complaint about yard horse safety with the Occupational Safety and Health Administration"). "While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event. A complainant reasonably must believe in the existence of a violation." *Simpson v. United Parcel Service*, USDOL/OALJ Reporter (PDF), ARB No. 06-065, ALJ No. 2005-AIR-031 at 5 (ARB Mar. 14, 2008) (citing *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998)), *available at* 2008 WL 921123.

While Mr. Lee filed internal complaints with his supervisors at Parker-Hannifin regarding the waste water that was discharged into Evaporator No. 2, those internal complaints were not the reason Parker-Hannifin terminated Mr. Lee's employment. Rather, both parties agree that Mr. Lee was terminated because he shut down Evaporator No. 2. Resp. Mot. Sum. Dec. Exh. #2 ¶ 2 (Letter from John Brown, Mr. Lee's attorney, to Jennifer Nohl, OSHA Investigator, March 17, 2009) ("Jimmy Lee alleges he was terminated for shutting down the No. 2 Evaporator. Parker Hannifin agrees with this allegation."); *see also id.* at Exh. #4 ¶ 7 (Affidavit of Sharon Chu, August 28, 2009) ("On November 4, 2008, I learned that, contrary to my express instruction to him, Mr. Lee shut down and locked out one of Parker's evaporators. As a result of Mr. Lee's *conduct*, . . . we decided to suspend Mr. Lee with pay . . . .") (emphasis added); *id.* at ¶ 10 ("It was ultimately decided that Mr. Lee should be terminated as a result of his insubordination, including his unauthorized decision to shut down Parker's Evaporator No. 2. The decision to terminate Mr. Lee was not based on any communication or report that Mr. Lee made regarding any alleged environmental violations."). Even assuming that Mr. Lee engaged in protected activity by *filing complaints* with Parker-Hannifin management, the reason for which Mr. Lee was fired had nothing to do with such activity. Rather, as indicated by both parties in the record, the undisputed reason for which Mr. Lee was terminated was because he shut down Evaporator No. 2.

As noted earlier, 29 C.F.R. § 24.102(b)(3) states that "[i]t is a violation for any employer to . . . discharge [an employee] . . . because the employee has . . . . [a]ssisted or participated, or is about to assist or participate, in any manner in such a proceeding or *in any other action* to carry out the purposes of such statute." (emphasis added). Mr. Lee alleges that Parker-Hannifin unlawfully retaliated against him by terminating his employment for engaging in protected activity as defined by "any other action" in 29 C.F.R. § 24.102(b)(3). *See* Resp. Mot. Sum. Dec. Exh. #2 ¶ 3. "[T]he term 'proceeding' encompasses all phases of a proceeding that relate to public health or the environment, including an internal or external complaint that may precipitate a proceeding." *Jenkins v. United States Environmental Protection Agency*, USDOL/OALJ Reporter (HTML), ARB No. 98-146, ALJ No. 1988-SWD-2 at 16 (ARB Feb. 28, 2003) (citations omitted). "The Secretary has interpreted the phrase 'any other action' under §

5851(a)(3) to extend beyond mere participation in a 'proceeding' to include internal complaints made to supervisors and others. Otherwise, the phrase would be mere surplusage, adding nothing to the protection already granted to participation in 'proceedings.'" *Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926, 931-32 (11th Cir. 1995) (citations omitted) (interpreting 42 U.S.C. § 5851(a), an employee-protection provision under the Energy Reorganization Act ("ERA")). Although the *Bechtel Const. Co.* court expanded the definition of "any other action" to include internal complaints in addition to external complaints, it does not follow that the definition is broad enough to include conduct—especially conduct in contravention of management's orders—which is what happened here.

The Second Circuit held that although filing a complaint about a vehicle's safety is a protected act, taking a vehicle out of service in contravention of company policy was not protected. *See Harrison*, 390 F.3d at 758-59. In *Harrison*, the Complainant initially had the responsibility of "red-tagging" vehicles that had "serious safety defects." *Id.* at 754. The Respondent company changed the Complainant's responsibilities such that the Complainant could no longer "red-tag" vehicles without receiving prior approval from certain supervisors; the Complainant was specifically notified not to "red-tag" without prior authorization. *Id.* The Complainant was eventually terminated because he continued to "red-tag" vehicles without prior approval and for "his 'overall work record.'" *Id.* at 755 (internal citations omitted). The Complainant filed a complaint with OSHA, under the employee-protection provisions of the Surface Transportation Assistance Act ("STAA"). The case was appealed to the Second Circuit, which held that "the fact that petitioner was entitled, within the Act's protection, to advise of safety concerns regarding a trailer does not support the proposition that he was entitled, within the Act's protection, to take the vehicle out of service." *Id.* at 758-59. In its holding, the Second Circuit differentiated between the protected complaints and the non-protected conduct.

The *Harrison* court analyzed the difference between the protected, communicative-warning aspect of red-tagging, and its corresponding unprotected effect of taking the vehicle out of service. *Id.* at 758. The Second Circuit illustrated the difference with a hypothetical: "An employee's entitlement to submit a complaint about a vehicle's safety would not mean that the employee was similarly entitled to attach the complaint to a rock and throw it through his supervisor's window." *Id.* at 759.

The facts of the instant case fall squarely within the bounds of the *Harrison* case. Here, Mr. Lee was protected in filing complaints with his supervisors, Ms. Chu, Ms. McCaul, and Ms. Connell. However, Mr. Lee's subsequent act of shutting down Evaporator No. 2 was not protected. "The fact that [Mr. Lee] was entitled to complain about the [Evaporator No. 2] does not protect his decision to make that complaint by unauthorized [conduct], taking the [Evaporator No. 2] out of service." *Id.* Although the *Harrison* case analyzed an employee-protection provision of the STAA—not the SWDA, as in the instant case—the purposes of both whistleblower provisions are similar: "Protected activity furthers the purpose of the environmental statutes." *Jenkins v. United States Environmental Protection Agency*, USDOL/OALJ Reporter (HTML), ARB No. 98-146, ALJ No. 1988-SWD-2 at 16 (ARB Feb. 28, 2003) (citations omitted). Discussing the STAA, the Second Circuit held that "it does not guarantee to employees the entitlement to use their own judgment to determine when to take equipment out of service." *Harrison*, 390 F.3d at 758. The same line of thinking can be applied

here. In this case, similar to *Harrison*, Mr. Lee's act of taking Evaporator No. 2 out of service was unprotected and therefore, his termination was proper and not violative of the SWDA's employee-protection provision.

In *Consolidation Coal Co. v. Marshall*, under a comparable fact pattern, the Third Circuit used similar reasoning to the Second Circuit's in *Harrison*. *See* 663 F.2d 1211 (3d Cir. 1981). *Consolidation Coal Co.* dealt with the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). *Id.* at 1212-13. In that case, the Complainant walked off the job while working at a continuous miner machine and at the same time shut down that machine, which meant no one else on his shift could work. *Id.* at 1213. Assuming that the Complainant had a right "to walk off the job when confronted with unsafe and unhealthful work conditions," the Third Circuit held that the "Mine Act does not provide for the right to shut down equipment so that other miners may not work." *Id.* at 1219. The court went on to say that "[a]n individual is protected by the [Mine] Act from retaliation for asserting and acting on his real fear that conditions are unsafe or hazardous to his health; but no one has the right to stop others from proceeding to work if they so wish." *Id.* In the instant case, Mr. Lee shutting down Evaporator No. 2 had the same effect in that it was out of service for a few days until Mr. Roman, Mr. Lee's direct supervisor, obtained authorization from Parker-Hannifin's corporate Manager, Environmental Services, to remove the lock that Mr. Lee had put on it. Resp. Mot. Sum. Dec. Exh. #4 ¶¶ 7-8.

In *Sievers v. Alaska Airlines, Inc.*, the Complainant was fired for alleged timecard fraud; however, the Complainant argued that he was fired because he refused management's orders to override the maintenance crew's decision not to sign off that a plane was airworthy. USDOL/OALJ Reporter (PDF) ARB No. 05-109, ALJ No. 2004-AIR-28 at 2, 6 (ARB Jan. 30, 2008), *available at* 2008 WL 316012. The ALJ found that "it is sufficient [in order to prove protected activity,] that Complainant carried out his required, safety-related duties: supervising the maintenance of Respondent's aircraft and reporting, repairing, or deferring the repair of any documented defects." *Id.* at 5. In reversing the ALJ, the Administrative Review Board ("ARB") held that "this language misstates what constitutes AIR 21 protected activity. . . . [T]o be protected, the statute requires that the employee provide *information* to the employer or Federal Government that relates 'to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety . . . ." *Id.* (emphasis added). The ARB also noted that "'[c]ompetently' and 'aggressively' carrying out duties to ensure safety, though laudable, does not by itself constitute protected activity." *Id.* The ARB in *Sievers* ultimately found that the fourth element in the analysis—a causal nexus between the alleged discrimination and the protected activity—failed. *Id.* at 12. The ARB stated that the "record supports only some of the ALJ's findings. And those findings . . . d[id] not constitute a preponderance of the evidence that [Complainant's] protected activity contributed to his firing." *Id.*

On the other hand, the ARB in *Sievers* did agree with the ALJ's finding that it was protected activity for the Complainant to refuse management's direction to override the maintenance crew's decision not to sign off that a plane was airworthy. *Id.* at 2, 6. Refusal to work can sometimes constitute protected activity. *See Sutherland v. Spray Systems Environmental*, USDOL/OALJ Reporter (HTML), Case No. 95-CAA-1 (Sec'y Feb. 26, 1996); *Pennsyl v. Catalytic, Inc.*, USDOL/OALJ Reporter (HTML), Case No. 1983-ERA-2 at 4-5

(Sec'y Jan. 13, 1984) ("A worker has a right to refuse to work when he has a good faith, reasonable belief that working conditions are unsafe or unhealthful. Whether the belief is reasonable depends on the knowledge available to a reasonable man in the circumstances with the employee's training and experience. Refusal to work is protected if 'the miner reasonably believed that he confronted a threat to his safety or health.'") (quoting *Consolidated Coal Co.*, 663 F.2d at 1219). However, the cases that so hold limit protection to the worker's personal refusal to work and do not sanction broader conduct. *See, e.g.*, *Consolidation Coal Co.*, 663 F.2d at 1219 ("An individual is protected by the [Mine] Act from retaliation for asserting and acting on his real fear that conditions are unsafe or hazardous to *his* health; but no one has the right to stop others from proceeding to work if they so wish.") (emphasis added). Mr. Lee was not concerned for his own health or safety; rather, he was concerned for his and Parker-Hannifin's criminal liability for continuing to operate Evaporator No. 2. *See* Resp. Mot. Sum. Dec. Exh. #1 ¶ 23-24 (Mr. Lee stated in his Complaint that "[t]he continued operation of the No. 2 Evaporator in knowing violation of EPA/DEP regulations would subject myself, Parker-Hannifin and many other employees to criminal penalties and/or sanctions under the Solid Waste Disposal Act's enforcement provisions."). Further, "[r]efusal to work loses its protection after the perceived hazard has been investigated by responsible management officials and government inspectors, [sic] if appropriate, and, if found safe, adequately explained to the employee." *Pennsyl v. Catalytic, Inc.*, USDOL/OALJ Reporter (HTML), Case No. 1983-ERA-2 at 5 (Sec'y Jan. 13, 1984). To this point, Ms. Chu instructed Mr. Lee not to shut down Evaporator No. 2, notified Mr. Lee that she took his concerns seriously, and finally that "someone from Parker's Environmental Services department would be visiting the plant to conduct an investigation." *See* Resp. Mot. Sum. Dec. Exh. #4 ¶ 6. As Mr. Lee was not concerned for his own health or safety, he did not have the right to refuse work, much less take it upon himself to shut down Evaporator No. 2—especially after speaking with the facility's highest-ranking manager about the situation.

Assuming, *arguendo*, that Mr. Lee was terminated because he complained to Parker-Hannifin management or an external regulatory body, this would be a classic case of protected activity. However, Mr. Lee took it one step further by taking it upon himself to shut down Evaporator No. 2 against management's direct orders. Under the Second Circuit's holding in *Harrison*, Mr. Lee's conduct was defined out of protected activity and rendered unprotected. *Harrison*, 390 F.3d at 758-59 ("[T]he fact that petitioner was entitled, within the Act's protection, to advise of safety concerns regarding a trailer does not support the proposition that he was entitled, within the Act's protection, to take the vehicle out of service."). Unless and until the law is changed to protect this kind of conduct, the ALJ is constrained to hold that Mr. Lee's activity was not protected.

Under the binding authority of the Second Circuit in *Harrison*, the ARB decisions, and the Secretary of Labor decisions, as well as the persuasive authority of the other circuit courts mentioned above, Mr. Lee's conduct, when he shut down Evaporator No. 2, was unprotected.

C. Conclusion

The Complainant has failed to show that there are genuine issues of material fact warranting an evidentiary hearing as I conclude, after considering the entire record in a light most favorable to him and drawing all reasonable inferences in his favor, that the Complainant

cannot meet his burden of proving that he engaged in activity protected by the Act or that any allegedly protected activities were a contributing cause leading to his resignation. Accordingly, the Respondent is entitled to summary decision.

V. Order

The Respondent's motion for summary decision is **ALLOWED**, and the complaint filed by Jimmy R. Lee, Sr. is **DISMISSED**.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS

To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. See 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).