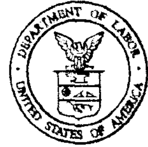
U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 15 December 2009

CASE NO. 2009-SDW-00005

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In the Matter of:

MICHAEL E. BOYD,

Complainant,

vs.

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA),

Respondent.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, COMPLAINANT'S MOTION TO AMEND HIS COMPLAINT, COMPLAINANT'S REQUEST FOR SUMMARY JUDGMENT, AND COMPLAINANT'S REQUEST FOR REMAND

This matter arises under the whistleblower protection provisions (collectively "whistleblower provisions") of the following statutes:

- The Safe Drinking Water Act of 1974 (SDWA), 42 U.S.C. § 300j-9(i);
- The Federal Water Pollution Control Act of 1972 (FWPCA), 33 U.S.C. § 1367;
- The Toxic Substances Control Act of 1976 (TSCA), 15 U.S.C. § 2622;
- The Solid Waste Disposal Act of 1976 (SWDA), 42 U.S.C. § 6971;
- The Clean Air Act of 1977 (CAA), 42 U.S.C. § 7622; and
- The Comprehensive Environmental Response, Compensation & Liability Act of 1980 (CERCLA), 42 U.S.C. § 9610.

On June 8, 2009, I ordered discovery and briefing on the threshold issues of timeliness, Complainant's status as an employee, and the sufficiency of the allegations in the complaint. The schedule was amended by an order dated June 19, 2009.

On August 14, 2009, I issued an Order Denying Respondent's Motion to Dismiss and Denying Complainant's Motion to Amend his Complaint (Aug. 14, 2009 Order). Respondent's motion asserted that because Complainant is neither an employee of respondent, as all the whistleblower provisions require, or a representative of employees, as three of the whistleblower provisions require, Complainant is not protected by any of the whistleblower provisions. Complainant's opposition argued that Title VI of the Civil Rights Act of 1964 (Civil Rights Act), the Occupational Safety and Health Act (OSH Act) of 1970, and CERCLA provide that OALJ

has jurisdiction over Claimant's whistleblower claims. I denied Respondent's motion to dismiss, which I construed as a motion for summary decision, because Respondent did not meet its burden to demonstrate the absence of a triable issue of material fact and that it is entitled to judgment as a matter of law. Aug. 14, 2009 Order, pp. 5-6 (citing Fed. R. Civ. P. 56, 29 C.F.R. § 18.40(d)). Respondent failed to address significant aspects of how the term "employee" is understood within the environmental whistleblower statutes under which this matter arises. Aug. 14, 2009 Order, pp. 5-6. Thus, it could not demonstrate its entitlement to summary decision. I also treated Complainant's claims of protection under the Civil Rights Act and the OSH Act as a motion to amend his complaint, which I denied because neither statute provides for hearings before the OALJ. Aug. 14, 2009 Order, p. 6.

On August 31, 2009, Respondent filed a Motion for Summary Judgment (Resp. Motion). On September, 16, 2009 Complainant filed a timely response opposing Respondent's motion (Comp. Opp.). Respondent's motion argues that Claimant has failed to state a claim upon which relief can be granted because Claimant does not qualify as an "employee" within the meaning of the whistleblower statutes. Resp. Motion, pp. 5-6. Complainant argues that Respondent directed one of its grantees to terminate its employment of Complainant. Comp. Opp., p. 4. In so doing, Complainant argues, Respondent acted in the "capacity of an employer," which renders Complainant an "employee" entitled to whistleblower protection. *Id.* at 1.

Complainant adds that Respondent is "liable under 42 U.S.C. § 7413(c)(3) of the [Clean Air Act] for its [a]ctions." *Id.* at 5. He explains that Respondent's violations include "delaying and sitting on Title VI complaints [and] missing their statutory deadlines for accepting and investigating these administrative complaints . . . ." *Id.*

Complainant also argues that he should be granted summary judgment and this matter should be remanded to the Occupational Safety and Health Administration (OSHA) because Respondent has allegedly failed to provide timely responses to interrogatories. *Id.* at 10.

ANALYSIS

The employee protection provisions of the various environmental statutes prohibit an employer from taking adverse employment action against an employee because the employee has engaged in protected activity. *See, e.g., Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, 1988-SWD-00002, Slip op. at 15 (ARB Feb. 28, 2003). Each of the six whistleblower provisions under which Complainant filed his original complaint protects "employees." 42 U.S.C. § 300j-9(i)(1); 33 U.S.C. § 1367(a); 15 U.S.C. § 2622(a); 42 U.S.C. § 6971(a); 42 U.S.C. § 7622(a); 42 U.S.C. § 9610(a). In addition, the FWPCA, the SWDA, and CERCLA extend their whistleblower protections to "authorized representatives of employees." 33 U.S.C. § 1367(a); 42 U.S.C. § 6971(a); 42 U.S.C. § 9610(a). Thus, if Complainant is neither an "employee" nor a "representative of employees" within the meanings of the statutes, he is not covered by the whistleblower provisions and has failed to state a claim under which relief can be granted.

I. Respondent's Motion for Summary Decision

Respondent argues that "even under the broadest interpretation . . . the facts [here] do not permit [Complainant] to qualify as an *employee* under the whistleblower protection provisions of the environmental statutes."[1] Resp. Aug. 31, 2009 Motion, p. 5. Therefore, Respondent argues, Complainant's case should be dismissed for failure to state a claim upon which relief can be granted. *Id.* at 6.

Complainant argues that he is protected by the whistleblower provisions as an employee. He maintains that Respondent directed his employer, the Community First Coalition (CFC), to terminate Complainant's employment in retaliation for Complainant's distribution of information regarding the alleged presence of asbestos dust in the Bay View Hunters Point community in San Francisco, California. Comp. Opp., p. 4.

I find that there remain genuine issues of material fact as to whether Complainant meets the whistleblower provisions' definition of "employee" and "representative of employees." Respondent's motion does not discuss whether Complainant meets the definition of "representative of employees." Additionally, it fails to establish that there is no genuine issue of material fact on the question that it as at the core of whether Complainant is an "employee": the extent of Respondent's control over Complainant's employment.

A. Standard for Summary Decision

An administrative law judge may grant summary decision when a moving party demonstrates that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. 29 C.F.R. § 18.40(d). The moving party bears the initial burden of showing that there is no genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). By moving for summary decision, a party asserts that based on the present record and without the need for further exploration of the facts and conceding all unfavorable inferences in favor of the non-moving party, there is no genuine issue of material fact to be decided and the moving party is entitled to a decision as a matter of law. Fed. R. Civ. P. 56, 29 C.F.R. § 18.40(d). When a motion is properly supported, the nonmoving party must go beyond the pleadings to overcome the motion. He may not merely rest upon allegations, but must set out specific facts showing a genuine issue for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Respondent, as the moving party, bears the burden of showing (1) that there is no genuine issue of material fact as to whether Complainant is an "employee" or "representative of employees" as understood under the whistleblower provisions, and (2) as a matter of law, Respondent is entitled to judgment that Complainant is neither an "employee" nor a "representative of employees." *See* 42 U.S.C. § 300j-9(i)(1); 33 U.S.C. § 1367(a); 15 U.S.C. § 2622(a); 42 U.S.C. § 6971(a); 42 U.S.C. § 7622(a); 42 U.S.C. § 9610(a); 29 C.F.R. § 18.40(d); *Celotex*, 477 U.S. at 325. Respondent has failed to meet this burden.

[1] Emphasis in original.

B. Respondent's Entitlement to Summary Decision

Employees of contractors of a respondent are protected by a whistleblower provision when the respondent has acted "in the capacity of an employer." *Stephenson v. Nat'l Aeronautics & Space Adm.*, ARB No. 96-080, ALJ No. 1994-TSC-5, Dec. & Ord. of Rem., slip. op. at 3 (ARB Feb. 13, 1997); *see also Hill v. Tenn. Valley Auth.*, ALJ No. 87-ERA-23,24, Dec. & Ord. of Remand, slip op. at 1-2 (Sec'y May 24, 1989) (disagreeing with an administrative law judge's conclusion that the Energy Reorganization Act's whistleblower protection clearly requires an employer-employee relationship). In *Stephenson v. Nat'l Aeronautics & Space Adm.*, the ARB explained that:

> An employer that *acts* in the capacity of an employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that that employer does not directly compensate or immediately supervise the employee. A parent company or contracting agency acts in the capacity of an employer by establishing, modifying, or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment. For example, the president of a parent company who hires, fires or disciplines an employee of one of its subsidiaries may be deemed an "employer" for purposes of the whistleblower provisions. A contracting agency which exercises similar control over the employees of its contractors or subcontractors may be a covered employer.

Dec. & Ord. of Remand, slip. op. at 3.

Respondent argues that it "exercises no control over technical assistance grant recipients' employment of expert outside consultants or internal personnel." Resp. Motion, p.2. Respondent further states that it "exercised no dominion over CFC or Complainant, and whatever decision the grantee made concerning Complainant's retention as a consultant was within the grantee's exclusive control." *Id.* at 3.

Respondent's motion was accompanied by a declaration by Ms. Jacqueline Lane (Lane Dec.), an EPA project officer who was responsible for overseeing the Hunters Point Naval Shipyard Superfund site Technical Assistance Grant (TAG). Lane Dec., p. 1. Ms. Lane's declaration explains that Respondent funded a grant to the Community First Coalition (CFC) to allow "the grantee to acquire independent technical advice in connection with the Hunters Point . . . Superfund site." *Id.* Ms. Lane further explains that CFC contracted with a company called Environmental Mitigation Unlimited (EMU) to serve as technical advisor to CFC. *Id.* According to Ms. Lane, EMU was a "non-profit public benefit association of Clifton J. Smith and Michael E. Boyd, Associates." *Id.* She further states that CFC terminated the contract with EMU because EMU failed to fulfill the terms of its technical assistance contract. *Id.*

Ms. Lane's declaration states that Respondent "does not dictate or even involve itself in the grantee's selection or retention of its employees or contractors/independent consultants." Lane Dec., p. 1. She adds that "the contracting, payment, and termination of contracts under the grant agreement is the sole responsibility of the [grantee]." *Id.* at 2. Ms. Lane further declares

that Respondent took no action regarding Complainant's work as a technical consultant to CFC and did not provide any advice to CFC regarding Complainant's retention, termination, or terms of employment. *Id.* at 2.

According to Complainant, Respondent directed his termination in retaliation for "providing the . . . Bay View Hunters Point San Francisco community information regarding the disturbance of asbestos dust . . . ." Comp. Opp., p. 4. A declaration by Lynne Brown, CFC Co-Chair, avers that Complainant "completed the May 15, 2005 newsletter including co-authoring the article titled Serpentine Soils in Shipyards Possible Source of Naturally Occurring Asbestos . . . ." Comp. Opp., Ex. 9, p. 59. Complainant's opposition includes the text of what appears to be an electronic mail message dated May 16, 2005, from Ms. Lane of the EPA apparently to Maurice Campbell of CFC. *Id.* at 3, Ex. 2, pp. 15, 20. The message states that the CFC newsletter "is supposed to talk to the community about Shipyard cleanup issues." *Id.* It then questions whether there was ever a problem with asbestos on the base property and anticipates that the issue "will be brought up at the next RAB [Restoration Advisory Board] meeting." *Id*; *see also* Comp. Opp., Ex. 2, p. 14.

Complainant's opposition is also accompanied by the minutes of a July 28, 2005 Restoration Advisory Board meeting. Comp. Opp., Ex. 3. They record that Mr. Campbell, a member of CFC and the RAB, stated that a document, which Complainant asserts is his newsletter, would be "reviewed by the CFC and then sent to Jackie Lane at the EPA; then it is submitted so the TAG contractor can be paid." *Id.* at 24.

Respondent's reply does not dispute that the document discussed in the RAB minutes is the newsletter containing an article prepared by Complainant related to asbestos. *See* Resp. Reply, pp. 2-3. Respondent argues that the intent of Ms. Lane's May 16, 2005, electronic mail message was to explain the "general limitation on CFC's expenditure of TAG grant funds" and to instruct "CFC as to what nature of work product EPA had committed itself to fund through the TAG grant." *Id.* at 2-3.

Respondent has not met its burden to show that there is no genuine issue of material fact regarding its control over Complainant's employment with CFC. As Respondent's Reply states, "it was incumbent upon Ms. Lane to ensure that Agency's grant funds were spent in furtherance of the purposes of the grant." Resp. Reply, p. 2. An obvious corollary is that activities not in furtherance of the purposes of the grant are not funded. Thus, Respondent appears to have the power of the purse strings over CFC's execution of the technical assistance grant. The discretion to pay or not pay a grantee represents some degree of control over the grantee's employment of contractors. Whether Respondent exercised enough control to act in the capacity of an employer is unclear, which is precisely the point. Further fact-finding on this issue is required. When additional fact-finding is required, summary decision should not be granted. Therefore, Respondent's motion for summary decision is **DENIED**.

II. COMPLAINANT'S MOTION TO AMEND COMPLAINT

In his Opposition, Complainant asserts that Respondent has engaged in a pattern of failing to accept and investigate "Title VI" complaints, including one filed by Complainant. Comp. Opp., p. 5. Therefore, Complainant asserts, Respondent is "liable under 42 U.S.C. § 741(c)(3) of the [Clean Air Act]." *Id.* As Complainant did not previously claim protection under this statute, I treat Complainant's assertion of Respondent's liability under 42 U.S.C. § 741(c)(3) as a motion to amend Complainant's complaint.

The Office of Administrative Law Judges (OALJ) does not have jurisdiction to adjudicate complaints arising under 42 U.S.C. § 741(c)(3). That provision provides for criminal punishment of persons convicted of violating certain provisions of the Clean Air Act. It does not provide for a hearing before an administrative law judge. As I do not have jurisdiction to adjudicate alleged violations of 42 U.S.C. § 741(c)(3), Complainant's motion to amend his complaint is hereby **DENIED**.

III. COMPLAINANT'S REQUEST FOR SUMMARY JUDGMENT AND REMAND

Complainant argues that "Summary Judgment should be issued for Complainant" and this matter remanded to OSHA because Respondent failed to respond to interrogatories propounded by Complainant on June 24, 2009. Comp. Opp., p. 10. According to Complainant he propounded interrogatories to Respondent and OSHA on June 24, 2009. *Id.* On July 14, 2009, an order issued staying discovery on the threshold issues pending a decision on Respondent's motion for dismissal, which was denied on August 14, 2009. Complainant asserts that the thirty days to respond to the interrogatories elapsed on August 25, 2009 without response.

The OALJ Rules of Practice and procedure authorize an administrative law judge to impose discovery sanctions when a party fails to comply with an order regarding discovery. 29 C.F.R. § 18.6(d)(2). While granting summary judgment is not among the sanctions authorized, an ALJ may order that an issue is established adversely to a non-complying party. 29 C.F.R. § 18.6(d)(2)(ii). A necessary pre-requisite for an order imposing discovery sanctions is that the party to be sanctioned must be in non-compliance with an order. 29 C.F.R. § 18.6(d)(2). Nothing in the record, however, indicates that Complainant filed a motion seeking an order to compel responses to his interrogatories. Absent a party's non-compliance with an order, a request for discovery sanctions is premature. Therefore, Complainant's request for summary judgment, which I treat as a request for discovery sanctions, is **DENIED**.

In addition, Complainant has failed to articulate a reason for remanding this matter to OSHA. Therefore, Complainant's request for remand to OSHA is hereby **DENIED**.

ORDER

Respondent's motion for summary decision is **DENIED**.

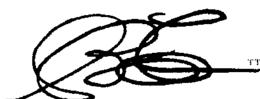
Complainant's motion to amend his complaint is **DENIED**.

Complainant's request for summary judgment is treated as a request for discovery sanctions and is **DENIED**.

Complainant's request that this matter be remanded to the Occupational Safety and Health Administration is **DENIED**.

The parties are directed to participate in a **telephone status conference call on Tuesday, December 22, 2009 at 11:00 a.m. Pacific Standard Time**. The topics to be covered will include:

1) The location and length of the trial;
2) The date of the trial;
3) The date for a meeting of the parties to develop a discovery plan, of the type described in Standard 1 of the ABA Civil Discovery standards,[2] which will permit the trial to begin on the date scheduled;
4) Whether alterations to the rules for service of documents should be made to permit service by facsimile or by e-mail attachments in WordPerfect or MS-Word format, and whether the time for responding to motions and discovery requests should be shortened;
5) Whether the meeting to develop the plan shall be in person, by telephone, conducted through electronic correspondence, or in some other manner;
6) Whether the initial disclosures required by Rule 26(a)(1), Federal Rules of Civil Procedure, shall be made before, or at the meeting of the parties to develop the discovery plan,
7) The dates for serving Pre-Trial Statements, described in the accompanying draft pre-trial order; filings fully conforming to that order ultimately entered are essential;
8) Whether an appointment of a settlement judge, under the procedure set out in 29 C.F.R. § 18.9 (e)(1), would be useful and should be made.



ANNE BEYTIN TORKINGTON
Administrative Law Judge

[2] http://www.abanet.org/litigation/discoverystandards/

SERVICE SHEET

Case Name: **BOYD_MICHAEL_v_US_ENVIRONMENTAL_PRO_**

Case Number: **2009SDW00005**

Document Title: **Order Denying Resp's Mtn for Summary Judgment, Compl's Mtn to Amend His Complaint, etc.**

I hereby certify that a copy of the above-referenced document was sent to the following this 15th day of December, 2009:

VIVIAN CHAN
LEGAL ASSISTANT

Michael Boyd
5439 Soquel Drive
Soquel, CA 95073
{Hard Copy - Regular Mail}

U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105
{Hard Copy - Regular Mail}

Paul Winick, Esq.
Office of General Counsel / U.S. EPA
1200 Pennsylvania Ave., NW
Ariel Rios Bldg. North, Room 7454D
Mailcode 2377A
Washington, DC 20460
{Hard Copy - Regular Mail}

Ken Nishiyama Atha
Regional Administrator
U.S. Department of Labor / OSHA
90 - 7th Street, Suite 18-100
San Francisco, CA 94103
{Hard Copy - Regular Mail}

Regional Solicitor
U. S. Department of Labor
Suite 3-700
90 Seventh Street
San Francisco, CA 94103-1516
{Hard Copy - Regular Mail}