



In the Matter of:

JESSE J. ROBINSON, II,

ARB CASE NO. 96-075

COMPLAINANT,

ALJ CASE NO. 94-TSC-7

DATE: September 23, 1996

v.

MARTIN MARIETTA SERVICES, INC.;
LOCKHEED MARTIN CORPORATION;^{1/}
MARTIN MARIETTA TECHNOLOGIES;
OFFICE OF INSPECTOR GENERAL; and
NATIONAL AERONAUTICS & SPACE ADMINISTRATION,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{2/}

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Toxic Substance Control Act (TSCA), 15 U.S.C. § 2622 (1988), and the Clean Air Act (CAA), 42 U.S.C. § 7622 (1988) (collectively, the environmental acts). Complainant, Jesse J. Robinson, II, complained that the Martin Marietta respondents violated the environmental acts when Martin Marietta took certain

^{1/} One originally named respondent, Martin Marietta Corporation, changed its name to Lockheed Martin Corporation in 1995. *Varnadore v. Oak Ridge National Laboratory*, Case Nos. 92-CAA-2, et al., Final Consol. Dec. and Ord., June 14, 1996, slip op. at 1 n.1. The parties have not notified us if the other related corporations have undergone name changes.

^{2/} On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under these statutes and the implementing regulations to the newly created Administrative Review Board (ARB). Secretary's Order 2-96 (Apr. 17, 1996), Fed. Reg. 19978 (May 3, 1996) (copy attached).

Secretary's Order 2-96 contains a comprehensive list of statutes, executive order, and regulations under which the Administrative Review Board now issues final decisions. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982) implementing this reorganization is also attached.

adverse actions against him, and that the remaining respondents, the National Aeronautics and Space Administration (NASA) and its Office of Inspector General (OIG), violated the environmental acts when NASA's OIG declined to investigate a safety problem that Robinson brought to its attention.

The Administrative Law Judge (ALJ) found that NASA and OIG were immune from suit under the TSCA's employee protection provision because the United States has not waived its sovereign immunity. Nov. 18, 1994 Recommended Order at 2.

In a later Recommended Decision and Order (R. D. O.), the ALJ found that NASA was not a joint employer of Robinson and dismissed the CAA complaint against the NASA respondents as well. Concerning the claims against the Martin Marietta respondents, the ALJ recommended dismissing the complaint on the ground that Robinson did not establish a *prima facie* case of a violation of the environmental acts.

Although we agree with the dismissal recommendation, we reach that conclusion through a different legal analysis as explained below.

BACKGROUND

Robinson was employed by Respondent Martin Marietta Services, Inc. as a development engineer and worked at NASA's Johnson Space Flight Center. T. 70. In September 1992, two scientists disclosed to NASA that they had invented a Dried Blood Collection System (DBCS) and would be seeking a patent for it. CX 13. The next month, Robinson was assigned to work on the DBCS, which was a method to preserve blood serum and plasma samples on board a space flight. T. 328, 613-614, 618, 631.

Fellow engineer Skip Todd expressed concern in December 1992 that a catalyst expected to be used as an oxygen scavenger in the DBCS might be a safety hazard. T. 723-724; RX 76. Robinson expressed similar concerns to his superiors at Martin Marietta. T. 98-101. In March 1993, after Robinson complained to his management that Todd had been promoted to Job Order Manager on the DBCS project, RX 88, Robinson was also promoted to that position. T. 262-263. A July 1993 performance evaluation praised Robinson's engineering skills but stated that he needed to improve his interpersonal skills. RX 99.

Preliminary tests found the ignitability of the catalyst to be acceptable, CX 38, but Robinson wrote in a memorandum to his superiors that there was a potential touch temperature problem with the catalyst, recommended further testing, and warned that any attempt to "cook" the data would seem suspicious. RX 109 at 3. One of the co-inventors of the DBCS, Dr. Clift, yelled at Robinson concerning the reference to cooking the data. T. 119-121. Robinson wrote the protocol for conducting a touch temperature test of the catalyst, was present during the test, and approved the use of the catalyst on board the October 1993 shuttle flight. RX 1, 111; R. 240, 243.

After testing was completed, Robinson received assignments to other projects because there no longer was a need for two manufacturing engineers on the DBCS. T. 129-130, 665-666, 776-777. Robinson later complained to a member of the staff of NASA's OIG that he had

been relieved of his normal duties after he expressed concerns about the safety of the catalyst. CX 4 at 2; T. 141-143.

Christy Hinders, a co-op student working as an intern at NASA, had the assignment to formulate and design an in-flight maintenance tool kit. T. 827-829. Robinson was assigned as the primary engineer on the mini-oscilloscope, one of the tools in the kit. T. 829-830. Hinders attempted to redesign the mini-oscilloscope with only the aid of a draftsman. T. 123-135. When Robinson informed his management that Hinders' design violated general engineering standards, T. 135, the managers asked him to cooperate with her. T. 137. Robinson refused to sign or approve the drawing set of Hinders' modifications to the oscilloscope, and as a result Hinders' version was not built. T. 138.

Robinson asked his managers to give him a different assignment because he disliked the mini-oscilloscope project. T. 261-262; RX 119. At about that time, Robinson failed to attend three required meetings and showed up late or unprepared for others. T. 269-272. Although he had work to do, Robinson played games, read the newspaper, wrote stories, and slept while at work. T. 274-275. As a consequence, in February 1994, Robinson's supervisor, Pat Hite, issued a written warning that further similar behavior would be viewed as refusal to do his job and would result in sanctions. T. 273; RX 150. Hite also placed Robinson on a weekly supervision schedule to monitor his progress.

Hite suggested that Robinson file a formal grievance concerning the catalyst used in the DBCS when Robinson raised the issue at one of the supervision meetings. T. 799-800; *see* RX 121. Hite discontinued his investigation of the use of the catalyst when he learned that Robinson had no further safety concerns about it. T. 804, 813.

In late April 1994, Robinson submitted a resignation letter stating that his "goals, beliefs and standards are essentially incompatible with those of NASA, Martin Marietta, and their respective management." RX 126. He asked that his resignation be made effective at a future date after he had secured other employment. *Id.* As a result, Hite stopped the weekly supervision sessions and stopped assigning Robinson new work. T. 806-808.

In May 1994, Martin Marietta's in-house newspaper published an article about the Medical Sciences Products Group that discussed the DBCS project but did not mention Robinson's name. CX 70. At the time, Robinson was not a member of that Group. T. 288. A short time later, Robinson learned that his name was not included on the patent application form submitted for the DBCS. CX 30.

Martin Marietta officially accepted Robinson's resignation and set June 24, 1994 as his last day. T. 284. Robinson sent his managers a memorandum rescinding his resignation. CX 51 at 3. Nevertheless, Martin Marietta treated Robinson as having resigned. The company later contested Robinson's right to collect benefits for unemployment on the ground that he had resigned and was not entitled to those benefits. T. 177.

DISCUSSION

Procedural Fairness

Robinson contends that the ALJ erred by declining to compel discovery responses, denying his request for a continuance of the hearing, and disallowing the testimony of two witnesses. Comp. Br. 25-26. We address these matters *seriatim*.

Robinson contends that the ALJ acted unfairly when he did not rule promptly on his discovery requests, required that they be re-served, and ruled that new requests were served too late for him to compel answers. Comp. Rebuttal Br. at 12-13. The ALJ explained that he did not rule on Robinson's initial discovery request that was styled a "Motion for Turnover of Documents," because under the rules, a party must begin with a request for document production, show that the request was not complied with, and only then request an order compelling production. Dec. 7, 1994 T. at 5-6.^{3/} After granting a continuance to an agreed date, the ALJ admonished the parties to do their discovery promptly and correctly because he was not inclined to grant further hearing postponements. Dec. 7, 1994 T. at 36. The ALJ later denied both Robinson's and Martin Marietta's motions to compel discovery responses because they were not submitted in time for him to address the issues prior to the hearing. T. 14.

An ALJ is given wide discretion in limiting discovery and his rulings will be reversed only when arbitrary or an abuse of discretion. *Celcom Communications Corp. V. FCC*, 789 F.2d 67, 69 (D.C. Cir. 1986); see *Corwin v. Marney, Orton Investments*, 843 F.2d 194, 200 (5th Cir.), *cert. denied*, 488 U.S. 924 (1988) and *Washington v. Norton Manufacturing, Inc.*, 588 F.2d 441 (5th Cir.), *cert. denied*, 442 U.S. 942 (1979) (both concerning appellate review of district court). We find that the ALJ did not abuse his discretion in declining to compel responses to Robinson's document requests.

Robinson requested a continuance of the hearing because of his new position as a part time college professor, stating that "[i]t would be strongly inadvisable from a career standpoint for complainant to be involved in the intensity of a whistleblower trial during any of the weeks during which he is working." Jan. 19, 1995 Motion at 3. Robinson asked that the hearing be held during the college's spring break week. *Id.* The ALJ denied the continuance because he was unavailable to hear the case during the requested week, and Robinson did not state that it was impossible for him to attend the hearing or to alter his part time work schedule to accommodate the prior scheduled hearing. Jan. 27, 1995 Order Denying Motion for Reconsideration.

Continuances are to be granted only in cases of "prior judicial commitments or undue hardship, or a showing of other good cause." 29 C.F.R. § 18.28(a). We agree with the ALJ that Robinson did not show good cause for continuing the hearing.

We now turn to the exclusion of two of Robinson's witnesses. According to Robinson's offer of proof, his pastoral counselor would have testified that Robinson was "suffering from

^{3/} Reference is to the transcript of a prehearing conference on December 7, 1994.

symptoms of depression and anxiety.” T. 8. This testimony would be relevant to Robinson’s entitlement to compensatory damages, which only comes into play if Robinson prevails in his complaint. Since Robinson has not prevailed, excluding the counselor’s testimony was, at most, harmless error. *See McDonough Power Equipment, Inc. V. Greenwood*, 464 U.S. 548, 553 (1984) (courts should ignore errors that do not affect the essential fairness of a trial); *see also Crosby v. United States Dept. Of Labor*, 1995 U.S. LEXIS 9164, No. 93-70834 (9th Cir. Apr. 20, 1995) (no reversible error where certain witnesses did not testify, since ALJ determined that their testimony would have been immaterial).

The second excluded witness, Robert Tyndall, is a retired special agent of the Office of Inspector General of a Federal agency, who would have testified that the NASA OIG violated basic standards of law enforcement when it failed to investigate a safety concern Robinson raised. T. 21-23. Thus, Tyndall’s testimony was only relevant to the issue of the NASA respondents’ liability. We explain below that, as to the NASA respondents, the TSCA complaint correctly was dismissed because of the sovereign immunity of the United States and the CAA complaint properly was dismissed because NASA is not within that statute’s definition of the Complainant’s “employer.” Since Tyndall’s testimony does not concern the issues of sovereign immunity or whether NASA was Robinson’s employer, the exclusion of his testimony likewise was, at most, harmless error. *McDonough*, 464 U.S. at 553; *Crosby*, 1995 U.S. LEXIS 9164.

Finally, Robinson objects because the ALJ should have recused himself. An ALJ may be disqualified upon a showing of personal bias. *See Spearman v. Roadway Express, Inc.*, Case No. 92-STA-1, Sec. Order Vacating Procedural Orders and Directing Reassignment, Aug. 5, 1992, slip op. at 1 (removing ALJ who granted the respondent’s motions prior to expiration of the time for the complainant to respond), *aff’d*, *Roadway Exp., Inc. v. Reich*, No. 93-3787 (6th Cir. Aug. 22, 1994). To establish improper prejudice, it must appear that the ALJ in some measure adjudged the facts and the law of a case in advance of hearing them. *City of Charlottesville, Va. v. FERC*, 774 F.2d 1205, 1212 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986).

As evidence of alleged bias, Robinson cites the ALJ’s post hearing letter, addressed to counsel for Respondents, which stated that the Secretary’s decision in *Reid v. Methodist Hospital Center of Oak Ridge*, Case No. 93-CAA-4, Sec. Final Dec. and Ord., Apr. 3, 1995, *pet. for review filed*, No. 95-3648 (6th Cir. June 1, 1995) “may be relevant to some of the procedural issues in the Robinson case” and enclosed a copy of the decision. The ALJ sent Robinson’s counsel a copy of the letter, but not of the *Reid* decision. Counsel for Robinson in this case also represented the complainant in *Reid*. As the ALJ explained in the letter, the *Reid* decision showed that it had been served on counsel.

The ALJ’s letter simply notified all of the counsel in this case about a recent decision by a binding authority relating to the determination of an “employer” within the CAA’s employee protection provision. The ALJ’s letter does not show prejudice of the facts or the law in this case. Accordingly, the ALJ did not err in denying the recusal requests.

Dismissing the TSCA Claim Against NASA and OIG Was Proper

We affirm the ALJ's conclusion that the United States has not waived its sovereign immunity to permit suits against it under the TSCA's employee protection provision. *See Stephenson v. National Aeronautics & Space Admin.*, Case No. 94-TSC-5, Sec. Dec. And Ord. Of Rem., July 3, 1995, slip op. at 5-8. Therefore, dismissal of the complaint under the TSCA was proper as to NASA and its OIG.

NASA Was Not Robinson's Joint Employer Under the CAA

_____The CAA prohibits an employer from discharging or discriminating against any employee because the employee engaged in protected activities. 42 U.S.C. § 7622(a); *Reid*, slip op. at 9. To determine whether a respondent is or was a complainant's employer within the CAA's prohibition, the Secretary used the test enunciated in *Nationwide Mutual Ins. Co. V. Darden*, 112 S.Ct. 1344 (1992), which lists a number of factors that determine "the hiring party's right to control the manner and means by which the product is accomplished:"

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 112 S.Ct at 1348, quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989).^{4/}

Applying the *Darden* factors to this case, the evidence shows that only Martin Marietta, and not NASA, was Robinson's employer. Only Martin Marietta evaluated Robinson's work, assigned him additional work, provided employee benefits, and paid him. T. 328, 330, 480-481, 504-506, 696-4.

Nevertheless, Robinson contends that NASA was his joint employer along with Martin Marietta because undergraduate co-op student Hinders purportedly supervised him for three months on the mini-oscilloscope project. Complainant's Opening Brief (Comp. Br.) at 22-23; T. 133-134. Neither Robinson nor any other witness gave examples of occasions on which Hinders directed Robinson's work. On the contrary, David White, a NASA employee who supervised Hinders,

^{4/} The Secretary has found that the ERA's definition of employer covered the Tennessee Valley Authority, which so interfered with its contract with a separate company that it caused the termination of the complainants' employment. *Hill and Ottney v. Tennessee Valley Authority*, Case Nos. 87-ERA-23 and 87-ERA-24, Sec. Dec. and Ord. of Remand, May 24, 1989. There is no allegation of similar contractual interference in this case.

testified that she did not supervise or give technical direction to Robinson and lacked authority to approve engineering drawings. T. 832-834.

The record reveals instead that Robinson was disappointed when his Martin Marietta managers did not support him in his criticism, but rather asked him to do everything possible to cooperate with Hinders. T. 137. Ultimately, Robinson's refusal to sign the drawing set of Hinders' modifications to the mini-oscilloscope prevented Hinders' version of the hardware from being built. T. 138-139. Robinson's ability to prevent Hinders' work from coming to fruition indicates that Hinders did not supervise him.

On the basis of the record, we find that NASA did not have the "right to control the manner and means by which [Robinson's work] product [wa]s accomplished." Accordingly, NASA was not Robinson's joint employer and it was proper to dismiss the CAA complaint as to NASA and its OIG.

Robinson Did Not Meet His Burden of Persuasion Concerning Martin Marietta

The alleged protected activity in this case was Robinson's complaining to his superiors about the danger of using the catalyst chosen for the DBCS on board a space flight. Robinson contended that the catalyst could ignite spontaneously, endanger the astronauts' lives, and cause emission of toxic substances and pollutants into the atmosphere of the shuttle and possibly the earth's atmosphere as well. *See Stephenson*, slip op. at 3 (complaint about emission of ethylene oxide and freon into space capsule constituted protected activity under CAA).

In a case such as this, in which the respondents articulated legitimate, nondiscriminatory reasons for their alleged adverse actions, the question whether the complainant previously established a *prima facie* case becomes irrelevant. *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Fin. Dec. and Order, Feb. 15, 1995, slip op. at 11, *aff'd*, *Carroll v. United States Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1996). "The [trier of fact] has before it all the evidence it needs to determine whether 'the defendant intentionally discriminated against the plaintiff.'" *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253(1981)).

Rather, the question in this case is whether Robinson established by a preponderance of the evidence that Martin Marietta retaliated against him for engaging in protected conduct. *See Carroll*, 78 F.3d at 356. We discuss below the legitimate reasons articulated by Martin Marietta for the actions it took and find that Robinson did not produce persuasive evidence that the real reason for the company's adverse actions was discriminatory.

1. 1993 Performance Evaluation

The 1993 performance evaluation that Robinson deemed adverse lauded his engineering skills, found that he met the requirements of his position, but stated that he needed to improve his interpersonal skills. RX 99; T. 264-265. The record documents several examples of Robinson's poor interpersonal skills, including an admission that there were occasions when co-workers told him

to calm down when he threw things. T. 156-157, 248, 252-253, 486-492; RX 73. In light of Robinson's admitted conflicts with co-workers, T. 248-255, he has not persuaded us that Martin Marietta retaliated against him in his performance evaluation.

2. Work Assignments

Some months later, when the DBCS project no longer required two engineers, Martin Marietta properly assigned Robinson to work on other assignments. Although Robinson described the subsequent mini-oscilloscope project as an "arm pit, hell-hole project" in an E-mail message demanding that his superiors reassign him, RX 119, T. 268, he routinely complained about his assignments. T. 804-805. We therefore conclude that Martin Marietta did not retaliate in assigning him work that he did not like.

3. Discipline for Poor Work Performance

Even after Robinson sought and received a promotion, T. 259, 262-263, Robinson's work performance deteriorated. He admittedly failed to attend, arrived late, and was unprepared for business meetings. RX 150; T. 270-273. Robinson also conceded that he played video games, wrote stories, read newspapers, and slept on the job. T. 274-275, 742-745.

In response, Martin Marietta gave Robinson a written warning that such behavior would be referred to the human resources department for further action. RX 150; T. 272-273, 797. The company also placed Robinson on a weekly supervision schedule because he was not meeting deadlines and was not making significant progress on his projects. T. 260-273, 799. Since Robinson admitted to all of the poor work place behaviors, we find that he did not show that Martin Marietta took these disciplinary measures in retaliation for his protected complaints.

4. Resignation

About six weeks after Robinson submitted his "termination of employment" memorandum, Martin Marietta managers asked Robinson's supervisors for an acceptable amount of time in which to reassign his work. CX 51 at 2. When the supervisors suggested two weeks, Martin Marietta set an effective date of resignation about two weeks later. *Id.* In light of the well documented deficiencies in Robinson's performance, we find that the company's decision not to permit Robinson to rescind his resignation was legitimate and was not motivated by his engaging in protected activities.

5. Patent Applications

Martin Marietta credibly explained that Robinson's name was not included on the patent application because two scientists, one from Martin Marietta and one from NASA, disclosed their intention to apply for a patent on the DBCS system about one month prior to Robinson's assignment to work on the project. T. 328, 618, 631. We find that since Robinson joined the project only after

the two scientists' patent disclosure, there was no retaliation in not including his name on the patent application.^{5/} See R. D. and O. at 3.

6. Newsletter Article

Similarly, Martin Marietta explained that Robinson's name was not mentioned in an article in the in-house newsletter that discussed the DBCS project, CX 70, because at that time he was not a part of the Medical Sciences Products Group that was featured in the article. T. 288. We find no retaliation in not mentioning Robinson in the newsletter article.

7. Contested Unemployment Benefits

Finally, Robinson asserts that the company's decision to contest his application to receive unemployment benefits was retaliatory. But Martin Marietta contested the application because he had resigned voluntarily. T. 177, 180. In light of the voluntary nature of Robinson's "termination of employment" memorandum, he did not offer persuasive evidence that his protected activities were the real reason for contesting his benefits.

CONCLUSION

In view of Robinson's failure to persuade us that Martin Marietta took any adverse action in retaliation for his engaging in protected activities, we find that the complaint should be DISMISSED.

SO ORDERED.

DAVID A. O'BRIEN,
Chair

KARL J. SANDSTROM,
Member

JOYCE D. MILLER,
Alternate Member

^{5/} Although afforded the opportunity to explain why he deserved to be included on the patent application, RX 145, Robinson did not attempt to do so.