U.S. Department of Labor

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

In the Matter of:

JAMES McKOY, **ARB CASE NO. 04-176**

COMPLAINANT, **ALJ CASE NO. 04-CAA-2**

v. **DATE: April 30, 2007**

NORTH FORK SERVICES JOINT VENTURE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Marty Glennon, Esq., ***Meyer, Suozzi, English & Klein, P.C.,*** **Melville, New York**

For the Respondent:
Benjamin N. Thompson, Esq., Jennifer M. Miller, Esq., ***Wyrick Robbins Yates & Ponton LLP,*** **Raleigh, North Carolina; Stephen J. Sundheim,** ***Pepper Hamilton LLP,*** **Philadelphia, Pennsylvania**

FINAL DECISION AND ORDER

James McKoy filed a whistleblower complaint against his employer, North Fork Services Joint Venture (NFS), claiming that when NFS terminated his employment as a heating, ventilation and air-conditioning (HVAC) technician at the Plum Island Animal Disease Center (PIADC) on Plum Island, New York, it violated the employee protection provisions of the Clean

Air Act (CAA) and the Federal Water Pollution Control Act (WPCA).[1] After an evidentiary hearing, a United States Department of Labor Administrative Law Judge (ALJ) concluded that NFS did not violate the CAA and WPCA and recommended that we dismiss the complaint. We accept the ALJ's recommendation and dismiss McKoy's complaint.

BACKGROUND

NFS held a contract with the Department of Agriculture to operate maintenance and support facilities at PIADC from January 7, 2003, until December 31, 2003.[2] PIADC is the federal government's primary facility for researching highly contagious foreign animal diseases, including foot-and-mouth disease and African Swine Fever. On June 1, 2003, the Department of Homeland Security (DHS) took over operation of PIADC from the Department of Agriculture, but NFS continued to hold the contract for operations and maintenance until its contract expired in December 2003.[3]

McKoy began working at PIADC in November 2002 when he took a job as an HVAC technician for LB&B Associates, Inc., the predecessor contractor to NFS.[4] The International Union of Operating Engineers, Local 30 (Local 30) asked McKoy to take the job so that he could monitor working conditions at PIADC and help the union organize non-union workers.[5] McKoy continued in the same job when NFS took over the contract in January 2003.[6]

On June 19, 2003, McKoy used his lunch hour to pass out a recruiting flyer for Local 30.[7] The flyer encouraged the employees to contact the union if they were concerned about working

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1 42 U.S.C.A. § 7622 (West 2003); 33 U.S.C.A. § 1367 (West 2001). The regulations that apply to the CAA and the WPCA are found at 29 C.F.R. Part 24 (2006).

2 NFS was a joint venture between LB&B Associates, Inc., and Olgoonik Logistics, LLC, a Native American entity based in Alaska. Transcript (Tr.) 285-86, 570.

3 Tr. 598.

4 Tr. 247.

5 Tr. 247-248.

6 Tr. 286.

7 Tr. 247, Complainant's Exhibit (CX) 4.

conditions and health issues at PIADC.[8] McKoy's supervisor, Ron Primeaux, observed him posting the union flyer on a company bulletin board and asked him whether he had permission to do so.[9] McKoy replied that he did not need permission.[10] Primeaux reported the incident to Matt Raynes, Project Manager, and both managers determined that McKoy should receive a verbal warning that he had violated NFS's rule prohibiting employees from posting notices without approval.[11] After drafting a letter documenting the verbal warning, Primeaux began searching for McKoy.[12]

Meanwhile, during his break on that same day, McKoy entered an onsite Community Forum that DHS sponsored and asked to speak to Resi Cooper, Senator Hillary Clinton's Long Island Regional Director, and Marc Hollander, Plum Island Site Director for DHS, both of whom were attending the forum.[13] McKoy testified that he met with Cooper and Hollander for approximately 20 minutes and told them that he was concerned that employees were improperly handling asbestos, and as a result, asbestos might get "into the airstream because there's ventilation going all the time inside there."[14] He also testified that he told them that he and another employee had switched identification badges on the way to work and "worked most of the day with the wrong picture, and nobody noticed."[15] Furthermore, he testified that he told them that workers without proper security clearance were roaming the bio-containment area unescorted.[16] He told Cooper and Hollander that he "was very concerned about the possibility of the – of these pathogens and viruses getting into our community and to Long Island and

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8 CX-4.

9 Tr. 447-448, 454-455; CX-4.

10 Tr. 459-460.

11 Tr. 461-462.

12 Tr. 467.

13 Tr. 147, 272.

14 Tr. 276-277.

15 Tr. 287.

16 Tr. 283.

Connecticut."[17] Both Cooper and Hollander assured McKoy that he would not lose his job for raising his concerns with them.[18]

As McKoy left the meeting with Cooper and Hollander, he encountered Primeaux, who immediately escorted him to Raynes's office.[19] When Raynes asked him where he had been, McKoy replied that he had been meeting with Cooper and Hollander.[20] Raynes then fired McKoy for leaving his post without supervisory approval.[21] Hollander then joined the meeting between McKoy and Raynes and temporarily stayed the termination.[22] But when McKoy arrived at work on June 20, NFS formally terminated his employment.[23]

McKoy filed this whistleblower action with the Occupational Safety and Health Administration (OSHA), alleging that his termination violated the whistleblower protection provisions of the CAA and WPCA.[24] OSHA investigated McKoy's claim and found it to be valid. NFS then requested a hearing with the Office of Administrative Law Judges.[25] The ALJ conducted a hearing on January 26-27 and April 27, 2004, and issued a Recommended Decision and Order (R. D. & O.) on August 31, 2004. The ALJ concluded that McKoy had not engaged in

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17 Tr. 288.

18 Tr. 291.

19 Tr. 292.

20 Tr. 294.

21 Tr. 296, 553.

22 CX-18 at 2-3.

23 Tr. 314.

24 McKoy also filed a complaint with the National Labor Relations Board (NLRB), alleging that NFS terminated him for his union activities. In a decision issued on April 28, 2006, the NLRB determined that NFS violated Sections 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C.A. § 158(a)(3) and (1), by discharging McKoy for his union activities. *L. B. & B. Assocs. and Olgoonik Logistics, LLC, a Joint Venture d/b/a North Fork Serv.s Joint Venture*, 346 NLRB No. 92 (2006).

25 *See* 29 C.F.R. § 24.4

any protected activity and therefore recommended that the complaint be dismissed. McKoy petitioned us to review the ALJ's recommended decision.

JURISDICTION AND STANDARD OF REVIEW

The employee protection provisions of the CAA and WPCA authorize the Secretary of Labor to hear complaints of alleged discrimination because of protected activity and, upon finding a violation, to order abatement and other remedies.[26] The Secretary has delegated authority to the Administrative Review Board (ARB) to review an ALJ's initial decision.[27]

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision.[28]

DISCUSSION

A. The Legal Standard

To prevail, McKoy must prove by a preponderance of the evidence that he engaged in protected activity, that NFS was aware of the protected activity, that he suffered adverse employment action, and that the protected activity was the reason for the adverse action.[29]

The CAA defines protected activity as: "commenc[ing] a proceeding," "testify[ing] in such a proceeding," "assist[ing] in such a proceeding," or "participat[ing] in any other action to

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[26] 42 U.S.C.A. § 7622(b); 33 U.S.C.A. § 1367(b).

[27] 29 C.F.R. § 24.8. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

[28] *See* 5 U.S.C.A. § 557(b) (West 2000); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571- 1572 (11th Cir. 1997); *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98- 056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

[29] *Seetharaman v. General Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21, slip op. at 5 (ARB May 28, 2004).

carry out the purposes" of the CAA.[30] Similarly, the WPCA defines protected activity as "fil[ing] or institut[ing] any proceeding" or "testify[ing] in any proceeding" to administer or enforce the WPCA.[31] We have held that making a complaint to the employer that is "grounded in conditions constituting reasonably perceived violations" of the environmental acts constitutes protected activity.[32] To be protected, safety and health complaints must be related to the requirements of the environmental laws or regulations implementing those laws; the employee protection provisions protect employees from retaliation only if they have reported safety and health concerns that the statutes address.[33] But employees need not prove that the hazards they perceived actually violated the environmental acts.[34]

B. McKoy Did Not Demonstrate That He Engaged in CAA-Protected Activity.

1. Improper handling of asbestos at PIADC

McKoy argues that he engaged in protected activity when he informed Cooper and Hollander that he had observed a supervisor and another employee improperly handling asbestos in the basement of the PIADC bio-containment area and that he believed the asbestos could escape into the air.[35] To establish that this was CAA-protected activity, McKoy must prove that when he expressed his concerns about the asbestos to Cooper and Hollander, he reasonably believed that NFS was emitting, or might emit, asbestos into the ambient air.[36] "Ambient air" is "that portion of the atmosphere, external to buildings, to which the general public has access."[37]

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30 42 U.S.C.A. § 7622(a).

31 33 U.S.C.A. § 1367(a).

32 *See, e.g.*, *Saporito v. Central Locating Services, Ltd.*, ARB No. 05-004, ALJ No. 2001-CAA-13, slip op. at 5 (ARB Feb. 28, 2006); *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 01-SWD-3, slip op. at 11 (ARB Mar. 31, 2005).

33 *Mourfield v. Frederick Plass & Plass, Inc.*, ARB Nos. 00-055, 00-056, ALJ No. 1999-CAA-13, slip op. at 8 (ARB Dec. 6, 2002).

34 *Saporito*, slip op. at 6.

35 Complainant's Brief on Appeal at 1-3.

36 *See Kemp v. Volunteers of Am., Inc.*, ARB No. 00-069, ALJ No. 00-CAA-6, slip op. at 4-6 (ARB Dec. 18, 2000).

Employee complaints about purely occupational hazards are not protected under the CAA's employee protection provisions.[38] For example, in the case of asbestos, even though the Environmental Protection Agency has regulated the manner in which it is handled within workplaces to prevent emissions into the outside air, if the complainant is concerned only with airborne asbestos as an occupational hazard within the workplace, and not in the outer, ambient air, the employee protection provisions of the CAA would not be triggered.[39]

In the July 17, 2003 Statement that he filed with OSHA, McKoy discussed what he said to Cooper and Hollander about asbestos:

> I told them that after working at the facility for almost three weeks I observed my then supervisor, Ray Corwin and a coworker, John Conley involved in the removal of asbestos pipe insulation from a leaking steam line, near the 100lb to 40lb reducing station. I saw no special precautions taken to insure that this highly hazardous material was contained. The asbestos containing materials were placed in regular trash bags, not the properly marked ones. The area was not marked showing that asbestos removal was taking place. They were not wearing protective clothing or gear. The material was dry and friable. John confirmed for me a few hours later that he knew he was working with asbestos. I did not say anything then because I was a new employee. At sometime later, I noticed in the 101 containment lab second floor feed corridor, a shelving unit with specially marked bags, and "glove bags," and other materials used in connection with the proper removal of asbestos. **I told Hollander and Cooper that it was clear to me that there was no concern for employee safety and that the same attitude towards safety and health still continues today.**[40]

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37 40 C.F.R. § 50.1(e) (2006).

38 *See Kemp,* slip op. at 4-5.

39 *Id.*

40 Respondent's Exhibit (RX) 23 at 7 (emphasis added).

McKoy's references to "employee safety" and employees "not wearing protective clothing or gear" indicate that, when he talked to Cooper and Hollander, his concern was for the employees working with the asbestos and not the emission of asbestos into the outside air. Cooper testified that McKoy's specific complaint to her was "[t]hat the asbestos was being improperly handled."[41] She said that she did not recall McKoy's telling her that asbestos could escape into the outside air.[42] This evidence indicates that McKoy was concerned about an occupational, not an environmental, hazard when he complained about asbestos to Cooper and Hollander.

But nine months later, at the hearing, McKoy testified that he had also told Cooper and Hollander that he feared that PIADC's air handling system might fail and release asbestos into the ambient air:

> [T]here are times when that that [sic] mechanical equipment does fail within the bio-containment area and I've witness [sic] that where an area is supposed to be under a negative air pressure and, because of the mechanical control or fan failure, it goes into positive mode –
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> * * *
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> -- which could release these – anything that's in that air to the outside atmosphere.[43]

He also testified that he had experienced such failures in the past.[44]

The ALJ did not credit McKoy's testimony that he told Cooper and Hollander about a possible failure of the air handling system because, prior to this testimony, McKoy had not mentioned the air handling system issue in either his July 17, 2003 Statement to OSHA or his July 11, 2003 affidavit filed with NLRB, Region 29.[45] McKoy mentioned this issue for the first

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41 Tr. 153.

42 Tr. 235.

43 Tr. 277.

44 Tr. 279.

45 RX-22.

time at the hearing. Therefore, the ALJ concluded that when McKoy spoke to Cooper and Hollander, he did not have a reasonable belief that asbestos could escape into the ambient air.[46]

We find that when McKoy talked to Cooper and Hollander, he did not reasonably believe that NFS was emitting, or about to emit, asbestos into the ambient air. Like the ALJ, we find incredible McKoy's testimony that he told Cooper and Hollander about his fear that the air handling system could fail and release asbestos into the ambient air because he never mentioned this fear in his previous OSHA Statement or the NLRB affidavit. Moreover, other than his testimony at the hearing, the record contains no additional or corroborating evidence to suggest that the air handling system could, or ever did, actually fail. Therefore, McKoy did not engage in CAA-protected activity.

2. Inadequate security measures at PIADC

McKoy argues that he engaged in activity that the CAA protects when he told Cooper and Hollander about security lapses in the bio-containment area.[47] Cooper testified that McKoy "was concerned for the community, not only the employees, but also the community and the country actually should someone who did not have the best of intentions be in the lab and be able to smuggle out a pathogen."[48] According to Cooper, McKoy also said that he and another employee had exchanged identification badges for an entire day without detection.[49] McKoy testified that he told Cooper and Hollander that he had observed unescorted individuals who lacked security clearances roaming freely in the bio-containment area and that he was concerned that someone could walk out with a vial of a dangerous pathogen and release it into the air or water. "I could have taken that virus – a tube of that virus, concealed it in my body some way and left that laboratory without anybody knowing about it."[50]

To establish protected activity, McKoy does not have to prove that the hazards he perceived actually violated the act. But he must express more than a vague notion that NFS's

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46 R. D. & O. at 18

47 Complainant's Brief on Appeal at 14-16.

48 Tr. 168.

49 Tr. 154.

50 Tr. 283-84, 288.

security policies or procedures might result in pathogens entering the outer atmosphere.[51] Nor can protected activity be based on numerous assumptions and speculation.[52] The ALJ found that McKoy's concerns about security were speculative. Therefore, he concluded that McKoy did not engage in protected activity when he told Cooper and Hollander about security at PIADC.[53]

We, too, find that that McKoy's concerns about security at PIADC were speculative, and that he therefore did not reasonably believe that security breaches could enable individuals to gain access to hazardous material and thereby harm the environment.[54] McKoy presented no evidence as to how unescorted persons might remove toxins and pathogens which, according to a GAO report in the record, are secured in locked freezers where only approved persons can access them.[55] Instead, he testified only that he "could have" stolen a tube of the virus and in "some way" hidden it and escaped, undetected, from the bio-containment area.

In fact, PIADC has elaborate measures that prevent anyone from removing pathogens. Cooper described the security procedures to enter and exit the bio-containment area:

> [Y]ou go into the locker room. You have to get completely undressed to the extent that if you wear contact lenses, you have to take your contact lenses out, or jewelry. Everything comes off. You are completely naked and you walk in through the shower area, and on the other side of the shower area there are clothes waiting for you. I mean everything, shoes, socks, everything, waiting for you. You then put those clothes on and, and then you move throughout the lab. There are different air lock systems you go through.

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51 *See Saporito*, slip op. at 6.

52 *Id.*

53 R. D. & O. at 19.

54 *Cf. Johnson v. Oak Ridge Operations Office*, ARB No. 97-057, ALJ Nos. 1995-CAA-20, 21 and 22, slip op. at 9 (ARB Sept. 30, 1999) (expressing concern that issuing security clearances to persons with questionable backgrounds might endanger the environment is "rank speculation," not protected activity).

55 CX-5 at 16-17. The September 2003 report is entitled "Combating Terrorism: Actions Needed to Improve Security at Plum Island Animal Disease Center."

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> You exit the lab – you have to get completely undressed again. I believe you have to go over to a sink and wash your hands with a scrub brush and then they tell you to spit in a sink. You have to do this all completely unclothes [sic] also. Spit into a sink three times to get the phlegm in case you picked up anything, to get the phlegm and everything out of your system. And then you go into the shower and, and you have to shower for a couple of minutes. I forget. They tell you how long. And shampoo yourself down, and then you can [go] back to the other side.[56]

Therefore, McKoy's mere belief, without supporting evidence, that unescorted persons in the bio-containment facility could release pathogens into the ambient air was not a reasonable perception that NFS was violating the CAA. Thus, he did not engage in CAA-protected activity when he told Cooper and Hollander about security at PIADC.

C. McKoy Did Not Engage in WPCA-Protected Activity.

Congress enacted the WPCA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and declared that "it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited."[57] With respect to his claim that NFS violated or was about to violate the WPCA, McKoy testified that "maybe" the decontamination process at PIADC could fail, resulting in the release of toxic materials into the waters of Long Island Sound.[58] The record, however, contains no evidence that McKoy told Cooper and Hollander about this concern. Also, his belief that "maybe" the decontamination process could fail is speculative. McKoy did not adduce any evidence about how it could fail or how contamination could occur as a result of the failure. Therefore, McKoy did not have a reasonable belief that the decontamination process posed a threat to Long Island Sound.

Nor does McKoy's testimony that he told Cooper and Hollander that, because of lax security procedures, someone could smuggle pathogens out of the lab and discharge them into the Sound evince WPCA-related protected activity. Like his testimony that lax security could possibly cause pathogens to be released into the ambient air, it is based on speculation, not a reasonable belief.

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56 Tr. 165-67.

57 33 U.S.C.A. § 1251 (a)(3).

58 Tr. 288.

CONCLUSION

McKoy did not prove by a preponderance of the evidence, as he must, that he engaged in either CAA- or WPCA-protected activity. Therefore, his whistleblower claims under each of those statutes fail. Accordingly, we **DISMISS** this complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge