U.S. Department of Labor

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

In the Matter of:

WIEB VAN DER MEER, **ARB CASE NO. 97-078**

COMPLAINANT, **ALJ CASE NO. 95-ERA-38**

v. **DATE: April 20, 1998**

WESTERN KENTUCKY UNIVERSITY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, (ERA) as amended, 42 U.S.C. §5851 (1994).[1/] It is before the Board for review of the Recommended Decision and Order (R. D. and O.) issued on March 14, 1997, and the Supplemental Recommended Decision and Order awarding attorney's fees, issued June 12, 1997. 29 C.F.R. §24.6 (1997).

The presiding Administrative Law Judge (ALJ) found for Complainant, Dr. Wieb van der Meer, following a three-day hearing held December 12-14, 1995. The R. D. and O. provides that Respondent, Western Kentucky University (WKU or University), be ordered to expunge any reference to the adverse action against van der Meer from all University files; post the R. D. and O. for a period of sixty days on appropriate bulletin boards; release the decision to the press without comment; pay Complainant compensatory damages in the amount of $40,000; and reimburse all costs and expenses incurred by Complainant in connection with this proceeding, including attorney's fees. R. D. and O. at 23.

After reviewing the entire record in this case, we concur with the ALJ's very lucid analysis of the testimony and exhibits adduced at trial (R. D. and O. at 2-17) and agree with the

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[1/] The ERA was amended by the Comprehensive Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat 2776, effective October 24, 1992.

ALJ's resulting decision. We accept most of the remedies recommended in the R. D. and O, but reject that part pertaining to the release of the decision without comment to the press, for the reasons set forth below. We also modify the Supplemental R. D. and O. to conform the award of attorney's fees to Departmental practice.

BACKGROUND

Complainant van der Meer is a tenured Associate Professor in the Department of Physics and Astronomy at the University. On February 9, 1995, he was placed on involuntary administrative leave of absence in a letter signed by Robert V. Haynes, Vice President for Academic Affairs. Exhibit (Ex.) 16.[2/] The letter alleged that the reason for the leave of absence was the Complainant's "threatening remarks," as well as his "conduct and presence on campus" which "frightened and threatened" "various members of the University faculty." *Id.*

The letter also prohibited van der Meer from going on the campus for any purpose whatsoever; from acting for any reason on behalf of the University, including in his position as a member of a search committee for the Physics Department; and in effect, required him to seek treatment for a presumed mental condition. The letter further advised van der Meer that the University could require an independent medical examination because his "conduct poses a potential danger to the campus community, . . ." and that a medical release and authorization would be required before van der Meer could resume his academic duties. *Id.*

The letter barring van der Meer from the campus was delivered to van der Meer by two campus plainclothes policemen immediately after one of his classes, and while students and a colleague were present in the classroom. After van der Meer was given Haynes' letter, he was escorted to his office by the campus police to pick up some personal items. He was allowed to make a phone call and was then driven home. Charles Wallace, Detective Sergeant, Campus Police, Tr. at 816-21.

There appears to be little dispute concerning the circumstances leading up to the University's imposition of the involuntary leave of absence on van der Meer. A neutron generator, which is a nuclear device capable of emitting considerable levels of radiation, was installed on the WKU campus early in 1994. Ex. 4. On February 21, 1994,[3/] the neutron generator was tested by two Physics Department faculty members, Dr. George Vourvopoulos and Dr. Douglas Humphrey, to determine whether the initial location where the device was sited had sufficient shielding to contain the radiation that would be released when the generator was operated. The test revealed that the site was not adequately shielded, and the device would have to be moved. Ex. 11.

[2/] Exhibits admitted into evidence at the ALJ's hearing are designated: "Ex."; references to the transcript of the hearing are designated: "Tr."

[3/] This date was alternatively identified as February 22, 1994, by Professor Vourvopoulos, but the discrepancy does not appear to be material. Ex. 10.

The neutron generator test itself, however, raised safety concerns for a semi-retired WKU professor of radiation biophysics, Dr. William G. Buckman. Dr. Buckman expressed these concerns orally to Charles McGruder, the Head of the Physics Department, in April, 1994. Ex. 7. Dr. Buckman apparently wrote a memo outlining his concerns at that time, but did not send it to Dr. McGruder until February, 1995. *Id.*

At that time, the Physics Department at WKU was not a model of collegiality, there being at least two factions among the faculty at odds with each other. Van der Meer was allied with one faction and Vourvopoulos and Humphrey were principals in the other faction.

Van der Meer learned of the February test, and Buckman's apprehensions concerning the safety of the test, from Buckman in April 1994. Van der Meer sent a memo to Dean Martin Houston of the College of Science, Technology and Health, and to Dr. McGruder stating his own concerns regarding the possible violation of the radiation protection regulations. Ex. 8.

When van der Meer learned that Vourvopoulos and Humphrey engaged in what he believed was a potentially dangerous testing of the neutron generator, he demanded an official response. Ex. 14; van der Meer, Tr. at 211-13. When van der Meer did not receive what he felt was an adequate response to his stated concerns, he changed his tactics to gain attention. He began to walk around the WKU campus wearing a whistle around his neck to indicate that he was going to be a whistleblower with regard to the test. Van der Meer, Tr. at 114.

On February 5, 1995, van der Meer sent a note to Thomas Meredith, President of WKU, implicitly advising him that he intended to make the situation concerning the "radiation mishap and a cover up" known to the appropriate authorities. Ex. 14. Four days after sending the note to Meredith, van der Meer was placed on leave of absence. Ex. 16.

DISCUSSION

LIABILITY

The burdens of production and persuasion in whistleblower cases are governed by the statutorily delineated burdens of proof added by the 1992 Amendments to the ERA. Under the ERA as amended, a complainant must prove that protected conduct or activity was a "contributing factor" in causing the unfavorable personnel action alleged by the complainant. 42 U.S.C. §5851(b)(3)(A).[4/] If a complainant successfully proves that his protected activity was a "contributing factor" to the adverse action, the respondent must then demonstrate "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the

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[4/] This is a lesser standard than the "significant," "motivating," "substantial," or "predominant" factor standard sometimes articulated in case law under statutes prohibiting discrimination. *See,* Procedures for the Handling of Discrimination Complaints Under Federal Employee Protection Statutes, 63 Fed. Reg. 6614, 6615 (1998) (to be codified at 29 C.F.R. §24.5(b)(2)).

absence of such behavior," 42 U.S.C. §5851(b)(3)(D). *Talbert v. Washington Public Power Supply System,* ARB Case No. 96-023, ALJ Case No. 95-ERA-35, ARB Fin. Dec. and Order, Sept. 27, 1996, slip op. at 4, citing *Yule v. Burns International Security Service*, Case No. 93-ERA-12, Sec. Dec., May 24, 1995, slip op. at 7-8 and n.7 (courts characterize clear and convincing evidence as more than a preponderance of the evidence, but less than evidence meeting the "beyond a reasonable doubt" standard).

The underlying purpose of the whistleblower provision of the ERA is to protect employees who become aware of, and report violations of the Act by their employers. The scope of the Act is to be broadly construed to prevent intimidation of employees through retaliation. *DeFord v. Sec'y of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); *Boytin v. Pennsylvania Power and Light Co.,* Case No. 94-ERA-32, Sec. Dec. and Order of Remand, Oct. 20, 1995, slip op. at 10-11.

The ALJ found that van der Meer established coverage under the law; that he engaged in protected activity; that he was subjected to adverse action by WKU; and that his protected activity contributed to the adverse action. The ALJ also found that although the University produced evidence that its adverse action was motivated by legitimate, nondiscriminatory reasons, the proffered explanation was not credible. R. D. and O. at 17-19.

We concur that van der Meer was covered under the law. Internal complaints are specifically covered in the 1992 Amendments, 42 U.S.C. §5851(a)(3)(A). Van der Meer's note to the University President clearly constituted protected activity.

We likewise concur with the ALJ that van der Meer was subject to an adverse action by the University. The Respondent contends that no adverse action was taken against van der Meer, because he was paid his full salary during the forced leave of absence. We reject this contention. The ERA protects employees against a broad range of discriminatory adverse actions, including non-monetary losses. *Boytin, supra*, slip op. at 11-13 (worsened working conditions can be construed as adverse action even without salary loss); *Artrip v. Ebasco Services, Inc.,* Case No. 89-ERA-23, Sec. Dec. and Order of Remand, May 21, 1995, slip op. at 6-7 (adverse action need not be monetary loss). Although van der Meer was paid throughout the involuntary leave of absence, his removal from the campus and the consequent publicity negatively impinged upon his professional and personal reputation. For example, the University's action against van der Meer was not accompanied by any timely official explanation, and therefore gave rise to unsubstantiated speculation regarding the cause for van der Meer's removal. One of van der Meer's students, who was present at the time when the campus police delivered Haynes' letter, testified that the speculation among the students regarding the probable reasons for van der Meer's removal ranged from drug smuggling to sexual molestation. Christopher Wheatley, Tr. at 343, 350-54.

It appears that most of the information about van der Meer's removal that became available to faculty and students at WKU (as well as the general public) came from local newspaper articles. One article in the local newspaper quoted the University's counsel as saying

that the reason for van der Meer's removal from the campus was his harassing and stalking behavior, which was endangering employees' safety. *Id.,* Tr. at 343-44, 353; Ex. 40.

There is no question that public embarrassment and damage to van der Meer's professional reputation were a direct consequence of WKU's hasty actions. Denying an academician the opportunity to teach and conduct research is a significant and compensable adverse action. The Board finds that the fact that van der Meer was placed on paid leave, rather than unpaid leave, to be no barrier to a finding of adverse action.

Although van der Meer's direct monetary loss is relatively minor, the Board takes note of it. Complainant was unable to attend a professional meeting where he intended to promote a new textbook he was completing. His inability to promote the textbook in this forum may have resulted in a monetary loss, albeit speculative. Van der Meer, Tr. at 156. In addition, van der Meer testified to an out-of-pocket loss of $250 because he had to give up coaching a University sponsored chess club. *Id.*, Tr. at 155. Van der Meer did not provide any cost information concerning medical bills that could be attributed to the campus incident.

An inference of causation is clearly raised by the temporal proximity (four days) between van der Meer's note to WKU President Meredith and the University's imposition of the involuntary leave of absence, *Combs v. Lambda Link,* ARB Case No. 96-066, ALJ Case No. 95-CAA-18, ARB Final Dec. and Order, Oct. 17, 1997, slip op. at 9 n.4; *White v. Osage Tribal Council,* ARB Case No. 96-137, ALJ Case No. 95-SDW-1, ARB Final Dec. and Order, Aug. 8, 1997, slip op. at 7, *citing Bechtel Const. Co. v. Sec'y of Labor,* 50 F.3d 926, 934 (11th Cir. 1995). In addition, the ALJ found the University's proffered justification for its actions unconvincing. R. D. and O. at 19-20. The ALJ determined that the statements of governing University administrators were not credible and set forth specific instances where their testimony was clearly contrary to previous statements or actions. The ALJ also faulted the University for failing to follow "its well-established policy of informal resolution of faculty grievances before taking formal action with respect to . . . Dr. van der Meer's alleged harassing and threatening activity." R. D. and O. at 20. The unexplained shunning of the normal grievance procedure, and the failure to afford Dr. van der Meer the usual opportunity for notice and response prior to his removal, is further evidence of improper motivation by the University.

The ALJ concluded that the real motivation for the adverse action taken against van der Meer was the potential loss of the University's federal grants if WKU's nuclear license was jeopardized by a determination that it engaged in improper practices. R. D. and O. at 19. The ALJ found Dean Houston to be the driving force behind the adverse action against van der Meer, and that Houston's February 8, 1995 memorandum to Vice President Haynes evidenced a continuing concern regarding van der Meer's complaints about the neutron generator test. Houston's concern was first expressed on April 20, 1994 when he warned van der Meer: "Wieb, if you keep up this action, and the University loses its license, I may ask you to resign ..." (Houston, Tr. at 873).

The record adequately supports the ALJ's finding that the "action" Houston was referencing in his comment of April 20, 1994, was van der Meer's questioning of the neutron generator test. There would be no reason for Houston to threaten van der Meer with possible termination if the University lost its nuclear license unless he was concerned about van der Meer's activities pertaining to the neutron generator test. We can think of no credible reason for the Dean to be concerned about WKU's nuclear license based on van der Meer's allegedly untoward actions regarding Drs. Vourvopoulos and Humphrey.

We also agree with the ALJ's conclusion that the statements in the leave of absence letter supporting the University's version of events based on Houston's memo are not worthy of belief. *Id.* at 19-20. The Board ordinarily gives deference to an ALJ's credibility findings, since the ALJ has the benefit of personally gauging the witness's demeanor as well as hearing the substance of the testimony. *Pogue v. U.S. Dep't of Labor,* 940 F.2d 1287, 1289 (9th Cir. 1991)(agency should accord substantial deference to credibility findings of ALJ); *Lockert v. U.S. Dep't of Labor,* 867 F.2d 513, 519 (9th Cir.1989)(reviewing court will uphold "ALJ's credibility findings unless they are 'inherently incredible or patently unreasonable.'")

Our review of the record, including the transcript of the hearing, reveals ample support for the ALJ's finding that the testimony of Houston lacked credibility. Houston's testimony contains a number of contradictions regarding the dates when he claimed he first learned about the neutron generator and the potential problems concerning the initial testing of the device. For example, Houston testified that he first learned of the neutron generator test when van der Meer came to his office "very upset . . . and said that we have a neutron generator and there's been a radiation leak." *Id., Tr.* at 863-64. Houston testified that this encounter was prior to van der Meer's memo of April 19, 1994. *Id.,* Tr. at 864, 876. However, Houston also testified that he didn't know when the new neutron generator had been delivered or that the University had a neutron generator that was replaced until he learned that there was a new generator at the hearings concerning the testing. *Id.*, Tr. at 866.

We note that on the same day that van der Meer sent his memo to Houston concerning the possible breach of radioactive security procedures (April 19), there was a second event that may have fueled Houston's unease regarding the University's nuclear license. On that day, the University student newspaper ran an article regarding the problem of unlocked campus buildings. The lead for the article was a quote from the campus police lieutenant that a room in one of the science buildings that had a sign on the door reading "Radioactive Materials" was left open almost every night. Although the newspaper account did not identify any specific academic department as the offending unit, the article could appear to lend support to van der Meer's voiced concerns about the handling of radioactive materials at WKU. Ex. 5.[5/]

[5/] Vourvopoulos testified that when he checked with the police officer, he was told that the room was in the Biology wing of the building and that his lab was not involved. Tr. at 749-50. Nevertheless, Vourvopoulos requested that the locks in his lab be changed to a more secure, restricted access. Tr. at (continued...)

The University's counsel suggests that Houston's April 20 warning to van der Meer was motivated by a fear of sabotage that somehow was linked to van der Meer.[6/] We find this suggestion unconvincing. Houston testified that on April 20, Dr. Connelly, his assistant dean, mentioned that Dr. Vourvopoulos wanted to change the locks on some lab doors where radioactive substances were stored because of "some hypothetical thing that Dr. Vourvopoulos had that might cause the university some problems losing their license." Houston, Tr. at 866. Houston testified that Dr. Connelly told him in "a very general way" about Vourvopoulos' concerns about some sabotage. *Id*., Tr. at 868.

The link between Houston's threat to dismiss van der Meer and any reasonable apprehension of sabotage by van der Meer is missing. Other than van der Meer's whistleblowing activities, nothing distinguishes him from other members of the faculty. There is no basis in the record for crediting any suggestion that van der Meer would put at risk a distinguished career in radiation biophysics by engaging in reckless and illegal handling of nuclear materials or records.

We find a more credible explanation for Houston's concerns that the University's nuclear use license could be imperiled was van der Meer's persistence in pursuing the possible impropriety of the neutron generator test. We agree with the ALJ's finding that when Houston threatened van der Meer with forced resignation if the University lost its license, he was responding to van der Meer's whistleblowing activities and not to his own alleged concerns about potential sabotage by van der Meer. Nothing in van der Meer's past would lead Houston to suspect van der Meer of planning sabotage. It is unclear even what form the sabotage would take that would threaten the University's license to operate the neutron generator. Under the circumstances, if Houston truly feared that van der Meer was planning sabotage, presumably his warning would be direct and unambiguous. It is reasonable to conclude, as the ALJ did, that Houston's threat to force van der Meer's resignation was prompted by van der Meer's protected activity and was carried out in February, 1995 (albeit in a modified fashion) because van der Meer persisted in seeking a response to his complaint regarding the neutron generator test.

The ALJ likewise found President Meredith's testimony not credible. In light of Meredith's active personal involvement in university matters of much less import, his statements that he was unaware of the preliminary actions which led to the unprecedented removal of a tenured faculty member from all campus activities were not plausible. Meredith, Tr. at 537-44, 551-53; R. D. and O. at 13-14.

We find no reason to set aside the ALJ's credibility determinations, especially since the ALJ had the advantage of observing the demeanor of the witnesses when they testified at the

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[5/](...continued)
755-56.

[6/] Respondent's Brief at 12.

hearing. *See Dorf v. Bowen,* 794 F.2d 896, 901-02 (3rd Cir. 1986) (an ALJ may rely on a number of factors related to the content of a witness's testimony, *e.g.* internal inconsistency, inherent improbability and witness self-interest); *Sheridan v. E. I. DuPont de Nemours, et al,* 100 F.3d 1061, 1066-67 (3rd Cir. 1996) (finding that a complainant presented a *prima facie* case of discrimination and disbelieving the employer's proffered reasons permits an inference of discrimination, *citing St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993). We therefore concur with the ALJ's factual findings, and conclude that van der Meer was subjected to unlawful retaliation because of his protected activities.

DAMAGES

The ERA's implementing regulations provide for the award of compensatory damages to a complainant if deemed appropriate. 29 C.F.R. §24.6. Compensatory damages are designed to make an aggrieved party whole.

In this case van der Meer suffered little out-of-pocket loss; he lost no salary as a result of the leave of absence, and there is no evidence of uncompensated medical costs. It is not possible to quantify the amount of royalty revenue which van der Meer lost because he was unable to promote his textbook at the conference. Van der Meer, Tr. at 156. Still, there can be little question that Complainant suffered professionally as well as personally. Van der Meer was humiliated when he was physically escorted from his classroom by the campus police, in front of his students, and then hustled through gathering up some personal effects from his office under the watchful eyes of the police. *Id.*, Tr. at 147-51. "It was . . . the worst day of my life," he testified. *Id.*, Tr. at 151.

The University's actions after barring van der Meer from the campus exacerbated the situation, because the University offered no timely information explaining its action. Instead, on June 22, 1995, more than four months after van der Meer had been removed from the campus, the University (speaking through its counsel) told the local community newspaper, The Park City Daily News, that van der Meer was removed from the campus because of "his endangering employees [of the University]," and that he would have to have a psychological examination before he would be permitted back on campus. Ex. 40.

Van der Meer also testified that he could feel the students shying away from him even in the most informal situations as being "the professor who lost it." Van der Meer, Tr. at 159. Van der Meer further testified that he suffered in his professional development when he was prevented from going to the Biophysics conference. *Id.*, Tr. at 156.

The extraordinary and very public action taken against Dr. van der Meer by the University surely had a negative impact on van der Meer's reputation among the students, faculty and staff at the school, and more generally in the local community. Likewise, it is more probable than not that Complainant was subjected to additional stress by the University's failure to follow the conciliatory procedures contained in the Faculty Handbook, Ex. 67.[7/]

[7/] Although the Faculty Handbook does not have a specific reference to involuntary leaves of absence, the procedures pertaining to Dismissal for Cause seem to be pertinent, even though dismissal is more dire than a limited term of absence. The Handbook, at 22-23, recommends a genuine effort to resolve the matter through preliminary inquiry, consultation, discussion and confidential mediation. Apart from some informal, and generally nonspecific, discussions with Drs. McGruder and Houston, none of the recommended methods were observed prior to the imposition of the leave of absence.

The ALJ's reliance on the range of previously awarded compensatory damages to aggrieved complainants is satisfactory. R. D. and O. at 22. We find the University's actions as egregious as those of the other employers where compensatory damages were awarded, and we affirm the ALJ's award of $40,000.

ATTORNEY'S FEES

Complainant entered into a forty percent contingent fee arrangement with his counsel. Contingent fees are usually paid out of a complainant's award; however, the environmental whistleblower statutes, as a matter of public policy, provide for fee shifting as a means to encourage employees to report their employers' potentially endangering practices.

The longstanding practice of the Department of Labor is to employ the "lodestar method" to determine the proper amount of attorney's fees awarded under the environmental whistleblower statutes. *Lederhaus v. Paschen & Midwest Inspection Service, Ltd.,* Case No. 91-ERA-13, Jan. 13, 1993, Sec. Final Dec. and Order, slip op. at 3-4, *citing City of Burlington v. Dague,* 505 U.S. 557 (1992) (attorney's fees amounts may not be enhanced above the lodestar method under federal fee shifting statutory provisions). The lodestar method requires multiplying the number of hours reasonably expended by a reasonable hourly rate. *Backen v. Entergy Operations, Inc.,* ARB No. 97-021, ALJ Case No. 96-ERA-18, ARB Dec., Dec. 12, 1996, slip op. at 1 n.2, *citing Hensley v. Eckerhart,* 461 U.S. 424 (1983). As the Secretary held in *Lederhaus:* "Respondents are liable only for reasonable attorney's fees no matter what Complainant may have contracted to pay his attorney." *Id.* at 5.

We note that our Preliminary Order of June 27, 1997, pursuant to §5851 of the ERA, ordered the University to pay Complainant's attorney $16,000 in attorney's fees and costs. That amount will be credited toward the amount of attorney's fees this Board will ultimately award once an appropriate petition for fees is submitted. Complainant's attorney's fee petition must include: adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent for practice in the local geographic area; records indicating date, time and duration necessary to accomplish the specific activity, each activity being identifiable as pertaining to the case; and all claimed costs, specifically identified. Complainant's attorney is entitled to fees for time devoted to this matter before this Board, with application for attorney's fees for the appellate phase of the case likewise governed by the lodestar method as set forth above.

PROHIBITION OF COMMENT REGARDING THE DECISION AND ORDER

The Board has no authority to prohibit comment by Respondent, or its attorney, to the media expressing their opinions of either the ALJ's Recommended Decision and Order or this Final Decision and Order. We do not adopt that portion of the R. D. and O. prohibiting comment.

ORDER

Respondent Western Kentucky University is ordered to:

1. Expunge any reference to the adverse action against Complainant Wieb van der Meer from all University files;

2. Post the ALJ's Recommended Decision and Order and this Final Decision and Order on appropriate bulletin boards on campus for a period of not less than sixty (60) days;

3. Pay Complainant compensatory damages in the amount of $40,000;

4. Pay to Complainant all costs and expenses, including attorney's fees reasonably incurred by him in connection with this proceeding before this Board. Complainant's counsel is allowed thirty (30) days for submission and service of a properly documented application for attorney's fees and costs as set forth above to this Board. Respondent has fifteen (15) days from receipt of such application to file objections before this Board. Complainant's attorney's fees ordered to be paid by our Order of June 27, 1997, will be credited toward any amount ultimately awarded. Any excess amount will be ordered to be repaid to Respondent.

SO ORDERED.

KARL J. SANDSTROM
Member

PAUL GREENBERG
Member