

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 27 April 2010**

Case No.: 2009-CAA-00010

In the Matter of:

**STEPHEN C. MILLER**  
Complainant

v.

**LOWER MAKEFIELD PUBLIC  
WORKS DEPARTMENT**  
Respondent

Appearances

Stephen C. Miller  
Pro-Se

David J. Trulove, Esq.  
For Respondent

Before:

Ralph A. Romano  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

Complainant brings this proceeding under six different whistleblower protection statutes<sup>1</sup> hereinafter the "Acts".

The matter was assigned to me on July 31, 2009, and the originally set trial date of September 16, 2009 was continued to December 10, 2009 at Respondent's request.

At trial, Complainant testified on his own behalf, and Respondent presented three witnesses. Complainant offered C 1- 47 (excluding C 20 and C 43), and Respondent submitted

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<sup>1</sup> Clean Air Act, 42 USC 7622; Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC 9610; Federal Water Pollution Control Act, 33 USC 1367; Safe Drinking Water Act, 42 USC 300 j-9(i); Solid Waste Disposal Act, 42 USC 6971; and Toxic Substance Control Act, 15 USC 2622.

R 1 through R 3. After trial, Complainant submitted C 48 and C 49, which are hereby received in evidence (CX 48, over the objection of Respondent).

Final briefs were submitted by March 5, 2010.

### THE LAW

In a case such as this, the burden is on the Complainant to prove by a preponderance of the evidence that retaliation for protected behavior was a motivating factor for the adverse employment action. First, the complainant must “make a *prima facie* showing that protected activity motivated Respondent’s decision to take an adverse employment action.” *West v. Systems Applications Int’l*, No. 94-CAA-15 at 5 (Secy. Apr. 19, 1995). “[T]o establish a *prima facie* case, a Complainant must show that: (1) he engaged in protected conduct; (2) the employer was aware of that conduct; and (3) the employer took some adverse action against him.” *Id.* At 5. In addition, he (4) “must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action.” *Id.* 6. *Accord Dartey v. Zack Co.*, No. 82-ERA-2 at 7-8 (Secy. Apr. 25, 1983). The respondent “may rebut [the] showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. Complainant must then establish that the reason proffered by Respondent was pretextual.” *West* at 5. As emphasized in *Crozier v. Westinghouse Hanford Co.*, 92-CAA-03 (Secy. Jan. 12, 1994) a complainant’s burden of proof in a whistle blower action is formidable:

The complainant has the ultimate burden of persuading that the legitimate reason articulated by the respondent was a pretext for discrimination, either by showing that the unlawful reason more likely motivated it or by showing that the proffered explanation is unworthy of credence. At all times, the complainant has the burden of showing that the reason for the adverse action was discriminatory.

*Id.* at 7 (citation omitted).

Where management is aware of protected activities when it takes adverse employment action in temporal proximity sufficiently close to the protected activity it gives rise to an inference of causation. *Ertel v. Giroux Brothers Transportation, Inc.*, 88 STA 25 (Sec. Feb. 15, 1989), at 15; *Stone and Webster Engineering, Inc. v. Herman*, 115 F.3d 1568 (11<sup>th</sup> Cir. 1997); *Mandreger v. Detroit Edison Co.*, 88 ERA 17 (Sec. March 30, 1994); *Crosier v. Portland General Electric Co.*, 91 ERA 2 (Sec. 1994); *Samodov v. General Physics Corp.*, 89 ERA 20 (Sec. 1993). See also: 29 CFR 24.104(d)(3).

### OPERATIVE FACTS

Complainant has been employed by Respondent as an equipment operator for approximately three years (Tr. 12). Henry Hoffmeister is his supervisor, and the director of public works at Respondent (Tr. 121-122). Paul Leva is the head mechanic at Respondent whose supervisor is also Mr. Hoffmeister (Tr. 90). Terry Fedorchak is the manager of Lower Makefield Township (Tr. 154) and Tim Heasley, is a co-worker there (Tr. 96).

Complainant testified that on February 24, 2009, he observed an oil spill incident at Respondent's recycling yard, of which spill area he took photos (Tr. 13-18; C 2-C 6). Hoffmeister testified that this incident took place on February 26, 2009 or February 27, 2009 (Tr. 126). On February 28, 2009, Complainant telephoned the Pennsylvania Department of Environmental Protection (DEP) and reported the spill (CX 10). Hoffmeister first learned of the spill on March 2, 2009 (Tr. 126), but, due to snow, did not attempt to clean up the spill until March 3, 2009 (Tr. 126-7). Hoffmeister testified that on March 5, 2009, DEP investigated the spill (Tr. 138), although other evidence notes such date as March 3, 2009 (CX 11). Hoffmeister became aware of Complainant's February 28, 2009 telephone call to DEP, on March 6, 2009 (Tr. 132).

At or about the time of the foregoing events, Complainant, who sought union representation other than that then available at Respondent, was involved in a conflict about this matter with Heasley, President of the current union, and Leva, the Shop-Steward, (see C 48). Leva had removed a posting made by Complainant calling for a quarterly meeting, and a confrontation ensued on February 27, 2009 between Leva and Complainant about this. Leva there felt he was physically threatened by Complainant (Tr. 96; R 1 tab A). Heasley overheard an apparently threatening part of this conversation (R 1 – tab B). Leva thereafter complained about this incident to Hoffmeister, who turned the matter over to Fedorchak (R 1- tab A), who suggested that Leva speak to the police chief (TR. 106), who in turn left it up to Leva to decide whether to pursue the matter criminally or "administratively" (Tr. 107). Later, Leva decided to handle it administratively rather than criminally (Tr. 108; R 1 tab C). Upon learning of this, Fedorchak wrote to Complainant requesting his version of the event in writing (Tr. 159; R 1 tab D). Complainant received a copy of this request on March 11, 2009 (Tr. 159), the same date of the letter above referenced where Complainant demanded the resignation of Heasley and Leva as officers of the current union (C 48). On March 16, 2009, Fedorchak asked for a reply to his March 11, 2009 letter (Tr. 160-61; R 1 tab E), and supplied another copy of this request to Complainant (R 1 Tab E). No reply by Complainant was made until the end of that day, to the effect that a reply was not necessary (see R 1 Tab E; Tr. 161-162). On March 18, 2009, upon consultation between Fedorchak and Hoffmeister, Complainant was suspended for 3 days for the Leva incident, and 3 days for insubordinate failure to respond to Fedorchak's requested version of events from Complainant (R 1 Tab H; Tr. 163). Throughout a union grievance procedure, up through April 6, 2009 (R 1 Tab O), Complainant failed to provide his version of what happened between he and Leva (Tr. 164-5), but had, by letter dated March 26, 2009, formally complained to Respondent that he was being illegally retaliated against for both his union representation efforts as well as whistle blowing activities (C 24). On April 13, 2009, both 3 day suspensions were reduced; the Leva incident to a written warning expugnable after 6 months without further incident, and the insubordination charge to a verbal warning (R1, Tab R).<sup>2</sup>

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<sup>2</sup> Noted, is that Complainant filed the instant complaint on March 31, 2009 (ALJ 2). This complaint was first received by Respondent on April 20, 2009 (C 36) after the April 13, 2009 suspension reduction.

Complainant has been repaid for the 6 days for which he was suspended (Tr. 39), and Respondent's brief notes that "...There is no evidence that the written warning remains in Complainant's file" (Br. 15), which I take to mean that no such written warning is in that file.

### DISCUSSION

Complainant argues that he was retaliated against due to both his union and whistle blowing activities. Since his pay has been restored, and no written warning appears in his file (supra), he seeks recovery of \$500 for attorneys fees (presumably for the legal representation surrounding counsel's reply to Respondent dated March 26, 2009 – C 24), as well as the \$639.79 cost for the hearing transcript. He sensibly also notes that confirmation of his (alleged) victimization by way of a favorable decision, will document the retaliation activity as well as help prevent future retaliation.

Respondent insists that it suspended Complainant because, absent Complainant's expression of his version of what took place between himself and Leva, repeatedly sought by management, the Leva complaint of work place threatened violence, standing alone, provided a legitimate, non-discriminatory basis for the adverse employment action.

Respondent admits Complainant's reporting of the oil spill is protected activity under the Acts (Br. 12). Hoffmeister, a Respondent manager, admits he knew of this protected activity on March 6, 2009 (C 12; Tr. 132), before the March 18, 2009 suspensions. No one disputes that employment action adverse to Complainant, i.e., the suspensions, was taken. That action having been taken shortly after the protected activity, gives rise to the inference that the reporting of the spill was a motivating factor in the suspensions. Complainant has thus established a prima facie case of violation of the Acts.

I find, however, that Respondent, has rebutted this showing by producing evidence that the suspensions were motivated solely by the Leva complaint of threatened work-place violence, unanswered by Complainant. Fedorchak and Hoffmeister time and again invited Complainant to negate in some way, Leva's impression of threatened violence. Complainant time and again declined to offer any exculpatory version of the events. Indeed, gone undenied by Complainant throughout this proceeding, is Leva's testimony that after lunch, on the very day of the subject confrontation, February 27, 2009, he approached Complainant and "...said [that he]...wanted to know if he [Complainant] had any reason to recant what he [Complainant] had said earlier in the day...to make me [Leva] feel less threatened". Leva further explained to Complainant that he had not yet submitted a "very serious" written complaint against him for threatening him, and "...that if there was anything that he [Complainant] could tell [Leva]...to alleviated those circumstances, ...[Leva] would be all ears". Complainant refused to speak to Leva about this (Tr. 102-3). And later that day, not denied by Complainant during this proceeding, Complainant told Leva that "...I was just...I flew off the handle, and I didn't mean anything by what I said, and it was just me being hot under the collar".<sup>3</sup> Leva replied that he

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<sup>3</sup> Astoundingly, none of this testimony is called to my attention in Respondent's brief!

“wish[ed] [Complainant] had said that to [him] an hour ago because [he had] already submitted [his] complaint” (Tr. 103). To repeat, Complainant never denied that these conversations took place, but weakly noted in his brief that Leva’s testimony in this respect “...demonstrates he [Leva] was unsure if he was threatened...” (Br. 7). Also, Complainant, at last and only in his brief (at 7), finally relates to someone his version of the February 27, 2009 exchange with Leva , i.e., that he told Leva “...without stronger union representation someone could get hurt”. The foregoing strongly suggests some level of distortion of facts and insincerity on behalf of Complainant, which both explains his reluctance/refusal to offer his version of the incident to management, and supplies, by default, a legitimate basis for management to suspend him.

Essentially, Complainant’s case is centered on the proposition that the Leva incident was a trumped-up charge by Respondent, pursued only after he reported the spill, and in retaliation for his whistle blowing.<sup>4</sup> He offers the delay in Respondent’s initiation and investigation of this incident (from the 2/27 incident date to the first 3/11 request for his version of the events), and the lack of “due process” in the investigation, as indicia of pretextual foundation for the suspensions. But, one of the prime actors in that incident, Leva, testified, without denial by Complainant, that Complainant virtually admitted that he threatened him, or “...flew off the handle...”, compelling the conclusion that the charge was not trumped up due to the whistle blowing or any other reason. Moreover, management’s delay in finalizing the charge was itself occasioned by Complainant’s refusal to comply with management’s request for his version of the events that occurred. So too, responsibility for the perceived lack of investigative “due process” may only be laid on Complainant as he refused to engage in the “due process” offered him by management, that is, his consistent refusal/failure to state his version of events. That he wasn’t interviewed, given insufficient “notice of the charges”, etc., is his imposition of his own standards of “due process”, and not those imposed by the company, which standards cannot, without further evidentiary elaboration, be considered in themselves falling short of “due process”.<sup>5</sup>

Finally, Complainant’s assertion that he was treated differently from other employees in similar situations (Br. 6), i.e., disparate treatment, is not supported in the record. The statement, “I can tell you of several other more severe employee conflicts where by (sic) the punishment was less severe in comparison”, does not rise to the level of evidence in support of this argument.

In summary, I find that Complainant has failed to prove by a preponderance of the evidence that retaliation for the protected activity was a motivating factor for the adverse employment action.

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<sup>4</sup> While Complainant was permitted to introduce evidence on his union activities in order to provide the totality of the facts surrounding his claim and in consideration of his pro se status, there is no jurisdiction in this case to provide a remedy for employer retaliation for activity relating to union organizing efforts.

<sup>5</sup> There is no evidence in this record concerning Respondent’s “...customary disciplinary procedure...”, noted at page 6 of Complainant’s brief.

ORDER

The complaint of Stephen Miller is **DENIED**.

**A**

Ralph A. Romano  
Administrative Law Judge

Cherry Hill, New Jersey

**NOTICE OF REVIEW:** The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.