



In the Matter of:

**LENARD E. TRIMMER,**

**ARB CASE NO. 96-072**

**COMPLAINANT,**

**ALJ CASE NOS. 93-CAA-9  
93-ERA-55**

**v.**

**DATE: May 8, 1997**

**LOS ALAMOS NATIONAL LABORATORY  
and UNIVERSITY OF CALIFORNIA,**

**RESPONDENTS.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

### **FINAL DECISION AND ORDER**

These consolidated cases arise under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988 and Supp. V 1993).<sup>1/</sup> Complainant Lenard E. Trimmer claims that Respondents, the Los Alamos National Laboratory and its contractor-operator, the University of California, violated the ERA by discriminating against him and discharging him because he raised health and safety issues concerning the Lab.<sup>2/</sup>

In a Recommended Decision and Order (R. D. and O.), the Associate Chief Administrative Law Judge (ALJ) found that Trimmer did not establish that the Lab had any discriminatory motive in its actions toward him. In the alternative, the ALJ found that even if Trimmer's raising health and safety concerns was a contributing factor, the Lab showed by

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<sup>1/</sup> Trimmer also claimed violations of the similar employee protection provisions of the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Water Pollution Control Act, 33 U.S.C. § 1367; Toxic Substances Control Act, 15 U.S.C. § 2622; Solid Waste Disposal Act, 42 U.S.C. § 6971; and Clean Air Act, 42 U.S.C. § 7622.

In response to a motion for Summary Judgment, the ALJ ruled that the complaint was timely under the ERA, which has a 180-day limitation period, but was time barred under all of the other acts, which have a 30 day limitation period. September 29, 1993 Order at 4.

<sup>2/</sup> We will refer to both Respondents jointly as "the Lab."

clear and convincing evidence that it would have taken the same actions even in the absence of Trimmer's protected activities. Accordingly, the ALJ recommended denying the complaint. We agree with the ALJ's recommendation of dismissal. The ALJ's findings of fact are supported by the record and we adopt them. We provide a synopsis of the facts to focus the discussion.

## **BACKGROUND**

### **Injury and First Alternate Placement**

Trimmer worked as a technician at the Lab beginning in 1962. Trimmer's job involved lifting and hauling heavy objects. In 1987 he sustained a back injury at work and experienced pain in the neck and upper back, numbness in the fingers, and pain in the lower back radiating to his lower extremities. T. 257-258. Trimmer worked on and off until July 1988, when the Lab declared him "unfit for duty" because of the effects of the injury. T. 207. Trimmer received workers' compensation payments during six months of rehabilitation. *Id.*

Trimmer's physician later determined that Trimmer was fit for light duty work. His standing and sitting was restricted 30 to 40 minutes at a time. T. 208, 260-261, CX 95; RX 1. Consequently, in December 1988, Trimmer asked for an "alternate placement," which was the Lab's program for placing employees in suitable new positions due to physical limitations and work restrictions. T. 207. Through the efforts of Lab employee Sue Simmons, Trimmer quickly was placed as a technician in the Environmental Management (EM) division, which dealt with radioactive waste. R. 42. Trimmer worked in a waste management facility that stored transuranic (or mid-level radioactive) waste. T. 76.

### **Protected Activities**

In 1989 and 1990, Trimmer notified his supervisors of various safety concerns, including leaking barrels of waste. T. 44, 224-225. Trimmer also gave internal Lab documents that supported his safety concerns to a Congressional subcommittee, an investigative team and the Inspector General of the Department of Energy, and members of the news media. T. 229-230, 353. Other Lab employees who were aware of Trimmer's safety concerns gave him photographs that showed leaking waste barrels. CX 19; T. 173-177, 1256-1258.

An article critical of Lab safety procedures appeared in the *Santa Fe New Mexican* newspaper on February 27, 1992. CX 73; T. 57, 1196. The article quoted Trimmer and also referred to the Lab documents that he had given to Congress. T. 57. Trimmer's supervisor, Anthony Drypolcher, suspected that Trimmer had provided copies of the documents to the author of the article. T. 55, 57.

### **Trimmer Ceases Work in November 1990**

Trimmer filed a grievance against the Lab concerning the selection of a different employee to be a lead operator, rather than Trimmer. On November 28, 1990, two supervisors asked Trimmer not to talk about the grievance during work time because it disturbed other employees and undermined their ability to work with him. T. 609, 742-743, 1833. Trimmer became upset and saw the Lab's physician, who sent him home.<sup>3/</sup> T. 308, 610-611. Trimmer did not return to work, and after using up his sick leave and vacation time, he went on leave without pay. Trimmer never returned to work at the Lab.<sup>4/</sup>

In early 1991, Anthony Drypolcher, the leader of the Waste Management Group in which Trimmer had been working, determined that the Group could not accommodate Trimmer's work restrictions in the position he had occupied. T. 1598. After evaluating work demands, Drypolcher decided to transfer Trimmer's former position to another section, where it was filled by an employee who was under threat of layoff. T. 1598-1599. Drypolcher informed Trimmer that he was eligible for alternate placement to help him find a suitable new position at the Lab.<sup>5/</sup> RX 45 p. 13; T. 1598, 1709-1710. Trimmer wrote back that he was interested in an alternate placement. RX 45 p. 15; T. 1710.

### **The Second Alternate Placement Search**

The Lab's medical director met with Trimmer in February 1991 to define specific work restrictions that would allow him to work regularly without harming his health. T. 555, 832. The medical director accepted Trimmer's suggestions, which resulted in restrictions on lifting, pushing and climbing, and instructions to avoid cold temperatures and prolonged standing on concrete floors. RX 45 p. 16.

Sue Simmons again was assigned to help Trimmer in an alternate placement effort. On two occasions in 1991, Simmons notified Trimmer about lab openings for which he might be qualified, but Trimmer declined to pursue the jobs. RX 45 p. 23.

Because he was considered physically unable to perform his job, Trimmer was granted disability benefits that paid 40 percent of his salary. T. 309-310. In addition, he received another 26 percent of salary through a private insurance plan. In August 1991, Trimmer told

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<sup>3/</sup> Trimmer does not allege that events that occurred between 1989 and 1991 form the basis of his complaint. Sept. 19, 1993 Order at 3. Rather, he complains that a December 9, 1992 letter and subsequent events, including his discharge, were discriminatory under the ERA. *Id.*

<sup>4/</sup> Trimmer told his clinical psychologist that the Lab was discriminating against him because of his disability and that he was being forced to work beyond his physical abilities. RX 2 p. 9; T. 781-782. He did not mention any suspicion that he was being discriminated against because of voicing health and safety concerns either to the psychologist, T. 782-783, or in a diary that he kept. T. 578.

<sup>5/</sup> The complaint was not timely as to the January 1991 notice that the Lab could not accommodate Trimmer in his former position. *See* n. 3 above.

Simmons to hold off on making efforts to find him an alternate placement since he had been granted disability benefits.<sup>6/</sup> T. 1990, 2004-2006; RX 45 p. 23; RX 48 p. 2. Simmons nevertheless continued to refer suitable job openings to Trimmer. T. 1994, 2007.

On February 13, 1992, Lab officials scheduled a meeting for March to discuss Trimmer's employment status since he had not worked in more than a year. T. 984, 1601; CX 18 p. 4. On February 27, the newspaper article that quoted Trimmer was published. The Lab managers met, as scheduled, on March 2, 1992 and decided that, if normal procedures were to be followed, the Lab should send Trimmer a letter explaining that he would be discharged if he did not actively pursue alternate placement. They also agreed that if they sent the letter at that time, it likely would be viewed as retaliation for the newspaper article. T. 59, 985, 1776-1778; CS 18 p. 4. Consequently no letter was sent at that time.

In November 1992, Scott Corwin, a claim manager for the private insurer that paid Trimmer's disability benefits met with him. Corwin reported that Trimmer said he had no intention of returning to employment at the Lab, RX 3 p. 31, and concluded that Trimmer "seems comfortable in his current state and is not motivated for change." *Id.* at p. 32.

### **The Third Alternate Placement Search**

The Lab eventually sent the planned letter to Trimmer in December 1992, explaining that he must meet four conditions to continue employment at the Lab. CX 7. Trimmer readily complied with the first three conditions by providing the Lab with information about his medical condition.

The fourth condition, concerning alternate placement, required Trimmer to return to work at a temporary assignment in the Lab's EM Division for a 90-day period to permit him to assist in locating a position for which he was qualified. CX 7. The letter explained that Trimmer's employment would be terminated if he was unable to locate a suitable position within 90 days. *Id.*

Trimmer consulted a Lab benefits representative, Gil Suniga, who advised that his disability benefits would be interrupted while he worked at a temporary, 90-day assignment. T. 1542. According to Trimmer, Suniga indicated that he himself would not return for a temporary assignment under those conditions. T. 389. Trimmer assumed that, if he was unable to find a new position, it would take six to eight months to reinstate his disability benefits. T. 506-507. An insurance company representative testified, however, that she told Trimmer that once his temporary salary stopped, the company would again pay him his disability benefit. T. 1644; RX 3 p. 12.

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<sup>6/</sup> Also in 1991, Complainant told the Lab he was going to retire and filed charges against it for discriminating against him on the basis of age and disability. T. 549-550. Trimmer abandoned his retirement plans.

Trimmer met Charles Nylander, EM Deputy Division Leader, at an awards ceremony on December 8, 1992. In a telephone call the next day, Trimmer told Nylander that he was a whistleblower, that he wished to return to work, and that Drypolcher was part of a conspiracy to withhold information about safety and health. T. 113, 150-151. At a meeting with Nylander in his home in late December, Trimmer outlined his health and safety concerns at length. T. 118-122. Nylander was given the responsibility to investigate and report on Trimmer's safety and health concerns. T. 162-163; *see* CX 1.

Pursuant to a suggestion of Suniga's, Trimmer asked to be permitted to participate in alternate placement and look for a job without returning to a temporary position at the Lab. T. 1545. The Lab agreed to Trimmer's request. CX 9. An employee relations specialist testified that she knew of no other Lab employee who was allowed to remain on inactive status during an alternate placement search. T. 992-994.

Trimmer promptly spoke with Jane Roberson, the person newly assigned to assist in his alternate placement search. T. 394, 1863; CX 9; RX 46. In telephone conversations Roberson discussed with Trimmer the "hidden job market" consisting of potential positions that have not been advertised officially. T. 437-438. Roberson encouraged Trimmer to contact individuals on his own to find out about such positions, T. 440, and suggested that Trimmer speak with representatives in the Employment Group of the personnel office because they would be able to provide better information on available positions. T. 442, 1926-1927, 2011. Trimmer did not speak with anyone in the Employment Group, however. T. 473-474, 1927, 1981.

In March, 1993, Nylander issued to group leaders in the EM Division a memorandum eliciting consideration of Trimmer for any current or anticipated openings. CX 3; T. 88-90, 142, 146. The Nylander memo did not produce any openings. The Associate Director of Human Resources next issued a standard memorandum seeking any openings lab-wide for which Trimmer might be considered. CX 4; T. 70, 1488-89, 1888, 1953.

Trimmer acknowledged that the only steps he took to obtain a new position were to speak with Roberson, provide his resume, and look at job listings. T. 582. The May 14, 1993, job listing issued by the Lab included an opening in which Trimmer was interested. On May 24, Trimmer discussed the position with Roberson, who advised him to submit his resume and fill out a formal bid for the job. T. 397, 1913. Roberson also discussed Trimmer's interest and qualifications with Dr. Richard Brake, who had advertised the position. Roberson delivered the bid form to Trimmer on May 29. T. 435, 445-446, 1920. Trimmer mailed the completed bid form to the Lab on June 2, T. 444-445, 1921, but he was not considered for the position because it had closed on June 1. Dr. Brake recalled discussing Trimmer's qualifications and telling Roberson that Trimmer would not be a competitive candidate because he lacked certain experience in facilities operation. T. 911, 923-933, 1916. Brake, who was unaware that Trimmer was a whistleblower, testified that Trimmer's interest in the job had no influence on the closing date for the position. T. 937.

Meanwhile, in late April, the overall responsibility for alternate placement was transferred to Gil Suniga, who just had been transferred to work in the Employment Group. T. 1855, 1884. Roberson gave Trimmer's file to Suniga, T. 1956, but she voluntarily continued to search for positions for Trimmer. T. 1546-1547, 1956-1957. The 90 day limit for the alternate placement search expired on June 15, 1993 without locating any job opening for which Trimmer was qualified.

### **Medical Discharge**

Under the Lab's procedure, if no alternate placement is found, the candidate is medically discharged. T. 998, 1928. The Medical Review Board met on July 30 to discuss Trimmer. RX 5 p. 3; T. 1433, 1931. According to Jane Roberson and the Board's chair, Nylander, all employment possibilities had been considered for Trimmer. T. 1435, 1457, 1930.

The Lab sent Trimmer a standard notice of Proposed Medical Termination on August 20, 1993 that asked him to submit relevant medical information that might affect the decision to discharge him. CX 87; T. 466. The medical director determined that the information Trimmer submitted was essentially the same as other, earlier provided information and therefore did not provide any reason to alter the decision to discharge Trimmer. CX 90. Accordingly, Trimmer was discharged as of September 16, 1993. *Id.*

## **DISCUSSION**

Complainants establish a violation of the ERA's employee protection provision when they demonstrate by a preponderance of the evidence that they engaged in protected activity that was a contributing factor in an adverse action. *Dysert v. Secretary of Labor*, 105 F.3d 607, 610 (11th Cir. 1997). It is undisputed that Trimmer engaged in protected activity by raising health and safety issues regarding the Lab's storage and disposal of radioactive and toxic substances with his superiors, members of Congress, and the press.

Trimmer alleges two adverse actions: 1) the postponement in sending him a notice that he would be medically discharged if he did not find a new position through an active alternate placement search, and 2) the subsequent discharge. As explained below, we find that the postponement was not an adverse action and Trimmer's protected activities were not a contributing factor in his discharge.

The postponement of the notice, which gave Trimmer additional time in which to seek a suitable job at the Lab and also delayed his discharge, appears to be favorable to Trimmer. Nevertheless Trimmer argues that the postponement was unfavorable because it prevented Sue Simmons from conducting the final alternate placement search. Simmons worked at the Lab in March 1992, when managers determined that, in the normal course, they should send

Trimmer a notice of medical discharge.<sup>7/</sup> The Lab eventually sent the notice in December 1992. After receiving Trimmer's written response, the Lab conducted a new alternate placement search in 1993. At that time, Simmons had stopped working and Jane Roberson assisted Trimmer in the search.

Although it is conceivable that Simmons may have been successful in placing Trimmer where Roberson was not, at best, this is pure speculation, and certainly does not support a conclusion that the postponement was purposely effected to achieve this end. Indeed the postponement extended complainant's employment with respondent and widened the window during which he could have found alternate placement with respondent. On its face, this action appears not adverse, but favorable to complainant. Even if complainant had been able to establish that the postponement did in fact prevent him from securing alternate placement, unless he could further demonstrate that respondent expected and intended this result, there would be no basis upon which to establish a violation.

The facts of this case demonstrate that complainant's claim is highly speculative. Simmons testified that the alternate placement searches she conducted resulted in new positions in only ten percent of the cases. T. 1987. Thus, having Simmons conduct a search was not a guaranty of success. Moreover, Simmons had worked diligently to find an alternate placement for Trimmer in 1991-1992, but without success. See T. 1988-1989; RX 45 pp. 19-23; RX 48. For example, when Simmons sent Trimmer a job listing for a Test/Measurements Technician in March 1992, he responded that he was not qualified for the job and did not apply. RX 48 p. 4; RX 49. Unwillingness to apply for positions effectively prevented an alternate placement, since the program did not include forced transfer against the participating employee's wishes. See RX 45 p. 53(b).

As further evidence of the supposedly unfavorable aspect of the postponement of the notice, Trimmer cited several openings for Lab positions that he did not learn about through the alternate placement program but which he believes he could have performed. The argument is unconvincing because Trimmer had actual knowledge of the positions through a friend, Lab employee Keith Carter. T. 1283-1284. Trimmer did not express any interest in the positions and did not pursue them. T. 1432-1433.<sup>8/</sup>

Trimmer also contends that the postponement of the notice denied him the opportunity to be considered either for the audit "position" to which Carter was assigned in April 1992 or for Carter's former position. Resp. Br. at 6. The Lab did not create a new position that

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<sup>7/</sup> Simmons took medical leave in January 1993, did not return to work, and retired later that year.

<sup>8/</sup> Ultimately, the Lab filled five of the positions with Contractor personnel and the sixth position with a Lab employee on directed transfer. T. 1284-1286, 1824. Purported job vacancies cited by Trimmer, CX 112, were not true vacancies, but rather represented work that needed to be performed and that the Lab could achieve without hiring new employees. T. 1479.

Carter filled; it assigned Carter to do audit work “until further notice” with a unit that needed help. CX 109. Nor did the Lab hire someone into Carter’s former position as a barrel inspector. Rather, it reassigned most of Carter’s duties to an existing employee and spread the remaining duties among several other existing employees. T. 1751-1752. Moreover, Carter’s former job duties included walking on concrete surfaces and outdoors in all weather, which was contrary to Trimmer’s medical restrictions, and Carter testified that if he had work restrictions, he could not have performed the job. T. 837, 1288-1289.

In addition to contending that the postponement was unfavorable to him, Trimmer also argues that the 1993 alternate placement search was conducted in a discriminatory fashion. Trimmer cites Drypolcher’s anti-whistleblower animus as evidence that the search was tainted. Brief 8-10. Drypolcher candidly acknowledged that he would prefer not to supervise an employee who, without authorization, gave Lab documents to a reporter and to Congress. T. 72, 74-75; CX 130. Moreover, Drypolcher suspected that Trimmer had participated in such activities.

Drypolcher’s admitted animus against supervising whistleblowers does not end the inquiry, however. As the complainant, Trimmer had the burden to establish that Drypolcher’s animus was a contributing factor in an adverse action. *See Hiatt v. Rockwell International Corp.*, 26 F.3d 761, 768-769 (7th Cir. 1994) (under state Workers’ Compensation Act, evidence that the supervisor had animosity toward the plaintiff’s workers’ compensation claims did not resolve the issue of liability; the plaintiff still had the burden of proving that the animosity played a causal role in his termination).

Consistent with the Lab’s procedures, the 1993 alternate placement search began with a request for suitable positions within the EM Division, in which Trimmer last had worked. T. 1432; CX 3. As head of the Waste Management section within that division, Drypolcher immediately notified the managers who reported to him, as well as other staff members who were developing and expanding their programs, of the need to search for suitable positions for Trimmer. T. 1575. In sending Trimmer’s resume to more personnel than usual, Drypolcher expressly sought anticipated openings for which Trimmer might be qualified, as well as actual openings. T. 1578. No one in the Waste Management section identified any positions for Trimmer, however. T. 1579; CX 2 p. 4. The documented efforts Drypolcher made on behalf of Trimmer convince us that any anti-whistleblower animus he may have harbored did not contribute to any discriminatory or unfavorable treatment of Trimmer in the alternate placement process.

After all of the groups within the EM Division reported in writing that there were no available positions, CX 2, Nylander double checked the responses in person. T. 1431-1432. We find Nylander’s efforts especially significant since Trimmer acknowledged that he trusted him. T. 377, 530. Moreover, since most of the groups in the EM Division did not even know about Trimmer’s protected activities, T. 1536, they could not have had discriminatory animus in reporting no suitable positions for Trimmer.



When the search within the EM Division did not produce a position, the alternate placement search went Lab-wide. CX 4, 70; T. 1488-1489, 1888, 1953. During this time, the responsibility for coordinating the entire alternate placement program was switched from Roberson to Gil Suniga. T. 1855, 1884. Trimmer makes much of the fact that Suniga did not inform Trimmer about being named coordinator. Brief at 13. But the record shows that, since Trimmer “did not especially care for Mr. Suniga,” Roberson volunteered to continue to assist in the alternate placement search for Trimmer, T. 1547, 1551-1552, 1558, 1563-1564, 1911, and Trimmer agreed. T. 1912. Roberson continued to search the job data base, including “wish lists” of jobs for which the funding was not yet secure, even after Trimmer’s discharge. T. 1882-1884. Any formal notification to Trimmer that Suniga had overall responsibility for the alternate placement program would have been pointless.<sup>2/</sup>

Referring to the transcript of a taped telephone conversation, Trimmer argues that Roberson’s mentioning the “hidden job market” shows that she was not capable of performing the job of AP coordinator. Brief 18-19. In a discussion about the scarcity of jobs in a recent Lab jobs listing, Roberson stated to Trimmer, “The hidden market is always out there anyplace and certainly it’s true here.” CX 131 at 4. Roberson also testified that Trimmer had as much access to the Lab’s hidden job market as she did, because the database of “wish list” jobs was available to Trimmer in the Lab’s library and the offices of the Employment Group. T. 1900.

Trimmer emphasizes that Roberson assured him during the taped telephone conversation that he was doing all he could do “at the moment” to find a job. Brief at 16-17, citing CX 131 at 6. Indeed, Roberson testified that Trimmer was very cooperative and polite. T. 1926.

Trimmer’s cooperative manner did not, however, extend to taking all the steps that Roberson suggested for his job search. Although Roberson strongly recommended that Trimmer speak with members of the staff in the Employment Group concerning available positions, Trimmer did not. T. 442, 473-474, 1926, 1927, 1981, 2011. Nor did Trimmer follow Roberson’s suggestion to be present at the Lab while looking for a job, which Roberson believed was much more effective because “you hear the jobs that may be coming up, they’re going to be advertised or whatever, or the funding is coming.” T. 1901-1902.

As the ALJ explained, Roberson advised Trimmer to network and actively seek leads, but “[Trimmer’s] failure to heed this advice or to make any effort himself in locating a job is indicative of his lack of motivation and sincere interest in returning to the Lab.” R. D. and O. at 29. We agree with the ALJ’s assessment that Trimmer “failed to undertake any effort

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<sup>2/</sup> We reject Trimmer’s contention, Brief at 13, that “no individual for the Lab was even acting in the role of AP coordinator for Mr. Trimmer.” The uncontradicted evidence shows that Roberson continued to search for an alternate placement for Trimmer, whereas Suniga coordinated the overall program.

to discover” jobs at the Lab, R. D. and O. at 31, but instead took a passive role and relied upon others to do the job search for him.

On the one occasion that Trimmer identified a job opening in which he was interested, Roberson promptly telephoned the person who advertised the job, Dr. Brake, who opined that Trimmer appeared to lack the required experience in accident investigation. T. 911, 925; *see* RX 9 p. 1. Brake did not eliminate consideration of Trimmer, however. T. 950. Roberson made the extra effort of delivering the job bid form to Trimmer in person. Brake testified credibly that he had no knowledge that Trimmer was a whistleblower, that he closed the job listing because he had 13 applicants, and that Trimmer’s interest in the job did not have any influence on the decision to close the listing. T. 936-937. Trimmer did not introduce any evidence to contradict Brake.

In summary, notwithstanding the lack of success, we are convinced that Ms. Roberson and other Lab employees made substantial and legitimate efforts to find an alternate placement for Trimmer in 1993. The record consistently shows that the Lab employees who helped Trimmer acted without discrimination toward him. We therefore find that the postponement of the alternate placement notice was not unfavorable to Trimmer.

We acknowledge that Trimmer’s medical discharge was an unfavorable personnel action, since he did not seek such a discharge. The ALJ found that the Lab sent Trimmer a standard form letter notifying him of his proposed medical termination, R. D. and O. at 19; CX 87; T. 466, and that the Medical Review Board convened to consider Trimmer’s case was conducted according to normal Lab procedures. R. D. and O. at 31. The Lab properly afforded Trimmer the opportunity to provide new medical evidence that his discharge was not warranted, CX 87, but Trimmer did not produce any new medical evidence. CX 90.

Trimmer nevertheless contends that his discharge was tainted by discriminatory animus because the Lab did not comply with its own regulation, AM (Administrative Manual) 118, governing medical discharges. Resp. Br. at 14-15 n.8. After a thorough review of the argument and the record, we disagree.<sup>10/</sup>

Trimmer contends that the Lab did not follow the regulation’s provisions governing accommodation of an employee’s disabilities. Following an examination, the appropriate Lab department determined that Trimmer was “unfit to return to duty in his current accommodated position” in the Waste Management Group. RX 45 p. 12. A Lab physician reaffirmed that conclusion in March 1991. RX 45 p. 16. Drypolcher determined that because of the extensive work restrictions, the Waste Management Group had no positions in which it could

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<sup>10/</sup> The Lab asked that we strike the footnotes from Trimmer’s brief on the ground that they violate the applicable page limitation. Resp. Br. at 15. We deny the motion and accept the brief as submitted.

accommodate Trimmer.<sup>11/</sup> RX 45 p. 18. The Lab reviewed Trimmer's condition in March 1993 and reaffirmed the need for the same permanent work restrictions that the Waste Management Group could not accommodate. RX 45 p. 31.

Since accommodation was not possible in the Waste Management Group, the Lab properly conducted an alternate placement search. See AM 118.07, 118.19. In conducting that search, the Lab considered unadvertised positions, as AM 118.22 provides, and fully documented its efforts on Trimmer's behalf, as stated in AM 118.20. RX 46 (Roberson), 48 (Simmons).

We also find that the Lab did not violate AM 118.14, which provides that the Employment Group assist employees in identifying jobs for which they are qualified. Although Roberson encouraged Trimmer to speak with someone in the Employment Group, he declined to do so. T. 1927, 1981. In any event, Roberson used the resources of the Employment Group on Trimmer's behalf. T. 473-474, 1927, 2015-2018, 2022. Therefore we find that there was Employment Group assistance in Trimmer's alternate placement search.

Moreover, notwithstanding the regulation providing that alternate placement searches usually are completed in 90 days, AM 118.21, the 1993 alternate placement search lasted much longer. In addition, the Lab permitted Trimmer to remain at home during that search as well as the earlier one conducted in 1991-1992.

In conclusion, we find no material deviation from the Lab's medical discharge procedures in Trimmer's case and we further find that Trimmer has not shown that any variance from the letter of the regulation indicates a discriminatory motive in the decision to discharge him.

In the alternative, even if Drypolcher's anti-whistleblower animus was a contributing factor in the discharge decision, we find that the Lab established by clear and convincing evidence that it would have discharged Trimmer even if he had never engaged in protected activities. The Lab fulfilled the requirements of attempting to accommodate Trimmer's work restrictions, but was unable to find a new position that comported with Trimmer's experience

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<sup>11/</sup> We are not concerned with the purported failure of the Lab to inform Trimmer about sources of financial support other than the employee's work group to help in accommodating an employee's disabilities, AM 118.24 and 118.25, because, as far as expenditures are concerned, Trimmer's work restrictions required only a "special chair meeting specific recommendations based on [an] ergonomic study." RX 45 p. 31.

and abilities. Pursuant to its written policy, and with careful consideration of the record, the Lab medically discharged Trimmer. Accordingly, the complaint is **DISMISSED**.

**SO ORDERED.**

**DAVID A. O'BRIEN**

Chair

**KARL J. SANDSTROM**

Member

**JOYCE D. MILLER**

Alternate Member