Marcus v. United States Environmental Protection Agency, 92-TSC-5 (Sec'y Feb. 7, 1994)

DATE: February 7, 1994
CASE NO. 92-TSC-5

IN THE MATTER OF

WILLIAM L. MARCUS,

COMPLAINANT,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER; ORDER
DENYING COMPLAINANT'S MOTION FOR TEMPORARY
RESTRAINING ORDER AND AN INJUNCTION

Complainant William L. Marcus brings the captioned complaint of unlawful discrimination against his former employer, the U.S. Environmental Protection Agency (EPA), under the employee protection provisions of the Toxic Substances Control Act, 15 U.S.C. § 2622 (1988); Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i) (1988); Clean Air Act (CAA), 42 U.S.C. § 7622 (1988); Solid Waste Disposal Act, 42 U.S.C. § 6971 (1988); Water Pollution Control Act or Clean Water Act (CWA), 33 U.S.C. § 1367 (1988); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 (1988); and the applicable regulations which appear at 29 C.F.R. Part 24. The case proceeded to hearing before a Department of Labor Administrative Law Judge (ALJ), and on December 3, 1992, the ALJ issued a Recommended Decision and Order (R.D. and O.) in favor of Dr. Marcus. As discussed below, I agree with the ALJ that Dr. Marcus should prevail in his complaint of unlawful

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discrimination. The record fully supports the ALJ's factual findings, and I adopt them.

A.

As a preliminary matter, EPA argues that the above employee protection provisions do not apply to Federal employees. I note, however, that at least one of those provisions, arising within the context of the CERCLA, incorporates exceptionally broad coverage. In particular,

> No *person* shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee

> or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

42 U.S.C. § 9610(a) (emphasis added). Under the CERCLA, "[t]he term 'person' means . . . the United States Government. . . ." 42 U.S.C. § 9601(21). Moreover, "[e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity. . . ." 42 U.S.C. § 9620(a)(1). Accordingly, the CERCLA contains express language subjecting EPA, as an agency of the United States, to its provisions, including its employee protection provision. As Dr. Marcus' complaint concerned exposure to an allegedly hazardous substance in drinking water, it touched on the CERCLA objective of controlling environmental health hazards. I find EPA to be a "person" within the meaning of 42 U.S.C. § 9610. *Cf. Pogue v. U.S. Department of the Navy Mare Island Shipyard (Pogue)*, Case No. 87-ERA-21, Sec. Dec., May 10, 1990, slip op. at 4-12, *rev'd on other grounds*, 940 F.2d 1287 (9th Cir. 1990) (Department of the Navy subject to CERCLA employee protection provision).

Directly applicable here, the SDWA also contemplates broad coverage. Its employee protection provision refers interchangeably to "employer[s]" and "person[s]" as being subject to its prohibitions. 42 U.S.C. § 300j-9(i)(1) and (2). While the SDWA does not define the term employer for purposes of Section 300j-9(i), "[t]he term 'person' means [a] Federal agency"

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which in turn is defined as "any department, agency, or instrumentality of the United States." 42 U.S.C. § 300(f)(11) and (12). I deem this language sufficient to subject EPA to the SDWA employee protection provision. [1]

I also note that, as is the case under the CWA and the CAA, federal facilities expressly are subject to the SDWA, an additional indication that Congress intended to waive governmental immunity. 42 U.S.C. § 300j-6(a). *See* H.R. Rep. No. 338, 95th Cong., 1st Sess. 12-13, *reprinted in* 1977 U.S. Code Cong. & Admin. News 3659 (federal agency provision of SDWA amended to make clear that "Federal facilities would have to comply with State and local requirements including recordkeeping or reporting requirements, permit requirements, and any other type of Federal, State, or local requirements").

Prior to 1977, the CWA and the CAA required federal facilities to comply with Federal, State, interstate and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements. Relying on principles of sovereign immunity and on legislative history arguably limiting the term "requirements" to "effluent limitations and standards and schedules of compliance," the

Supreme Court held that federal facilities were not subject to State permit requirements. *EPA v. State Water Resources Control Bd.*, 426 U.S. 200, 215, 227 (1976); *Hancock v. Train*, 426 U.S. 167 (1976). Thereafter, Congress amended the federal facilities provisions of the CWA and the CAA to overrule *EPA* and *Hancock* and to clarify that the Federal Government was required to comply with State permit, reporting and other procedural requirements. S. Rep. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4326, 4392; H.R. Rep. No. 6161, 95th Cong., 1st Sess. 12, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1077, 1089-1090. Congress's concern that federal facilities comply with all State requirements suggests that it also intended all requirements of the Federal statutes to apply. *See* 1977 U.S. Code Cong. & Admin. News 4392 (amendment to CWA Section 1323 clarifies that "all Federal facilities must comply with all substantive and procedural requirements of Federal, State, or local water pollution control laws").

B.

EPA next contends that Dr. Marcus' exclusive remedy arises under the Civil Service Reform Act (CSRA), which provides protection for whistleblowers. *See* 5 U.S.C. § 2302(b)(8) (Supp. IV 1992). This argument essentially is one of implied repeal, specifically that the CSRA, with its comprehensive scheme of remedies to enforce personnel prohibitions, effectively has repealed the environmental whistleblower statutes as they apply to Federal Government employees. This argument previously has

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been rejected under both the CERCLA and CWA. *Pogue*, slip op. at 13-16; *Conley v. McClellan Air Force Base*, Case No. 84-WPC-1, Sec. Dec., Sept. 7, 1993, slip op. at 13-16. For the reasons set forth in those decisions, I find EPA's instant argument to be without merit.

C.

EPA finally contends that the ALJ's disposition on the merits is erroneous. To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action against him because he engaged in an activity protected under the applicable statute. A complainant initially must show that it was likely that the adverse action was motivated by a protected activity. *Guttman v. Passaic Valley Sewerage Comm'rs*, Case No. 85-WPC-2, Sec. Dec., Mar. 13, 1992, slip op. at 9, *aff'd*, No. 92-3261 (3d Cir. Apr. 16, 1993). The respondent may rebut such a showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The complainant then must prove that the proffered reason was not the true reason for the adverse action and that the complainant's protected activity was the reason for the discharge. *St. Mary's Honor Center v. Hicks*, 125 L. Ed.2d 407, 416 (1993).

SWDA Section 300j-9(i) provides:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has --

> (A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State,
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> (B) testified or is about to testify in any such proceeding, or
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> (C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.

42 U.S.C. § 300j-9(i)(1). Quoted previously, the CERCLA employee

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protection provision constitutes a similar "participation" provision. In the instant case, the ALJ found Dr. Marcus to have engaged in protected activity when he authored and disseminated a memorandum criticizing a draft report, concerning toxicology and carcinogenesis studies, which EPA contemplated using in regulating fluoride levels. Hearing Transcript (T.) 491-499; Complainant's Exhibit 56. In so doing, Dr. Marcus clearly participated in a proceeding for the administration of regulations under the SDWA and, in a broad sense, his participation contributed to the identification of hazardous substances under the CERCLA. Accordingly, Dr. Marcus engaged in protected activity.

Moreover, EPA unquestionably engaged in adverse action when it discharged Dr. Marcus. Finally, the ALJ correctly found causation based on EPA's treatment of Dr. Marcus following his protected activity which eventually culminated in his discharge. Accordingly, Dr. Marcus succeeded in showing that his discharge likely was motivated by his protected activity.

In its defense, EPA claims that it discharged Dr. Marcus based on a report issued by its Inspector General (IG). I agree with the ALJ that this rationale is pretextual and that the true reason for the discharge was retaliation. *See* R.D. and O. at 27. In this regard, I find the following considerations persuasive.

1. Marc Smolonsky, Chief Investigator for the U.S. Congressional Subcommittee on Human Resources and Intergovernmental Relations, investigated Dr. Marcus' discharge because of Marcus' prior involvement with the subcommittee on fluoride issues. T. 44-45. As part of the investigation, he interviewed Francis Kiley, the supervisory agent assigned to the Marcus IG investigation. Smolonsky testified:

> Mr. Kiley also told me that he was aware that Dr. Marcus' supervisors did not like him, that they welcomed the IG's investigation, that they were hopeful the IG's investigation would lead to his removal, and that they were, independent of all that, concerned . . . about his activities, whistle-blowing on the fluoride issue.

T. 46. Lorraine Farchild, the EPA IG special agent who investigated Dr. Marcus, testified that Michael Cook, Marcus'

immediate supervisor, was not happy with him "[a]nd that it was related to the fluoride issue." T. 126. (Farchild also testified that exculpatory material obtained during the investigation was not included in the final IG report and that Agent Kiley directed her to destroy investigation materials prematurely. T. 138-143, 716-724.) In this connection, it is

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significant that the sole chemical that Dr. Marcus was precluded from working on following issuance of his memorandum was fluoride. T. 881-885. As a senior science advisor, Marcus clearly was responsible for acquiring information about this chemical. T. 449-450, 488, 520-522; Complainant's Exhibit 65.

2. Margaret Stasikowski, Director of Dr. Marcus' division at EPA, recommended that he be discharged, and Dr. Tudor Davies, Director of the Office of Drinking Water, made the final discharge decision. Respondent's Exhibits 1 and 2. Both the recommendation and decision were premised on uncritical acceptance of the IG's findings, which is contrary to accepted personnel practice. T. 282-284.

3. The ALJ found many of the IG's charges to be unsubstantiated. It is difficult to believe that Dr. Davies did not question these charges especially after hearing Dr. Marcus' rebuttal. I find particularly disturbing Davies' acceptance of the abuse of leave charge in the absence of any convincing documentation.

4. Finally, I find Dr. Davies' stated rationale for the discharge decision unconvincing. Davies cited Marcus' supposed recalcitrance in limiting his outside consulting activities as precipitating his decision. T. 1068-1070. Marcus, however, had been more than conscientious about coordinating his activities. Although he initially was given blanket approval to consult, Marcus frequently discussed his activities with EPA ethics personnel in order to avoid the appearance of conflict, and when management began monitoring his activities more closely, he complied in all respects. Had Davies determined to withdraw Marcus' approval completely, there is no suggestion that Marcus would not have complied. In these circumstances, discharge, rather than some form of intermediary discipline coupled with a direction not to consult, was unduly harsh in light of EPA's disciplinary practices and, indeed, convinces me that the true reason for Marcus' discharge was his protected activity.

ORDER

Respondent U.S. Environmental Protection Agency is ordered to offer Complainant Dr. William L. Marcus reinstatement to his former or comparable position together with the compensation, terms, conditions, and privileges of his former employment. I otherwise agree with and adopt the remainder of the ALJ's recommended order, R.D. and O. at 30-31, with the exception of item 4. Rather, interest shall be computed at the rate specified under Section 6621 of the Internal Revenue Code for use in computing interest charged on underpayment of Federal taxes. Assuming, without deciding, that exemplary damages are available against the United States Government, I agree with the ALJ that they are not appropriate here. I also agree with the ALJ's award

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of compensatory damages.

Counsel for Complainant are granted a period of 20 days from receipt of this Decision and Order to submit any petition for

costs and expenses, including attorney fees. Respondent thereafter may respond to any petition within 20 days of receipt.

On December 15, 1993, Complainant filed with the ALJ a motion for a temporary restraining order and an injunction preventing termination of his employee health insurance plan coverage which had been continued only temporarily following his discharge and allegedly was due to expire on December 16. On December 22, 1993, the ALJ referred Complainant's motion to me for disposition.

Upon consideration, I deny the motion as moot because Respondent is now required by this decision and order to provide Dr. Marcus with health insurance coverage pursuant to his reinstatement as an employee and to compensate him for any out-of-pocket expenses that he has incurred as the result of changes in his insurance coverage attributable to his discriminatory discharge. Accordingly, Complainant's motion IS DENIED. Should Complainant suffer further damage as the result of plan coverage termination, he may move for consideration of whether an additional award is appropriate.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Because the CERCLA and the SDWA afford Dr. Marcus a full measure of relief, I do not discuss coverage under the remaining environmental whistleblower statutes.