



In the Matter of:

JAMES CARPENTER,

ARB CASE NO. 07-060

COMPLAINANT,

ALJ CASE NO. 2006-ERA-035

v.

DATE: September 16, 2009

BISHOP WELL SERVICES CORP.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard R. Renner, Esq., *Tate & Renner*, Dover, Ohio

For the Respondent:

Susan E. Baker, Esq., Daniel H. Plumly, Esq., *Critchfield, Critchfield & Johnston, Ltd.*, Wooster, Ohio

FINAL DECISION AND ORDER

James Carpenter filed a complaint alleging that Bishop Well Services Corp. fired him because he engaged in activity protected under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003); the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998); the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9(i) (West 2006); the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 2003); the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (West 2005); and the Pipeline Safety Improvement Act of 2002 (PSIA), 49 U.S.C.A. 60129 (West Supp. 2005).

A United States Department of Labor Administrative Law Judge (ALJ) recommended dismissal of the complaint because, inter alia, Carpenter failed to prove that he engaged in protected activity. We affirm.

BACKGROUND

Dave Bishop, owner of Bishop Well Services, a company that services oil and gas wells in the State of Ohio, hired Carpenter in 1992 to operate its service rigs.¹ On May 20, 2005, Carpenter was working on a Bishop rig when a utility hose struck him in his back. Following the incident, Bishop placed Carpenter on a transitional work program and assigned him to work in a “light duty” capacity. In this capacity, Carpenter supervised other employees and Bishop paid him for a full eight-hour work day even if he did not work the entire day.² According to Bishop, the company saved approximately \$20,000 in workers’ compensation premiums by placing Carpenter in a transitional work program and thereby precluding him from receiving benefits through the State of Ohio’s Bureau of Workers’ Compensation (Bureau).³

Carpenter began pursuing a claim for additional work restrictions related to his back injury in the early Spring of 2006. Bishop contested Carpenter’s claim at several Bureau hearings.⁴ According to Bishop, in March 2006 he decided to “terminate Carpenter’s light duty position,” but refrained from doing so because Carpenter was scheduled to undergo “non work related surgery” in April 2006, and his “surgical non-work-related restrictions” would expire on May 29, 2006.⁵

In April 2006, Carpenter told Bishop that there was a mechanical problem with one of the company’s service rigs. In response, Bishop directed an operator and a mechanic to resolve the problem.⁶ On May 16, 2006, Carpenter contacted the Occupational Safety and Health Administration (OSHA) by telephone and complained that Bishop’s “high pressure hoses are not safe” and that “handrails on the trucks are

¹ Complainant James Carpenter’s Brief (Complainant’s Brief) at 1; Respondent Bishop Well Services Corp.’s Appeal Brief (Respondent’s Brief) at 2. Bishop hired Carpenter when the company was known as Conley Well Service.

² Complainant’s Brief at 3; Hearing Transcript (Tr.) at 139-40.

³ Tr. at 140, 249-50.

⁴ Complainant’s Brief at 3; Respondent’s Brief at 7.

⁵ Tr. at 117-118, 125; Respondent’s Exhibit (RX) 10.

⁶ Tr. at 107, 151.

missing.”⁷ That same day, Carpenter and Bishop attended a Bureau hearing regarding Carpenter’s claim for additional restrictions.

OSHA inspected the sites where Bishop Well Services was operating on May 23, 2006. The company received two citations directing it to provide its employees with additional training, but these citations were unrelated to Carpenter’s complaints.⁸ That same day, the Bureau issued an order denying Carpenter’s claim for workers’ compensation.⁹

Bishop gave all of his employees except Carpenter pay raises on May 26, 2006. According to Bishop, he did not give Carpenter a raise because he “had already decided to let [him] go.”¹⁰ On May 30, 2006, Bishop met with representatives of his biggest client, Great Lakes Energy Partners. They told Bishop that Carpenter was serving no function as a light duty employee, and therefore neither Carpenter nor any other light duty employee should be sent to any Great Lakes location.¹¹ The following day, Bishop informed Carpenter that he could “no further accommodate [his] light duty restrictions and he would have to let [him] go.”¹² Carpenter’s employment with Bishop Well Services ended on May 31, 2006.

On June 20, 2006, Carpenter filed a complaint with OSHA alleging that his discharge violated the CAA, CERCLA, SDWA, TSCA (collectively, the environmental statutes), ERA, and PSIA.¹³ OSHA dismissed the complaint. Carpenter appealed the dismissal, and his complaint was referred to the Labor Department’s Office of Administrative Law Judges for a hearing.

⁷ RX 8 (OSHA Notice of Alleged Safety or Health Hazards).

⁸ RX 9; Tr. at 114-15.

⁹ RX 1, Tr. at 169-173.

¹⁰ Tr. at 125.

¹¹ Complainant’s Exhibit (CX) 9; Tr. at 78.

¹² Tr. at 155.

¹³ Carpenter’s retaliation complaint also alleged that Bishop Well Services violated Section 11(c) of the Occupational Safety and Health Act (OSH Act). *See Complaint of Retaliation Against Whistleblower at 1.* Carpenter did not appeal the Secretary’s findings regarding his OSH Act claim, and the Secretary of Labor has not delegated final decision making authority in whistleblower actions under the OSH Act to this Board. *See, e.g., Knox v. U.S. Dep’t of the Interior*, ARB No. 03-040, ALJ No. 2001-CAA-003, slip op. at 4 (ARB Sept. 30, 2004).

The ALJ held a hearing on October 31 and November 1, 2006. Both parties were represented by counsel. On March 6, 2007, the ALJ issued a Recommended Decision and Order (R. D. & O.), concluding that Carpenter's May 16, 2006 phone call to OSHA did not constitute protected activity under the statutes alleged. The ALJ also held that, even if Carpenter's call to OSHA did constitute protected activity, he failed to prove "that his protected activity led to his discharge."¹⁴

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review ALJ decisions under the ERA, PSIA, and environmental acts (collectively, the whistleblower statutes).¹⁵ 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. We review the ALJ's conclusions of law de novo.¹⁶

Under the PSIA, the Board reviews the ALJ's findings of fact under the substantial evidence standard.¹⁷ Substantial evidence is that which is "more than a mere scintilla." It means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁸

At the time the parties appealed and filed their briefs with the Board, we reviewed questions of fact under the ERA and environmental statutes de novo.¹⁹ A new regulation calls for substantial evidence review.²⁰ Neither party has requested leave to supplement or amend its brief in light of the change in the standard of review for questions of fact. We therefore assume that neither party considers the change in standard of review

¹⁴ R. D. & O. at 14.

¹⁵ 29 C.F.R. §§ 24.110, 1981.110 (2008). *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)).

¹⁶ 5 U.S.C.A. § 557(b) (West 1996).

¹⁷ 29 C.F.R. § 1981.110(b).

¹⁸ *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998).

¹⁹ *See Sayre v. VECO Alaska, Inc.*, ARB No. 03-069, ALJ No. 2000-CAA-007, slip op. at 2 (ARB May 31, 2005).

²⁰ 72 Fed. Reg. 44,956 (Aug. 10, 2007), codified at 29 C.F.R. § 24.110(b)(2008).

material to this case.²¹ In any event, applying either standard of review, we conclude that Bishop Well Services did not violate any of the whistleblower statutes, and Carpenter’s complaint must be dismissed.

DISCUSSION

1. Elements of a Whistleblower Claim

Although the whistleblower statutes at issue in this case contain different language, each requires Carpenter to prove by a preponderance of the evidence that he engaged in activity protected by those statutes. He must also prove by a preponderance of the evidence that Bishop Well Services was aware of his protected activity and that he suffered an unfavorable personnel action. Under the environmental statutes, Carpenter must prove that his protected activity was the reason for the unfavorable personnel action.²² Under the ERA and PSIA, he must prove that his protected activity was a contributing factor in the unfavorable personnel action.²³

Protected activity is an essential element of Carpenter’s claim, without which he cannot prevail.²⁴ We therefore begin our analysis by describing what constitutes protected activity under the whistleblower statutes.

a. Protected Activity under the ERA

The ERA provides that an employer may not “discharge” or “otherwise discriminate” against an employee “with respect to his compensation, terms, conditions or privileges of employment” because the employee has engaged in certain protected activities. These activities include: (1) notifying an employer about an ERA or Atomic Energy Act (AEA) violation, (2) refusing to engage in a practice made unlawful by the

²¹ Cf. Fed. R. App. P. 28(j) (the parties have the burden of calling the court’s attention to any pertinent and significant authorities that came to the parties’ attention after their briefs have been filed).

²² See, e.g., *Cante v. New York City Dep’t of Educ.*, ARB No. 08-012, ALJ No. 2007-CAA-004, slip op. at 4-5 (ARB July 31, 2009) (citing the environmental statutes). Cf. 29 C.F.R. § 24.104(d)(1) (2009) (requiring that a complainant prove that his protected activity was a motivating factor in the unfavorable personnel action).

²³ See 42 U.S.C.A. § 5851(b)(3)(C) (ERA); 49 U.S.C.A. § 60129(b)(2)(B)(iii) (PSIA).

²⁴ See, e.g., *Backus v. Indiana Michigan Power Co.*, ARB No. 06-129, ALJ No. 2005-ERA-008, slip op. at 10 (ARB Sept. 30, 2008).

ERA or AEA, and (3) commencing, causing to be commenced, testifying, assisting, or participating in an ERA or AEA proceeding.²⁵

Protected activity under the ERA must implicate nuclear safety definitively and specifically.²⁶ Additionally, a whistleblower complaining about the employer's violation of the ERA must have actually believed that the employer was in violation, and that belief must be reasonable for an individual in the same circumstances with the same training and experience.²⁷

b. Protected Activity under the Environmental Statutes

The environmental whistleblower protection provisions prohibit employers from discharging or otherwise discriminating against any employee "with respect to the employee's compensation, terms, conditions, or privileges of employment" because the employee (1) has commenced, or caused to be commenced, any proceeding under the acts, (2) has testified in any such proceeding, (3) assisted or participated in any manner in such a proceeding, (4) assisted or participated in any other action to carry out the purpose of the environmental acts, or (5) is about to engage in any of the listed actions.²⁸

An employee engages in protected activity if he provides information grounded in conditions constituting reasonably perceived violations of the environmental acts. Such conditions include the release of unsafe substances, contamination of drinking water, the disposal of water, and the release of toxins into the ambient air.²⁹ The employee need not prove that the hazards he perceived actually violated the act, or that his assessment of the hazard was correct.³⁰ On the other hand, a complaint that expresses only a vague notion

²⁵ 42 U.S.C.A. § 5851(a).

²⁶ *Devine v. Blue Star Enters., Inc.*, ARB No. 04-109, ALJ No. 2004-ERA-010, slip op. at 6 (ARB Aug. 31, 2006), citing *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 9 (Sept. 30, 2003).

²⁷ *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 27-28 (ARB July 14, 2000).

²⁸ See 29 C.F.R. § 24.102. See also 15 U.S.C.A. § 2622(a) (TSCA); 42 U.S.C.A. § 7622(a) (CAA); 42 U.S.C.A. § 9610(a) (CERCLA); 42 U.S.C.A. § 300j-9(i)(1)(A) (SDWA). *Accord Morriss v. LG&E Power Servs., LLC.*, ARB No. 05-047, ALJ No. 2004-CAA-014, slip op. at 31-32 (ARB Feb. 28, 2007).

²⁹ *Culligan v. Am. Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 2000-CAA-20, 2001-CAA-009, -011, slip op. at 9-11 (ARB June 30, 2004).

³⁰ See, e.g., *Dixon v. U.S. Dep't of Interior*, ARB Nos. 06-147, 06-160, ALJ No. 2005-SDW-008, slip op. at 9 (ARB Aug. 28, 2008).

that the employer's conduct might negatively affect the environment or that is based on "numerous assumptions and speculation" is not protected.³¹

c. Protected Activity under the PSIA

Congress passed the PSIA to enhance the safety of the nation's pipeline systems. The PSIA's employee protection provision prohibits discrimination against an employee who engages in certain types of protected activity, including (1) providing to an employer or the Federal Government information relating to any violation or alleged violation of any Federal law relating to pipeline safety; (2) refusing to engage in any practice made unlawful by the PSIA; (3) providing testimony before Congress or at any Federal or State proceeding regarding any Federal law relating to pipeline safety; or (4) commencing, assisting or participating in a proceeding under any Federal law relating to pipeline safety.³²

Under all of the whistleblower statutes, an employee's protected activity must relate "definitively and specifically" to the subject matter of the particular statute under which protection is afforded.³³ A PSIA complainant's protected activity must therefore relate definitively and specifically to pipeline safety.

2. Carpenter Did Not Engage in Activity Protected by the Whistleblower Statutes.

The parties agree that the alleged protected activity in this case is Carpenter's complaint to OSHA on May 16, 2006.³⁴ Henry Cleveland, an OSHA compliance officer, completed a "Notice of Alleged Safety or Health Hazards" (Notice) memorializing Carpenter's concerns. The "Description" category of the Notice states as follows: "1. The high pressure hoses are not safe. 2. The handrails on the trucks are missing."³⁵

The ALJ reviewed the Notice as well as Carpenter's deposition and hearing testimony to determine whether Carpenter engaged in protected activity. He found that Carpenter did not report any concerns about nuclear, pipeline, or environmental hazards when he spoke to OSHA.³⁶ The ALJ therefore concluded that Carpenter did not engage

³¹ *Id.*

³² 49 U.S.C.A. § 60129(a).

³³ *See, e.g., Kester*, slip op. at 9 (in whistleblower complaint arising under the ERA, protected activity must "definitively and specifically" relate to nuclear safety).

³⁴ Complainant's Brief at 24; Respondent's Brief at 29.

³⁵ RX 8.

³⁶ R. D. & O. at 8-10.

in protected activity under the whistleblower statutes, and his complaint should be dismissed. We agree.

The record supports the ALJ's finding that Carpenter complained about the handrails and hoses and nothing else.³⁷ Carpenter's deposition and hearing testimony do not provide a description of what he told Cleveland beyond the information contained in the Notice. His complaint about handrails and hoses did not implicate any concerns related to nuclear safety. He did not allege that Bishop Well Services committed any acts that would constitute a violation of the ERA or AEA. And Bishop testified that his employees do not work with nuclear devices and are not exposed to nuclear materials.³⁸

We agree with the ALJ's conclusion that Carpenter's May 16, 2006 call to OSHA did not implicate pipeline safety. His complaint about handrails and hoses did not provide information to OSHA that related to an alleged violation of Federal law relating to pipeline safety. And Carpenter testified at the hearing that he did not make any complaints related to pipeline safety.³⁹

Carpenter also failed to prove that he reported any environmental concerns to OSHA. The record supports the ALJ's finding that when he contacted OSHA, Carpenter did not report any concerns regarding unsafe substances, contamination of drinking water, the disposal of water, or the release of toxins into the ambient air.⁴⁰ Carpenter's complaint about the handrails and hoses informed OSHA of potential workplace safety hazards at Bishop Well Services. Such complaints, which describe hazards limited to a workplace but not endangering the public, are not protected under the environmental statutes.⁴¹

In sum, we conclude that Carpenter did not engage in protected activity under the ERA, PSIA, or environmental statutes.

³⁷ ALJ Exhibit 12 at 47 (Deposition of James Carpenter).

³⁸ Tr. at 265-66.

³⁹ *Id.* at 197.

⁴⁰ See R. D. & O. at 8-9, citing Carpenter's deposition and hearing testimony transcripts.

⁴¹ See, e.g., *Mourfield v. Frederick Plaas & Plaas, Inc.*, ARB Nos. 00-055, 00-056, ALJ No. 1999-CAA-013, slip op. at 4 (ARB Dec. 6, 2002); *Aurich v. Consolidated Edison Co.*, ALJ No. No. 1986-CAA-002, slip op. at 3-4 (Sec'y Apr. 23, 1987).

3. The Record Does Not Indicate that the ALJ Committed the Errors Carpenter Alleges in His Brief.

In his brief to the Board, Carpenter argues that the ALJ committed several errors. Specifically, Carpenter alleges that the ALJ erred by denying his Motion for Voluntary Dismissal, denying a requested continuance, denying his Motion to Compel Discovery, refusing to compel production of a witnesses, allowing an expert witness not disclosed during discovery to testify, admitting documents not produced during discovery, refusing his request to call a specific witness, granting the Respondent's motion to quash a subpoena, and admitting the OSHA determination into evidence.⁴²

We review an ALJ's determinations on procedural issues and evidentiary rulings under an abuse of discretion standard, i.e., whether, in ruling as he did, the ALJ abused the discretion vested in him to preside over the proceedings.⁴³ We find that the ALJ did not abuse his discretion in any of the instances alleged by Carpenter. And Carpenter does not indicate how the alleged errors affected his ability to satisfy his requirement of proving that he engaged in activity protected by the whistleblower statutes.

Since Carpenter failed to prove that he engaged in protected activity, a requisite element of his case, his entire claim must fail.

CONCLUSION

The ALJ correctly concluded that Carpenter failed to prove that he engaged in protected activity pursuant to the whistleblower statutes and thus did not establish an essential element of his retaliation claim. We therefore **AFFIRM** the ALJ's R. D. & O. and **DENY** Carpenter's complaint.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

⁴² Complainant's Brief at 9-10, 12, 21-24.

⁴³ *Khandelwal v. Southern Calif. Edison*, ARB No. 98-159, ALJ No. 1997-ERA-006, slip op. at 2 (ARB Nov. 30, 2000).