Official

AUG 13 1993

Docket Nos. 50-250, 50-251
License Nos. DPR-31, DPR-41
EA 93-199 and EA 93-200

Florida Power and Light Company
ATTN: Mr. J. H. Goldberg
President - Nuclear Division
Nuclear Energy Department
P. O. Box 14000
Juno Beach, Florida 33408

Bechtel Construction, Inc.
ATTN: Mr. W. G. Bell
Vice President
Labor Relations and Safety
Post Office Box 3965
San Francisco, California 94119

Gentlemen:

SUBJECT: ENFORCEMENT CONFERENCE

You are requested to attend an enforcement conference to discuss two cases of employee discrimination that were filed with the Department of Labor (DOL) under the provisions of Section 210 of the Energy Reorganization Act of 1974 (ERA), as amended (now in Section 211), and on which decisions were recently issued by the Secretary of Labor. The first case, captioned as Roy Edward Nichols v. Bechtel Construction, Inc. (DOL Case No. 87-ERA-44) was the subject of a "Decision and Order of Remand" issued by the Secretary of Labor on October 26, 1992. The second, captioned as James Carroll Pillow, Jr. v. Bechtel Construction, Inc. (DOL Case No. 87-ERA-35) was the subject of a "Decision and Order of Remand" issued by the Secretary of Labor on July 19, 1993. In both cases, the Secretary of Labor found that Bechtel Construction violated provisions of the ERA in its employment actions related to the termination of Mr. Nichols and Mr. Pillow at the Florida Power and Light Company's Turkey Point Nuclear Plant in 1987.

In the complaints filed by Mr. Nichols and Mr. Pillow, it was alleged that they were terminated as a result of raising nuclear safety concerns. Discrimination by a Nuclear Regulatory Commission (NRC) licensee or a contractor of an NRC licensee against an employee for engaging in certain protected activities as defined by Section 210 (now Section 211) is prohibited by 10 CFR 50.7. The individuals responsible for the discriminatory termination were employees of Bechtel Construction, a contractor to Florida Power and Light Company.

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In view of the findings made by the Secretary of Labor in these cases (copies of the Secretary of Labor decisions are enclosed), it is expected that Bechtel Construction will address the pertinent issues associated with these cases at the enforcement conference, including whether the individuals responsible for the discriminatory actions are still employed with Bechtel Construction and, if so employed, whether those individuals are in positions where they could again engage in discriminatory actions against individuals protected under Section 211, and finally, what actions have been taken by Bechtel Construction to preclude supervisors and managers from engaging in such actions.

Florida Power and Light Company is also expected to address the pertinent issues associated with these cases, including actions taken to ensure that contractors and subcontractors performing work related to NRC licensed activities do not engage in discriminatory actions in violation of NRC regulations and Section 211. Both Florida Power and Light Company and Bechtel Construction should be prepared to discuss any specific programs currently in place that address the ability of employees to raise safety-related concerns without fear of reprisal or job related discrimination and how these programs assure that both licensee and contractor supervisors and managers understand and execute their responsibilities under these programs.

With regard to setting a date for the enforcement conference, please have your representative contact Mr. Marvin V. Sinkule, Chief, Reactor Projects Branch 2, Division of Reactor Projects, Region II, at (404) 331-5506, within seven days of your receipt of this letter to coordinate an acceptable date for the enforcement conference. We would expect to conduct the enforcement conference before October 1, 1993.

In accordance with Section 2.790 of the NRC's "Rules of Practice," Part 2, Title 10, Code of Federal Regulations, a copy of this letter and its enclosures will be placed in the Public Document Room.

Should you have any questions concerning this letter, we will be pleased to discuss them with you.

Sincerely,

Stewart D. Ebneter

Stewart D. Ebneter
Regional Administrator

Enclosures:
1. DECISION AND ORDER OF REMAND,
   Secretary of Labor, 10/26/93,
   Nichols v. Bechtel Construction, Inc.
   87-ERA-44

Enclosures con't: (see next page)

Enclosures con't:
2. DECISION AND ORDER OF REMAND,
Secretary of Labor, 07/19/93,
Pillow v. Bechtel Construction, Inc.
87-ERA-35

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8/12/93	8/12/93	8/13/93	8/13/93	8/13/93

J. Gray (OE) reviewed & concurred via E-Mail.

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: October 26, 1992
CASE NO. 87-ERA-0044

IN THE MATTER OF

ROY EDWARD NICHOLS,

COMPLAINANT,

v.

BECHTEL CONSTRUCTION, INC.,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER OF REMAND

Before me for review is the Recommended Decision and Order (R.D. and O.) of the Administrative Law Judge (ALJ) in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). Complainant, a carpenter at a nuclear power facility, alleged that Respondent retaliated against him for raising safety concerns by selecting him for layoff. Respondent appealed the finding of the Area Director of the Wage and Hour Administration that Respondent violated the ERA and sought a hearing.

After a two-day hearing, the ALJ found that Complainant did not make a prima facie showing that he engaged in protected activity or that such activity, if protected, motivated Respondent's decision to lay off Complainant. R.D. and O.,

Conclusions Part C (p.8). [1] The ALJ recommended denying the complaint. Id.

Both Complainant and Respondent filed post-hearing proposed findings of fact and conclusions of law, which I have considered in reaching this decision. Neither party filed a brief before me, as permitted by the Order Establishing Briefing Schedule. [2]

Based upon a thorough review of the entire record before the ALJ, I find that the ALJ's decision is not supported by the evidence and that Complainant established that he was selected for layoff because of engaging in protected activities.

1. The Facts

Complainant worked as a carpenter for Respondent Bechtel Construction, Inc., a contractor to Florida Power and Light Company (FP&L), the licensee of the Turkey Point nuclear power facility at Florida City, Florida. At the time at issue here, Complainant had worked full time for Bechtel for approximately 31 months, excluding a nine or ten week period of layoff, at which time Complainant was one of the last workers laid off. T. 194. Complainant was a permanent employee, rather than one hired for a

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[1] The R.D. and O. has no page numbers. Accordingly, references to the R.D. and O. are to the section and part, with the appropriate page number in parentheses.

[2] By mistake, the ALJ's R.D. and O. and the initial Secretary's Order Establishing Briefing Schedule were not served on the correct counsel for Complainant. Consequently, a Supplemental Order Concerning Briefing, permitting an additional period for filing briefs, was served on all counsel. Counsel for Complainant submitted a letter indicating that he was unaware of the R.D. and O. prior to the Supplemental Order, and was unable to reach his client for authority to submit a brief pursuant to the Supplemental Order. No briefs were filed.

specific outage. [3/] T. 194, 371.

Prior to March 1987, Complainant was assigned to the crew of foreman Greg Lilge, which worked outside the containment (or radiologically "hot") area of the facility. T. 288-289. That month, Bechtel needed a great number of craft workers to work in the containment area because of outages in two units. T. 339; CX 3. Carpenters general foreman Larry Williams decided to form an additional crew of carpenters to work inside the containment area and named John Wright the foreman of the new crew. T. 338-340. Bechtel staffed the new crew by a transfer from an established crew and by hiring new workers. T. 340-341.

Williams told Lilge to name a carpenter to be transferred to Wright's new crew, and suggested carpenter Russ Smith. T. 342. Lilge asked Williams to take Complainant instead. Id. Lilge testified that for about six months, he had been having "an attitude problem" with Complainant. T. 290. Lilge stated that a few weeks prior to suggesting Complainant for transfer to Wright's new crew, Lilge had recommended to Williams that Nichols be laid off in the next reduction in force. T. 290; T. 342-343. T. 343.

Williams told Complainant that Wright's crew needed some experienced carpenters, and that it was "more than likely" that Complainant would return to Lilge's crew when the outage was

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[3/] Approximately every 18 months, the nuclear units at Turkey Point are shut down for refueling, maintenance, and general repairs. These periods of shut down are called "outages" and require an increase in the number of workers. R.D. and O., Findings of Fact (p. 2).

over. T. 345. At the hearing, however, Williams testified that he did not tell Complainant the whole truth, and that Williams actually believed that all of Wright's crew (including Complainant) would be laid off at the end of the outage. T. 344-346. Complainant was transferred to Wright's crew in early March, 1987. T. 46.

When Wright's crew began working inside the containment area, a difference of opinion arose between Complainant and Wright concerning the proper procedure for surveying and tagging contaminated tools. Wright told Complainant that it was not necessary to wait at the tool box for a Health Physics (HP) worker to survey and tag the tools, [4/] but rather that it was acceptable to transport the tools to the HP work station for the survey. T. 196-197. Complainant disagreed and stated that he believed safety procedures required that the tools be dose rated and tagged at the tool box. T. 197, 258. On occasions when Complainant waited at the tool box for an HP worker to survey and tag the tools, Wright showed his disgust and impatience with Complainant, and said that he wanted Complainant to get to the work site and start working. T. 107, 199. Complainant acknowledged that because of his size, he was somewhat slower than other employees in putting on protective gear, T. 200, but stated that another reason he was slower to start the assigned work was that he observed the proper procedures for surveying and

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[4/] HP workers survey the tools to determine the level of contamination, and indicate on a tag that the tools have been surveyed, or "dose rated." T. 68-69.

tagging tools. T. 199-200.

Complainant told Laborer General Foreman Williams that he had a problem with the way Wright said to handle the tools, and Williams told Complainant he would check into it. T. 201. Williams raised the issue with Wright, who confronted Complainant, asked if Complainant had a problem with procedures concerning tools, and advised Complainant to come to Wright first with any such problems. T. 99-100, 202. Complainant indicated that he already had come to Wright about the issue. T. 202-203.

Ultimately, HP shift supervisor Hicks resolved the issue of where to survey and tag the tools. [5/] Hicks told Wright that Complainant was correct about where the tools had to be surveyed, and Wright still indicated that he believed that surveying the tools at the tool box caused too much delay. CX 5 at 10, 22. Wright capitulated, however, and told his crew that they had to have their tools surveyed and tagged at the tool box, T. 209-210, as Complainant maintained all along.

Complainant testified that after members of another crew of carpenters, headed by foreman Dave Trantham, were caught violating the tool survey safety procedure, a certain carpenter exhibited offensive behavior toward Complainant in the lunchroom. T. 203-206. Wright observed the offensive behavior on several occasions and said words to the effect that if Complainant did

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[5/] The testimony revealed that various health physics supervisors differed on whether it was acceptable to transport the tools to the HP station before surveying and tagging them. See, e.g., CX 5 at 8-9.

not like it, he could quit. T. 58-59, 205.

Wright testified that Complainant was slow in getting dressed out in the required protective gear and stretched out the work by working slowly on some assignments. T. 89-92. Wright believed that Complainant had "slacked off" recently and exhibited a poor attitude. T. 89. Notwithstanding his disappointment in Complainant's performance, Wright did not inform Complainant that his work was too slow, T. 107-108, or report Complainant's allegedly slow performance to Wright's superiors, T. 111-112, except for once mentioning to Williams that Complainant was slow in getting dressed and ready for work in the morning. T. 120.

When it is time to reduce the number of workers at the Turkey Point plant, the general foreman asks craft foremen to recommend particular workers for layoff. T. 364-365. [6/] Toward the end of the outage at issue, Williams told Wright to select one of the carpenters on his crew to be laid off as part of an ongoing reduction in force. T. 366-367. Wright initially selected a worker who had been absent from work, but then changed his mind and selected Complainant. T. 366-367, 461-462. When Wright informed Williams that Complainant would be the first worker laid off from the crew, Williams asked Wright if he was sure about the choice. T. 367. Wright testified that he chose Complainant because of slow work performance and stretching out

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[6/] It is undisputed that Bechtel does not use seniority in layoffs. Complainant acknowledged that the foreman has discretion to choose which workers to lay off. T. 208.

jobs, and a belief that Wright could get more work out of other crew members. T. 89, 367. During the months following Complainant's layoff, Wright's entire crew was laid off except for Wright, who was transferred back to being a laborer on his former crew. T. 44.

After Complainant was laid off, he asked Williams the reason. Williams indicated that Complainant had always been a good worker, and was laid off at John Wright's discretion because Wright believed he could work better with the other carpenters on the crew. T. 215-216, 369.

Complainant testified that the only time he ever intentionally stretched out a job was when his foreman directed him to do so. T. 210-211. Carpenters Lawrence Kippenhan and Paul Ramsdale, who worked on the same crew as Complainant during the Spring 1987 outage, T. 122, 162, testified that Complainant did his work correctly and according to procedures, and did not stretch out jobs, work slowly, or exhibit a poor attitude toward work or his foreman. T. 135, 138, 172-173. Complainant's partner, Michael Dean, agreed that Complainant followed procedures, worked steadily, and got along with his foreman. T. 279-280.

Ramsdale testified that, based on working for Bechtel as a temporary worker during five outages, the temporary and less experienced workers usually were laid off ahead of more senior, experienced workers. T. 175. However, as the outages ended in the Spring of 1987, Complainant was laid off from Wright's crew

earlier than other, less experienced workers. T. 75-77.

Kippenhan stated that on three occasions in 1987, Wright directed him to violate established safety procedures. T. 123-129. Ramsdale similarly testified about an occasion in 1987 when Wright told him to violate safety procedures. T. 162-165. Ramsdale thereafter attempted to be the first person in the containment area so that he could follow the correct safety procedure at issue. T. 165-166.

2. Analysis

There is no dispute that Respondent, a contractor to licensee FP&L, is an employer covered by the ERA, 42 U.S.C. § 5851(a), and Complainant, who worked for Respondent at FP&L's Turkey Point nuclear facility, is a covered employee.

To make a prima facie case, the complainant in a whistleblower case must show that he engaged in protected activity, that he was subjected to adverse action, and that respondent was aware of the protected activity when it took the adverse action. Complainant also must raise the inference that the protected activity was the likely reason for the adverse action. Dartey v. Zack Co. of Chicago, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 8.

At the hearing, Bechtel moved for a directed verdict. Relying upon Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984), Bechtel argued that Complainant did not show that he engaged in any protected activities because he did not participate in a Nuclear Regulatory Commission proceeding.

T. 258-262. In that decision, the Fifth Circuit defined protected activity as requiring "the employee's contact or involvement with a competent organ of government . . . ." Brown & Root, 747 F.2d at 1036. The ALJ denied Respondent's motion. T. 268.

The ALJ correctly noted that there is no precedent in the controlling circuit requiring an "external" contact with a government agency to establish protected activity. See T. 268. This case arises in the Eleventh Circuit, which has not ruled on the issue. The majority of courts that have considered the question have held or stated, either explicitly or implicitly, that internal complaints to management are protected under the whistleblower provision in the ERA. See Jones v. Tennessee Valley Authority, 948 F.2d 258, 264 (6th Cir. 1991) (explicit); Couty v. Dole, 886 F.2d 147 (8th Cir. 1989) (implicit); Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1513 (10th Cir. 1985) (explicit), cert. denied, 478 U.S. 1011 (1986); Machowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1163 (9th Cir. 1984) (explicit); Consolidated Edison Co. v. Donovan, 673 F.2d 61 (2d Cir. 1982) (implicit).

I continue to be persuaded that reporting violations internally is a protected activity and that Machowiak and Kansas Gas & Elec., rather than Brown & Root, set forth the appropriate resolution of this issue. For the reasons set forth more fully in Goldstein v. Ebasco Constructors, Inc., Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992, slip op. at 5-10, appeal docketed, No.

92-4567 (5th Cir. June 1, 1992), and Willy v. The Coastal Corp., Case No. 85-CAA-1, Sec. Dec., June 4, 1987, slip op. at 3-4, 8, I decline to follow the Brown & Root decision, as the ALJ stated.

The ALJ found, however, R.D. and O., Conclusions Part B (p. 7), that Complainant's "mere questioning of the correct method in which to handle tools" was not protected activity under the ERA. I disagree. The whistleblower provision of the ERA and similar statutory provisions "share a broad, remedial purpose of protecting workers from retaliation based on concerns for safety and quality," Machowiak, 735 F.2d at 1163, and consequently "a narrow, hypertechnical reading of the [ERA's whistleblower provision] will do little to effect the statute's aim of protection." Kansas Gas & Elec., 780 F.2d at 1512. See also Hill and Ottney v. Tennessee Valley Authority, Case Nos. 87-ERA-23 and 87-ERA-24, Dec. and Ord. of Rem., May 24, 1989, slip op. at 4.

Complainant questioned his foreman, Wright, about the correct safety procedure for surveying and tagging tools, and also asked Wright's superior, laborer general foreman Williams, about the issue. I find that Complainant's questioning of the safety procedure Wright used was tantamount to a complaint that the correct safety procedure was not being observed. Complainant's oral complaints to foremen Wright and Williams were protected activity under the ERA. See Dysert v. Westinghouse Electric Corp., Case No. 86-ERA-39, Final Dec. and Ord., Oct. 30, 1991, slip op. at 1-3 (employee's complaints to team leader about

procedures used in testing instruments is protected internal complaint under the ERA); see also Wagoner v. Technical Products, Inc., Case No. 87-TSC-4, Final Dec. and Ord., Nov. 20, 1990, slip op. at 9-12 (internal oral complaints of warehouse foreman protected under analogous whistleblower provision of the Toxic Substances Control Act, 15 U.S.C. § 2622).

Complainant alleged as adverse actions both the offensive behavior directed toward him in the lunchroom, and his selection for layoff. Complainant asserted that the lunchroom antics were intended to provoke him either to quit his job, or to get in a fight and therefore be subject to discharge. The ALJ found that the person accused of engaging in the offensive behavior had a longstanding reputation for engaging in such behavior, that the lunchroom incidents had no role in Bechtel's selecting Complainant for layoff, and therefore that the rude behavior did not constitute adverse action. R.D. and O., Conclusions Part C (p. 8-9). The record evidence supports the ALJ's finding on this point and I adopt it. Clearly, however, the layoff was an adverse action against Complainant, and therefore he has established the second element of a prima facie case. See Emory v. North Bros. Co., Case No. 86-ERA-7, Final Ord. of Dis., May 14, 1987, adopting ALJ Dec. and Ord., Jan. 7, 1987, slip op. at 10 (inclusion in a reduction in force constitutes adverse action).

Complainant also showed that Bechtel was aware of his protected activities when it chose to lay him off. Complainant

made his first complaint about a safety procedure to Wright, who knew that Complainant also raised the safety concern with Wright's superior, Williams. Wright determined that Complainant would be laid off first.

In making a prima facie case, temporal proximity between the protected activities and the adverse action may be sufficient to establish the inference that the protected activity was the motivation for the adverse action. Less than two months elapsed between the time Complainant questioned Wright and Williams about safety procedures and Complainant's layoff. 7/ In view of the short period of time, I find that Complainant introduced evidence sufficient to raise an inference that his protected activities motivated his being selected for layoff. See Goldstein, slip op. at 11-12 (causation established where seven or eight months elapsed between protected activity and adverse action); see also Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989) (temporal proximity sufficient as a matter of law to establish final element in a prima facie case). Thus, I find that Complainant made a prima facie case that Bechtel violated the ERA.

Once Complainant established a prima facie case, the burden shifted to Respondent to articulate legitimate, nondiscriminatory reasons for the adverse action, Dartey, slip op. at 8, and Bechtel did so. Wright testified that Complainant worked slowly on some assignments, did not exhibit the same enthusiasm he once

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7/ Complainant began to work for Wright shortly after March 1, 1987, soon complained about the safety procedure to Wright and Williams, and was laid off effective April 30, 1987.

had, and that the other members of the crew were easier to work with. T. 89-92.

Complainant had the ultimate burden of persuading that the reasons articulated by PG&E were pretextual, either by showing that the unlawful reason more likely motivated PG&E or by showing that the proffered explanation is unworthy of credence. Dartey, slip op. at 8. I examine below the credibility of the proffered reasons for selecting Complainant for layoff.

Of the witnesses who testified about Complainant's job performance as a member of Wright's crew in March and April, 1987, only foremen Wright and Trantham stated that Complainant was a slow worker who exhibited a poor attitude. [8/] Significantly, Wright did not discuss Complainant's slow work performance either with Complainant or with Wright's superiors, except for once mentioning to general foreman Williams that Complainant was slow to get started working in the morning. One reason for Complainant's slowness, of course, was his insisting on observing the correct procedure for surveying tools, which sometimes involved waiting for a HP worker to come to the tool box. Wright's preferred method of having the tools surveyed at

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[8/] Complainant's former foreman, Greg Lilge, and members of Lilge's crew testified that Complainant sometimes questioned Lilge's supervision, see, e.g., T. 314 (Lilge), 319 (Lilge's brother-in-law, Joseph Davis), and exhibited a change in attitude about his work, T. 330 (Richard Dyke). This testimony concerns Lilge's decision to recommend Complainant for transfer to Wright's crew when it was formed. Complainant has not alleged that the transfer constituted adverse action. See CX 3 (complaint to Department of Labor). The testimony of these witnesses is not relevant to Complainant's performance as a member of Wright's crew after the transfer.

the HP work station, while quicker, ultimately was rejected by HP supervisor Hicks. Thus, any slowness attributed to observing the correct safety procedure was not a legitimate basis for selecting Complainant for layoff.

Foreman Trantham, whose crew worked in the containment area at the same time as Wright's crew, testified that he observed Complainant working slowly on one occasion, T. 427, and that in his opinion, Complainant was slow to "dress out" in protective gear, T. 428. Trantham admitted that the "tight" dressing area often contained about 50 carpenters at a time and that the workers occasionally had to wait for clothing in their size. T. 438-439.

Three other witnesses, crew members Kippenhan, Ramsdale, and Dean, testified that Complainant was a diligent worker who did the job, did not work slowly or stretch out jobs, and did not show any disrespect for his superiors or a poor attitude about work. The ALJ neither mentioned the testimony of these coworkers nor judged their credibility. Their testimony undermines the ALJ's finding, R.D. and O., Conclusions Part C (p. 8), that Complainant did not get along with the carpenters in Wright's crew; three of the six other carpenters in the crew indicated that they got along fine with Complainant. See T. 139, 173, 279-280.

Wright's and Trantham's testimony concerning Complainant's allegedly slow work contrasts sharply with that in Emory, ALJ Dec. and Ord., Jan. 7, 1987, slip op. at 3, 9-10, where the

Secretary affirmed that the employer legitimately laid off a worker who often was late for work without a proper excuse, was found outside the work area during working hours, routinely failed to finish his work, exhibited a lackadaisical attitude, and was found lying down on the job, contrary to company policy. Here, however, Wright and Trantham together mentioned only three occasions on which they believed Complainant worked slowly, and Wright did not deem those occasions worthy of discussion with either Complainant or Wright's superiors.

The testimony concerning Complainant's poor attitude toward his work similarly was unconvincing as a basis for selecting Complainant first for layoff. In a case where the Secretary credited the employer's claim of discharging the complainant because of poor attitude, the employer established the complainant's use of profanity and persistent antagonism toward his dispatcher. See, e.g., Monteer v. Milky Way Transport Co., Inc., Case No. 90-STA-9, Final Dec. and Ord., July 31, 1990, slip op. at 4-5, appeal filed, No. 91-3027-CV-S-4, (W.D. Mo., S. Div., Jan. 1991). Similarly, in Connors v. State Auto Sales, Case No. 86-STA-13, Final Dec. and Ord., Sept. 11, 1986, adopting ALJ R.D. and O., July 30, 1986, slip op. at 5-6, the Secretary credited poor attitude and insolence as legitimate reasons for discharging an employee who affixed to his superior's door an "impudent reply" to the superior's inquiry about his job performance.

In this case, the witnesses agreed that Complainant got along with his superiors. Indeed, General Foreman Williams

indicated by his initial reaction to learning that Wright selected Complainant for layoff that Complaint was generally considered a fine worker; Williams said, T. 367: "Are you sure, John [Wright]?" And Williams candidly admitted that after the layoff he told Complainant "there was no problem with your work." T. 368-369.

The ALJ found that the safety issue Complainant raised, concerning the proper place to survey the tools, "would be of minor concern to the Bechtel foremen," R.D. and O., Conclusions Part C (p. 6). That assessment is undercut by the testimony establishing Wright's preoccupation with getting the work started quickly. Wright told Complainant that waiting at the tool box for an HP worker to survey and tag tools was not necessary, questioned why it took Complainant so long to enter the containment area, and told Complainant to hurry up. T. 197, 199. Whether or not other Bechtel foremen or workers thought this safety issue was important, Wright clearly did because it slowed workers down. The record reveals that shortly after Complainant raised a safety issue that would slow the work down somewhat, Wright selected Complainant as the first of the crew to be laid off.

In addition, Ramsdale and Kippenhan testified that Wright did not want them to take the time to follow established procedures and exit the containment area for the purpose of changing the Radiation Work Permit under which they were working. T. 123-129, 162-165. Their testimony corroborated that

Wright was very concerned with getting work done quickly, even at the expense of safety procedures.

Moreover, Wright admittedly was "a little upset" at the fact that Complainant raised an issue about safety procedures with Wright's superior, Williams, because Wright instructed Complainant to come to Wright first. T. 100. Under the ERA, an employer may not, with impunity, hold against an employee his going over his superior's head, or failing to follow the chain of command, when the employee raises a safety issue. See, e.g., Pogue v. United States Dep't of Labor, 940 F.2d 1287, 1290 (9th Cir. 1991).

Based on a thorough review of all of the record evidence, I find that Bechtel's proffered reasons for selecting Complainant as the first carpenter to be laid off from Wright's crew were not believable, and that Complainant has sustained the burden of persuasion that the real reason for his selection was his protected activity. The record indicates that foreman Wright placed speed above safety. It is more believable that Wright selected Complainant for layoff because of Complainant's insistence on following a safety procedure that slowed the work down, than that Wright chose Complainant because of slow work or poor attitude. Accordingly, I find that Respondent violated the ERA when it selected Complainant for layoff.

In the event that a respondent is found to have violated the ERA, "the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation,

and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment . . . ." 42 U.S.C. § 5851(b)(2)(B). See generally Wells v. Kansas Gas & Elec. Co., Case No. 85-ERA-0072, Sec'y Final Dec. and Ord., Mar. 21, 1991, slip op. at 17. In addition, "the Secretary may order such person to provide compensatory damages to the complainant." Id. Finally, the Secretary shall assess costs and expenses, including attorney's fees, reasonably incurred in bringing the complaint. Id.; DeFord v. Secretary of Labor, 700 F.2d 281, 288-289, 291 (6th Cir. 1983).

At the hearing, the ALJ did not receive, or accept into evidence, records proffered by Respondent that show the hours worked by the members of Wright's crew, including Complainant. T. 474-476. Accordingly, the record does not include evidence from which to calculate the back pay owed to Complainant. Therefore, remand will be necessary so that the record for damages and any claims for costs and expenses may be established.

ORDER

Accordingly, Respondent is ORDERED to offer Complainant reinstatement to the same or a comparable position to which he is entitled, with comparable pay and benefits, to pay Complainant the back pay to which he is entitled, and to pay Complainant's

costs and expenses in bringing this complaint, including a reasonable attorney's fee. The case is hereby REMANDED to the ALJ for such further proceedings as may be necessary to establish Complainant's complete remedy. The parties and the ALJ are encouraged to complete the remand proceedings expeditiously.

SO ORDERED.

Lynn Martin
Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: Roy Edward Nichols v. Becthel Construction, Inc.

Case No. : 87-ERA-0044

Document : Decision and Order of Remand

A copy of the above-referenced document was sent to the following persons on OCT 26 1992.

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U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: July 19, 1993
CASE NO.: 87-ERA-35

IN THE MATTER OF

JAMES CARROLL PILLOW, JR.,

COMPLAINANT,

v.

BECHTEL CONSTRUCTION, INC.,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER OF REMAND

Before me for review is the Recommended Decision and Order (R.D. and O.) issued by the Administrative Law Judge (ALJ) in this case which arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA or the Act), 42 U.S.C. § 5851 (1988). The ALJ denied the complaint on the ground that Complainant did not establish a prima facie showing that his protected activity was a motivating factor in Respondent's adverse actions toward him. In the alternative, the ALJ ruled that even if Complainant's protected activity were a motivating factor, Respondent established that it would have treated Complainant the same in the absence of the protected activity.

After a thorough review of the ALJ's decision and the entire record, I conclude that Respondent violated the ERA when it switched Complainant's work shift and selected him for layoff.

I. The Facts

Complainant worked for Respondent Bechtel Construction, Inc. (Bechtel), a contractor to owner Florida Power & Light (FP&L) at the Turkey Point nuclear power plant during the 1984 outage and for three days during the 1986 outage. [1/] T. 69, 131. Respondent again hired Complainant to work as a laborer at Turkey Point during the 1987 outage, beginning on April 6, 1987. T. 69. Immediately prior to being rehired by Bechtel in 1987, Complainant was working for a different contractor at the Turkey Point plant. T. 668.

In the early morning of April 11, 1987, foreman Charles Ferguson assigned Complainant to decontaminate a pipe. T. 83. According to Complainant, Ferguson forced Complainant to sign the Radiological Work Permit (RWP) assigned to the decontamination task and rushed him into the containment area before Complainant had the opportunity to read the RWP fully. T. 82-83. The RWP determines the type of safety equipment required for a task. T. 79. Ferguson informed Complainant that readings on the assigned pipe showed a low level of contamination, measured in

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1/ The nuclear units at Turkey Point are shut down periodically for refueling and other reasons, and the periods of shut down are called "outages." T. 533. There is an increase in the number of workers during outages. T. 469-470.

average disintegrations per minute (DPMs). [2/] T. 83-84. As Complainant was decontaminating the pipe, a Health Physics (HP) technician advised him that based on a current DPM reading, Complainant should possibly be wearing a respirator. T. 91. When Complainant talked to Ferguson about the possibility that the pipe was highly contaminated, Ferguson told him not to worry, to shut up, and to do what Ferguson said. T. 93. Complainant's first safety concern was Ferguson's refusal to discuss or investigate further the decontamination incident and his belief that he was working under an incorrect RWP that night. T. 98, 100, 104.

Complainant believed that Ferguson violated safety rules by sleeping on the job, T. 100, and by failing to assign someone to relieve Complainant for lunch when Complainant was assigned to firewatch duty. T. 111-112. When Complainant brought up the lunch relief issue, Ferguson told Complainant to hide the fire extinguisher and just leave the containment area when Complainant wanted to eat lunch. T. 112. These alleged violations of the safety rules were Complainant's second safety concern.

Complainant reported these safety concerns to Bechtel supervisor George King. T. 99-100. A short time later, Ferguson chastised Complainant for going to King, and told Complainant he

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[2/] Average DPMs are calculated by taking the average of the geiger counter readings of DPMs on 10 to 25 paper smears. T. 436. The ALJ's finding, R. D. and O. at 4, that Complainant stated that an assignment requires the use of a respirator if the radiation level was above 20,000 DPMs is corrected by replacing the number 20,000 with the number 50,000. See T. 84.

was fired. T. 101, 515. Ferguson and Complainant together brought their dispute to supervisor Kenneth Hampton, who overruled the firing, but told Complainant to keep quiet and do as he was told or he would lose his job. T. 102, 517. Bechtel manager Larry Booth also warned Complainant he would be fired if he kept getting involved in matters other than his work as a laborer. RX 18, p. 24, 26.

King believed that there was a personality conflict between Complainant and Ferguson and decided to switch Complainant to a different night shift crew of carpenters under a different foreman, effective April 15, 1987. T. 572; RX 2.

Complainant also tried to get the union hall to help with his problem with Ferguson. T. 103-104. Union hall president Albert Huston received a message that Complainant wanted to discuss safety issues concerning Ferguson, and Huston told laborer general foreman Willie Murphy to look into it and fix the problem. T. 596. According to Complainant, Murphy reacted adversely and told Complainant not to go to the union hall or talk to anyone else about the problem. T. 106. Murphy said he told Complainant to come to him first with any problem, rather than going directly to the union hall. T. 346-347, 671.

In early April 1987, the Nuclear Regulatory Commission (NRC) informed FP&L about an anonymous tip that unnamed pipe fitters at Turkey Point were using drugs on the job, and FP&L in turn informed the pipe fitters' employer, Bechtel. T. 468. Bechtel required all pipe fitters to undergo drug testing, and four

workers tested positive. T. 468. The workers with positive test results were discharged during the first two weeks of April. T. 469.

Union representative Bill Loy and Civil Superintendent George King heard rumors that Complainant was the person who had informed the NRC about the pipe fitters' drug use. T. 490, 573. During one night shift, Loy heard threats against Complainant over the plant's public address system. T. 490. Loy told Project Superintendent Robert Slover about the rumors concerning Complainant and the voiced threats. T. 476. Neither Loy nor Slover talked to Complainant about the threats, T. 487, 493, and no one knew who made the threats. Since the threats occurred at night, Slover decided to transfer Complainant to the day shift, effective the next work day (April 20), as a means to protect Complainant. T. 477-478. According to Bechtel, there was more supervision of workers during the day shift and Complainant would not have to go to the parking lot or drive home in the dark. T. 478.

Complainant testified that in the aftermath of his raising safety concerns to his superiors, he was transferred to day shift without notice and at a significant loss in pay. T. 113-115. Bechtel neglected to tell Complainant about the transfer, either directly or by leaving a message on his telephone answering machine. T. 114. He learned about the transfer only when he reported for the night shift on April 20 and Murphy asked why Complainant had not earlier reported for the day shift. T. 113-

114. Under a work rule, as a result of missing work on April 20, Complainant was not permitted to work and earn overtime pay during the weekend of April 25 and 26. T. 114-115, 141. Complainant testified that working day shift represented a loss of 20 to 30 hours per week of pay at time and a half. T. 115.

According to Complainant, Bechtel manager Booth warned him that by transferring him to the day shift, Bechtel was setting up Complainant to be fired. [3/] T. 105. Complainant testified that while on day shift, Bechtel discriminated against him by assigning him permanently to distasteful "cask wash" duty. T. 116-117. Day shift foreman Calvin Battle stated that he assigned Complainant to cask wash because the job needed to be done and Complainant was proficient at it. T. 208. Battle stated that he did not rotate crew members in the cask wash, and that he consistently assigned a different worker to cask wash from May 1987 through the hearing in February 1988. T. 208-209.

On April 26, Complainant made a complaint to the Nuclear Regulatory Commission (NRC) alleging safety violations, which the NRC promptly investigated. T. 118-119. Complainant believed that Bechtel was aware that Complainant had contacted the NRC because the NRC representative interviewed Complainant for an hour and a half, and interviewed other workers for only 10 or 15 minutes apiece. T. 121.

[3/] Booth, who had left Bechtel's employ and moved to Arizona, was not a witness at the hearing. See RX 18 at 5. In his pre-hearing deposition, RX 18, no one asked Booth whether he told Complainant about being "set up," as Complainant later testified.

Field Superintendent Don Hamilton determined on May 15, 1987, that it was necessary to lay off three laborers and informed another manager, who in turn told Murphy, the laborer general foreman. T. 536-537. Murphy had the sole responsibility to determine which persons to lay off, T. 537-538; 675, and since there is no seniority at Bechtel, he chose to lay off employees who presented problems. T. 574. Murphy stated that he selected Complainant because Complainant had interfered with the first aid department, contrary to orders, T. 669-670, called the union hall for assistance without first seeking Murphy's help, T. 670-671, and because Murphy believed that Complainant might resign again to take a better job, as he had in 1986 after only three days of training while on Bechtel's payroll. T. 674, 681-682. Complainant was laid off effective May 15, 1987, and had not been recalled to work as of the hearing, which closed in March 1988.

Murphy also selected two other laborers for layoff that day. One laborer was chosen because of absenteeism, T. 389, 674, and another for interfering with workers and keeping them from doing their work. T. 389. In the months following Complainant's layoff, Bechtel reduced substantially the number of laborers at Turkey Point. RX 22.

II. Preliminary Issues

The parties' filings are lengthy and several. Complainant submitted a Notice of Supplemental Information (Notice) in February 1992. Pursuant to a May 1989 Joint Stipulation of Briefing Schedule, however, the pleadings closed with the

submission of Complainant's Reply to Bechtel's Response to Complainant's Amended Exceptions, submitted in June 1989. Complainant has not offered any reasons why he should not be bound by the Joint Stipulation. Accordingly, the Notice has not been considered.

Complainant argues that the ALJ denied him a fair hearing by issuing the R.D. and O. without either permitting closing arguments or considering Complainant's post hearing brief. [4/] Complainant's counsel had just received a copy of the transcript and notified the ALJ that Complainant would submit a post hearing brief, when the ALJ issued the R.D. and O. seven months after the close of the hearing. By order of February 13, 1990, the Secretary accepted for filing Complainant's 157 page, single spaced post hearing brief, and it has been considered in reaching this decision. Thus, any possible unfairness has been cured.

Complainant further contends that the testimony of Bechtel's expert witness Kelley deprived him of a fair hearing. Complainant initially moved to strike Kelley's entire testimony on the ground that Bechtel had not listed him as a witness prior to the hearing. T. 456. When the ALJ allowed Complainant to renew his objection at the completion of Kelley's testimony, Complainant withdrew his motion to strike. T. 464. Since

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[4/] Closing arguments and post hearing submissions are discretionary. See 29 C.F.R. § 24.5(e)(3). In this case, the ALJ authorized submission of post-hearing proposed findings of fact and conclusions of law 30 days after receipt of the hearing transcript. T. 689.

Complainant waived objection to the testimony, it was not unfair to include it. [5/]

Finally, Complainant contends that he also was prejudiced by the admission at the hearing of the depositions of Bechtel's witnesses Robarge and Williams, who resided outside Florida and did not appear at the hearing. After initially indicating that he would not call Robarge and Williams at trial, Bechtel's counsel took their depositions by telephone on the day before the hearing opened, after one day's notice to Complainant. T. 529. Complainant's counsel did not participate in the last minute telephonic depositions and therefore the witnesses' testimony was not subjected to cross-examination. At the hearing, the ALJ admitted both depositions over Complainant's strenuous objection. T. 530. In view of the lack of cross-examination, I have given little weight to the testimony in the depositions. Moreover, any possible prejudice to Complainant from the admission of the depositions is at most harmless error, since I have found that Bechtel violated the ERA.

III. Analysis

A. Prima Facie Case

To make a prima facie case, the complainant in a whistleblower case must show that he engaged in protected activity, that he was subjected to adverse action, and that the

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[5/] Moreover, although Complainant contends that including Kelley's testimony was unfair, Amended Exceptions No. 6 at p. 6 and Nos. 32, 33 at p. 14, Complainant seeks to rely on portions of Kelley's testimony that substantiate his own. See, e.g., Amended Exceptions No. 28 at p. 13; No. 32 at p. 14.

respondent was aware of the protected activity when it took adverse action against him. Complainant also must present sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action. Dartey v. Zack Co. of Chicago, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 8. Under the ERA,

> No employer, including a . . . contractor . . . of a Commission licensee, . . . may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter . . . ; (2) testified or is about to testify in any such proceeding or; (3) assisted or participated or is about to assist or participate in any other manner in such a proceeding . . . .

42 U.S.C. § 5851 (1988).

There is no dispute in this case that the complaint to the NRC is protected activity under the Act. See Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1510-1513 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986) (protection afforded during all stages of participation in order to maintain integrity of administrative process in its entirety). Complainant argues that the ALJ unfairly limited the protected activities in this case to the NRC complaint, whereas Complainant's internal complaints to his supervisors also are protected. Although I do not believe that the ALJ so limited the scope of protected activities, I agree that internal complaints are protected. See Adams v. Coastal Production Operators, Inc., Case No. 89-ERA-3, Dec. and Order of Remand, Aug. 5, 1992, slip op. at 9; Kansas Gas & Elec.,

780 F.2d at 1513; Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1163 (9th Cir. 1984). I find that Complainant's protected activities included both internal complaints to his supervisors and management, contacting the union representative and an external complaint to the NRC. [6/] See, e.g., Dysert v. Westinghouse Electric Corp., Case No. 86-ERA-39, Final Dec. and Order, Oct. 30, 1991, slip op. at 1-3 (employee's complaints to team leader about procedures used in testing instruments is protected internal complaint under the ERA).

Complainant's layoff clearly constituted adverse action against him. Complainant also established that transfer to the day shift was adverse since day shift workers received less overtime pay than those on night shift.

Although Complainant testified convincingly that he found working in the cask wash to be a hot, distasteful assignment, T. 116-117, he did not complain about it to the assigning foreman, Calvin Battle. T. 208. Battle testified that in his opinion, the cask wash was not the worst assignment for his workers, that some laborers volunteered to do it, and that after Complainant's layoff, he assigned laborer Chris Lee to cask wash a similar percentage and duration of time as he had assigned

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[6/] The ALJ's finding that "no Nuclear Regulatory Commission regulation was violated," R.D. and O. at 4, is not dispositive on the issue of protected activity, since a complainant need not prove a violation of Federal safety laws or regulations to establish a violation of a whistleblower provision. See Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 356-357 (6th Cir. 1991) (under analogous whistleblower provision of the Surface Transportation Assistance Act, 49 U.S.C. § 2305 (1988)).

Complainant to it. T. 208-210; see RX 11, 12. I find that the evidence establishes that Complainant's assignment to cask wash was routine and did not constitute adverse action against him. [7/]

Bechtel managers King and Hampton clearly knew of the internal safety complaints Complainant made to them. As for the external complaint, Ferguson knew that Complainant had complained to the NRC, T. 199, 633-634, and several managers heard rumors, or assumed, that Complainant spoke with the NRC about his safety concerns. T. 581, 584-585 (King); RX 18 at 47 (Larry Booth). In addition, several managers heard rumors that Complainant had tipped off the NRC about the pipe fitters' drug use, a serious safety violation. T. 573 (King) and T. 476 (Slover). Therefore, Bechtel managers either were aware, or strongly suspected, that Complainant had complained to the NRC. [8/] See Williams v. TIW Fabrication Machining, Inc., Case No. 88-SWD-3, Sec. Dec.,

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[7/] Even if assignment to cask wash were considered an adverse action, Bechtel proferred legitimate business reasons for assigning him to it: the task needed to be done and Complainant was good at it. T. 207-208. I find that Complainant did not sustain the burden of establishing by a preponderance of the evidence that the reasons Bechtel gave were a pretext for discrimination, or that Bechtel discriminated in assigning him to cask wash.

[8/] Complainant proffered in rebuttal the testimony of FP&L official Tom Young that two days before Complainant was laid off, Young notified a Bechtel manager that Complainant had made a complaint to the NRC. T. 686. The ALJ excluded the testimony because it was not rebuttal evidence, T. 687, and would not establish that the foreman who selected Complainant for layoff was aware of the NRC complaint. T. 689. In light of my finding that Complainant established that Bechtel was aware of his protected activity, the exclusion of the testimony did not prejudice Complainant.

June 24, 1992, slip op. at 6 (managers' suspicions that complainant had filed complaints with government agency sufficient to show respondent's knowledge).

Causation is shown in that Complainant's transfer to day shift occurred shortly after he made his internal safety complaints and his layoff occurred shortly after he made his complaint to the NRC. Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989) (temporal proximity sufficient to establish causation). [9/] Moreover, Complainant produced ample testimony supporting the inference that Bechtel retaliated against him because of his safety complaints. Complainant testified that his foreman, Ferguson, became angry and told Complainant he was fired when Complainant raised safety concerns to Ferguson's superior. T. 101. Bechtel manager Kenneth Hampton told Complainant to keep his dispute with Ferguson quiet or Complainant would be out of a job. T. 102. According to Complainant, T. 105, Bechtel superintendent Larry Booth warned that Bechtel transferred Complainant to the day shift in order to set him up to be fired. Finally, Complainant stated that Murphy ordered him not to go to the union hall with his complaints, which involved a safety

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[9/] The ALJ found Complainant's prima facie case defective because he "failed to establish that Respondent was even partially motivated in its actions by Complainant's protected activity." R.D. and O. at 4. At this stage, Complainant was not required to establish motivation. To establish a prima facie case, Complainant need produce only enough evidence to raise the inference that the motivation for the adverse action was his protected activity. Darrey, slip op. at 8.

related dispute with Ferguson. T. 106. After these events, Complainant was switched to day shift, then laid off. T. 122.

I find that Complainant established a prima facie case that the transfer to day shift and his layoff violated the employee protection provision of the ERA.

B. Motivation for Adverse Actions - Rebuttal, Pretext, Dual Motive

Once Complainant established a prima facie case, Respondent had the burden to come forth with legitimate, nondiscriminatory reasons for the adverse actions. Dartey, slip op. at 8. Bechtel articulated legitimate reasons for transferring Complainant to day shift and laying him off. Complainant had the ultimate burden of persuading that the articulated reasons were a pretext, and that the real reason for the adverse action was discriminatory. St. Mary's Honor Center v. Hicks, No. 92-602, 1993 U.S. LEXIS 4401, at 15-16 (U.S. June 25, 1993). [10/]

When the employer's adverse action against the employee was motivated by both prohibited and legitimate reasons, the dual motive doctrine applies. Dartey, slip op. at 8-9; see Mackowiak, 735 F.2d at 1163; Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977). In such a case,

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[10/] The Dartey decision, which laid out the burdens of production and persuasion in "whistleblower" cases under the ERA, in turn relied upon the framework for cases brought under Title VII of the Civil Rights Act of 1964. See Dartey, slip op. at 7-8, citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). The Supreme Court's recent decision in St. Mary's Honor Center clarifies that the plaintiff in a Title VII case has the burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff on an impermissible basis.

the employer has the burden to show by a preponderance of the evidence that it would have taken the same action concerning the employee even in the absence of the protected conduct. Dartey, slip op. at 9; Mackowiak, 735 F.2d at 1164; Mt. Healthy, 429 U.S. at 287; Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (plurality opinion). The employer bears the risk that the influence of legal and illegal motives cannot be separated. Mackowiak, 735 F.2d at 1164; Guttman v. Passaic Valley Sewerage Comm'rs, Case No. 85-WPC-2, Final Dec. and Order, Mar. 13, 1992, slip op. at 19, affirmed sub nom. Passaic Valley Sewerage Comm'rs v. Martin, No. 92-3261 (3d Cir. Apr. 16, 1993).

C. Transfer to day shift

Complainant argues that Bechtel transferred him to the day shift in retaliation for his internal safety complaints about a night shift foreman, Ferguson. Bechtel witness King explained that in immediate response to Complainant's disagreements with Ferguson, he placed Complainant on a different night shift crew under a different foreman. [11] T. 572. Bechtel's witnesses also stated that Bechtel transferred Complainant to day shift only after hearing threats against Complainant over the public address system during the night shift. Bechtel managers knew of rumors that Complainant had tipped off the NRC about employees' drug use. In light of the fact that several pipe fitters had been discharged for positive drug tests, it is believable that

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[11] Complainant does not contend that the switch to a different night crew was discriminatory.

Bechtel's managers feared that someone might try to harm Complainant. Protecting an employee is generally a legitimate management concern.

The entirety of the evidence convinces me that Bechtel also had another motive for the shift switch, however. Complainant convincingly testified that he was not notified of the switch to day shift and that he had a telephone answering machine and did not receive a message about the switch. T. 114. None of Bechtel's witnesses stated that they attempted to inform Complainant about the switch prior to the day it took effect. If, as Bechtel witnesses testified, the company feared for Complainant's safety if he continued to work nights, it seems odd that no one informed Complainant ahead of time that he was being switched to the day shift. Bechtel made the decision to switch shifts on Friday, April 17, T. 490-491, and Complainant was not scheduled to work again until Monday, April 20. T. 113. Through Bechtel's failure to advise him, Complainant apparently was put in danger an extra evening when he reported for the night shift on April 20, 1987.

In addition, as a consequence of the work rules, Complainant was not permitted to work during the weekend of April 25-26 because he had missed the day shift (through no fault of his own) on April 20. T. 141. Complainant testified that Murphy said he might be fired for missing work. T. 114, 141-142. Murphy did not refute Complainant's testimony on the subject. Since it clearly was Bechtel's fault that Complainant missed work that

day, it seems punitive either to consider firing him or not to pay him compensation to which he would otherwise have been entitled, for work on April 20 and the subsequent weekend. In addition to these anomalies, Complainant testified credibly that his superiors threatened him about safety related complaints and warned him he was being set for discharge through the switch to day shift. I therefore find that Bechtel also had a discriminatory motive of punishing Complainant for raising safety issues concerning foreman Ferguson.

Bechtel thus had mixed motives for transferring Complainant to day shift, both a legitimate motive of protecting him from threatened harm, and a retaliatory motive because he raised safety issues. After weighing the evidence carefully, I find that Bechtel did not sustain its burden of establishing that it would have made the transfer for Complainant's safety even if he had not engaged in protected activities. In failing to notify about the switch to day shift and penalizing Complainant monetarily for missing the day shift on April 20, Bechtel did not act consistently with its avowed desire to protect Complainant from harm. The threats about Complainant pursuing a safety-related dispute with Ferguson were particularly egregious, and occurred shortly before the switch in shifts. Accordingly, I find that Complainant convincingly established that the real reason for the transfer to day shift was his engaging in protected activities.

D. Selection for layoff

Concerning the layoff, Murphy testified that when he was notified to reduce the laborers' work force by three, he chose employees with whom he had problems, including Complainant. T. 674. The other two employees Murphy selected for layoff on the same day as Complainant caused problems of the type for which any employer would find fault in a worker: absenteeism and keeping other employees from doing their work. T. 389, 674-675. I will examine in turn each of Murphy's stated reasons for selecting Complainant.

According to Murphy, the first problem was Complainant's interference with the safety department. When he rehired Complainant in 1987, Murphy said that because of complaints of interference with the first aid department during Complainant's prior employment at Bechtel, he warned Complainant not to interfere with the department again. [12/] T. 378, 669. Notwithstanding that warning, Murphy testified, Complainant went to the first aid department within the first few weeks of his 1987 reemployment to ask about joining an "emergency response team" mentioned in a Bechtel brochure. T. 382-385; see RX 21 at 5-6. Bechtel did not have such a team at the Turkey Point plant, however, and used only professional safety department staff to handle first aid. RX 21 at 6, 11.

[12/] Project Safety Supervisor Ken Elledge corroborated that Complainant had interfered with the Safety (first aid) Department in 1984. T. 507-508.

Complainant argued that Bechtel's "safe practices" booklet directs all employees to tell the responsible safety supervisor that they have first aid training, [13] and he visited the first aid department to do so. Comp. Post-Trial Br. at 110-111. When safety department employee Mike Williams complained to Murphy about Complainant's visit, Murphy believed that Complainant had breached his promise not to interfere with the department. T. 670. Complainant contends, however, that Murphy's warning to stay away from the department occurred after his visit to report his first aid training, and not before. Comp. Post-Trial Br. at 108.

According to Williams, Complainant visited the first aid department a second time in 1987 and gave unsolicited medical advice to an injured employee. RX 21 at 7-8. [14] Complainant did not testify about such a visit. [15]

The ALJ found that Complainant's interference with the first aid department alone was sufficient justification for layoff,

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[13] The "safe practices" booklet to which Complainant's counsel referred was not admitted into evidence. The part of the booklet that counsel read into the record, T. 39-40, does not mention an employee's obligation to notify the safety department about first aid certification or training. Since Bechtel's project safety supervisor did not dispute that the booklet so states, T. 618, I will assume that it does.

[14] Complainant also visited the first aid department during his 1987 employment to receive medical attention for heat stress. T. 612-614; CX 11. No witness faulted Complainant for his visit for the purpose of treatment.

[15] As explained above, Complainant's counsel did not attend the eleventh hour deposition of Williams, which was taken on one day's notice. At the time Complainant testified at the hearing, Williams' deposition was not yet a part of the hearing record.

absent Complainant's engaging in protected activities. [16/] R.D. and O. at 12. But Complainant had a plausible basis for visiting the department to report his first aid training and to offer to join a purported emergency team at Turkey Point, as Project Safety Supervisor Elledge conceded. T. 619. I find that Murphy's concern about the first visit to inform about Complainant's first aid training was not a credible basis for laying off Complainant.

As for Complainant's alleged second visit to the safety department in 1987, other witnesses appeared to contradict Williams. Murphy testified that after chastising Complainant about the first visit concerning the emergency team, he had no further complaints about Complainant interfering with the safety department. T. 383, 677. Nor did Elledge know of any contact between Complainant and the safety department during his 1987 employment, with the exception of Complainant's clearly legitimate visit for treatment. T. 611-613. It appears that after complaining to Murphy about the visit concerning first aid training, Williams inexplicably did not complain about a second visit in which Complainant purportedly offered medical advice. Williams' testimony was not subject to cross examination and does not convince me that the alleged second visit occurred in 1987. I note that Complainant had periods of employment at Turkey Point

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[16/] At one point in his decision, the ALJ mistakenly referred to the adverse action against Complainant as a discharge, R.D. and O. at 12, whereas Complainant was laid off due to a reduction in force. CX 8.

other than his 1987 employment at issue. Thus, I find that the alleged second visit is also unconvincing as a reason for laying off Complainant.

Murphy's second reason for selecting Complainant was his belief that Complainant might work only a very brief time for Bechtel, as he had previously. In 1986, Complainant left Bechtel's employ after only three days of training to take a better paying job with another contractor at Turkey Point. T. 682. Murphy testified that he remembered Complainant's short-lived 1986 stint and reluctantly hired Complainant during the 1987 outage only because Complainant was a union member and Murphy felt compelled to hire him. T. 377.

The fear that Complainant might quit is not a convincing reason to select him for layoff. Bechtel established that the 1987 outage was nearing completion at the time it hired Complainant. T. 389. The list of employees that Bechtel laid off between May 15 and May 29, 1987, includes eight other laborers, RX 8, and Bechtel reduced the number of laborers even more through August 14, 1987. RX 22. Therefore, even if Complainant had quit his job before the end of the 1987 outage, it would not have harmed Bechtel substantially because of the need to reduce the number of laborers. Moreover, Project Field Superintendent Hamilton said that Bechtel would not hold it against a worker who quit to take a better job. T. 551-552. That is precisely why Complainant resigned from Bechtel's employ in 1986.

Murphy's third stated reason was Complainant's seeking help from the union hall without first giving Murphy a chance to resolve the problem. Complainant argues that the statement of Bechtel's counsel that bringing a complaint to the union hall was "the motivating factor" [17] in deciding to lay off Complainant was an admission that Bechtel discriminated against Complainant for engaging in protected activity, since the issues he intended to raise were safety related. T. 103-104. See Amended Exceptions No. 31, p. 14; P-T Br. at 126. Under the ERA, it is not permissible to find fault with an employee for failing to observe established channels when making a safety complaint. See, e.g., Pogue v. United States Dep't of Labor, 940 F.2d 1287, 1290 (9th Cir. 1991) (superior's purported anger over employee's failing to follow chain of command in reporting a whistleblower complaint was pretext for anger over the making of the complaint).

Murphy did not state that he was aware that Complainant intended to obtain the union hall's help on safety issues. Rather, Murphy referred to the firewatch issue as if it were solely an economic issue involving payment for working through lunch. [18] Complainant testified, however, that the issue was

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[17] In arguing a motion, Respondent's counsel referred to the Union Hall issue as "the motivating factor" in selecting Complainant for layoff. T. 26-27. Murphy testified, however, that Complainant's going to the Union Hall was one of three factors that led him to choose Complainant. T. 389-391.

[18] See, e.g., T. 335, 347, and 671. When asked if he knew whether Complainant raised safety issues with the Union Hall, (continued...)

one of safety: whether anyone would be on firewatch when Complainant took a lunch break. T. 112-113. Murphy understood that Ferguson and Complainant disagreed over the correct RWP for a job, T. 336, and that was clearly a safety issue. Moreover, Union president Huston testified that he was aware that Complainant had a safety complaint, and that he asked Murphy to address the problem. T. 596, 598-599. Huston may have indicated to Murphy that the issue was safety based.

Since both Complainant and Huston viewed the issues as safety related, I find it disingenuous that Murphy purportedly did not know that Complainant intended to raise safety issues with the union hall. [19] I find further that Murphy's faulting Complainant for going around established channels to bring a safety complaint was not a valid basis for choosing him for layoff.

Citing Complainant's "altercations" with Ferguson, the ALJ found that Respondent established that it would have laid off Complainant even in the absence of his protected activities. R.D. and O. at 11-12. Respondent, however, did not proffer this reason for selecting Complainant for layoff. Murphy did not mention the relationship between Complainant and Ferguson as a reason for choosing Complainant, and therefore, it is not

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[18] (...continued)
Murphy testified that he did not. T. 348.

[19] The ALJ did not discuss Murphy's statement that the union hall issue was one reason he laid off Complainant.

probative that Complainant legitimately could have been laid off absent his protected activities. [20/] Complainant disagreed with Ferguson on a safety issue, and that disagreement led to the strong feelings they exhibited toward one another. In any event, no one alleged or demonstrated that Complainant engaged in abusive or violent behavior toward Ferguson that could legitimately justify discharge, rather than layoff. The fact that Bechtel considered Complainant eligible for rehire, R.D. and O. at 11, undermines the seriousness of the "altercations" between him and Ferguson. Nor is the ALJ's assessment, R.D. and O. at 11, that Pillow had difficulty getting along with coworkers relevant, since Murphy did not mention it as a reason for the layoff either. [21/]

After a thorough review of the record and the ALJ's decision, I find that Complainant met his burden of establishing that the reasons Bechtel advanced for choosing him for layoff were a pretext, and I am persuaded that Murphy selected him for layoff because he pursued safety-based disputes with Ferguson. I note that the ALJ found no contradictions between the testimony of Complainant and that of Respondent's witnesses, R. D. and O.

[20/] Similarly, the ALJ's reliance on Dunham v. Brock, 794 F.2d 1037 (5th Cir. 1986), R.D. and O. at 11, is misplaced. In that case, the Secretary and the court found that the employer legitimately could have discharged an employee for his insubordination. Here, however, Murphy did not cite insubordination as a reason for laying off Complainant.

[21/] In any event, some co-workers testified to the contrary, that Complainant got along well on the job. See, e.g., T. 203 (foreman Battle) and T. 249-250 (co-worker Dalton).

at 4, and made no determinations of witness credibility. Therefore, I have not disagreed with any assessment of witness credibility. Rather, I disagree with the legal conclusions the ALJ drew from the evidence. I find that Bechtel violated the ERA when it laid off Complainant on May 15, 1987.

IV. The Remedy

In the event that a respondent is found to have violated the ERA, "the Secretary shall order the person who committed such violation to (1) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment. . . ." 42 U.S.C. § 5851(b)(2)(B). See generally Wells v. Kansas Gas & Elec. Co., Case No. 85-ERA-0072, Final Dec. and Order, Mar. 21, 1991, slip op. at 17. In addition, "the Secretary may order such person to provide compensatory damages to the complainant" and shall assess costs and expenses, including attorney fees, reasonably incurred in bringing the complaint. Id.; DeFord v. Secretary of Labor, 700 F.2d 281, 288-289, 291 (6th Cir. 1983).

Complainant does not ask for reinstatement, but seeks back pay, compensatory damages, costs and attorney fees, and asks that I remand to the ALJ for a hearing limited to damages. Comp. Post-Trial Brief at 157. Complainant has the burden of establishing the amount of back pay that Respondent owes. He testified that the switch to day shift caused him to lose between 20 and 30 hours of pay per week at time and a half during his

1987 employment, T. 115, and Bechtel did not refute his testimony. Complainant is entitled to 30 hours back pay per week at time and a half for the period from April 20, 1987, through May 15, 1987.

The issue of the correct amount of back pay due to the discriminatory selection for layoff requires determining whether, and when, Complainant would have ceased working for Bechtel, absent any discrimination. Complainant is entitled "only to recover damages for the period of time he would have worked but for wrongful termination; he should not recover damage for the time after which his employment would have ended for a nondiscriminatory reason." Blackburn v. Martin, 932 F.2d 125, 129 (4th Cir. 1992). The record reveals that Bechtel hired Complainant on three different occasions as part of a build-up of staff during outages: in 1984-85, again in 1986, and in 1987. Complainant did not establish that he was hired in 1987 as a permanent employee who could expect to continue working at Turkey Point after the outage ended. I find that even absent any discrimination, Bechtel would have laid off Complainant some time in 1987 as the outage ended. Respondent showed that it laid off a total of 56 laborers, including Complainant, from May 15, 1987 (date Complainant was laid off), through August 14, 1987, as the 1987 outage ended. RX 15. Bechtel's Construction Daily Force Report corroborates that the number of laborers at Turkey Point declined substantially during that period, and that thereafter the number was held between 38 and 44 laborers for the remainder

of 1987. RX 22. I further find that the cutoff date for back pay is August 14, 1987, the last day on which Bechtel laid off laborers as the 1987 outage ended.

Complainant testified that after the time of his layoff, he was employed for an unspecified period by Bartlett Nuclear, Inc. T. 68. If this employment occurred during the period May 16 through August 14, 1987, the amount that Complainant earned must be deducted from the back pay award.

Complainant is entitled to back pay as a night shift worker, for the period May 16 through August 14, 1987, including overtime pay, less any earnings during that period, together with interest thereon calculated pursuant to the rate for underpayment of taxes in the Internal Revenue Code, 26 U.S.C. 6621. Wells, slip op. at 17 and n.6. I will remand for the ALJ to take evidence on, and recommend, the amount of back pay to which Complainant is entitled under the discussion of back pay outlined above.

Complainant also seeks compensatory damages, which may be awarded for pain and suffering, mental anguish, embarrassment, and humiliation. DeFord, 700 F.2d at 283. Such awards may be supported by the circumstances of the case and testimony about physical or mental consequences of retaliatory action. Lederhaus v. Donald Paschen, et al., Case No. 91-ERA-13, Final Dec. and Order, Jan. 13, 1993, slip op. at 10, and cases there cited. On remand, the ALJ shall afford the opportunity to present evidence concerning entitlement to compensatory damages and any opposition thereto, and shall recommend the amount of such damages, if any.

Finally, Complainant seeks an award of costs and an attorney fee associated with bringing his complaint. On remand, the ALJ shall afford Complainant's counsel a period of time to submit a request for costs and attorney fee, shall afford Respondent's counsel a like period to file any objection, and shall make a recommendation on an appropriate award.

Accordingly, this case is REMANDED to the ALJ for further proceedings and a recommended decision on the amount of back pay, compensatory damages, if any, and costs and attorney fees, to which Complainant is entitled.

SO ORDERED.

Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: James Carroll Pillow, Jr. v. Bechtel Construction, Inc.

Case No. : 87-ERA-35

Document : Decision and Order of Remand

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