

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 10Jul2002

CASE NO.: 2001-ERA-00037

In the matter of:

HUGH K. TURPIN,
Complainant

v.

LOCKHEED MARTIN CORPORATION,
LOCKHEED MARTIN ENERGY SYSTEMS, INC.,
and BWXT Y-12, L.L.C.
Respondents

AND

CASE NO.: 2002-ERA-22

In the matter of:

HUGH K. TURPIN,
Complainant

v.

BWXT Y-12, L.L.C.
Respondent

Appearances:

Edward A. Slavin, Jr., Esq.
For the Complainant

Edward G. Phillips, Esq.
John C. Burgin, Jr., Esq.
For Respondents Lockheed Martin Corporation
and Lockheed Martin Energy Systems

Kenneth M. Brown, Esq.
For Respondent BWXT-Y-12, L.L.C.

BEFORE: DANIEL L. LELAND
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Energy Reorganization Act of 1974 (ERA), 42 U. S. C. § 5851, and the implementing regulations at 29 CFR § 24, which prohibit licensees of the Nuclear Regulatory Commission from discharging or otherwise discriminating against an employee who has engaged in activity protected under the Act. Hugh K. Turpin (complainant) filed a complaint under the Act on September 16, 2000, which was investigated and found to have no merit by the Regional Administrator of the Occupational Safety and Health Administration. Complainant made a timely request for a hearing before an administrative law judge, and a hearing was held before the undersigned in Knoxville, TN on March 19, 20, and 21, 2002. Complainant's Exhibits (CX) 1A, 1B, 1C, 2A, 2B, 2C, 3A, 3B, 4A, 4B, 4C, 5A, 5B, 6, 7, 8, 9, and 14, and Respondents' exhibits (RX) 1, 2, 3, 6, 7, 8, 9, 10, 16, 17, 18, 19, 20, 21, 22, 23, 24, 28, 30, 33, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 51, 52, 53, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 73, 74, and 76 were admitted into evidence. At the close of the hearing, the parties were given until June 17, 2002, to submit briefs and the due date was subsequently extended to June 24, 2002. Timely briefs have been submitted. Complainant filed a second complaint on March 25, 2002, which was consolidated with the prior complaint by order issued May 16, 2002.

Factual Summary

The Y-12 National Security Complex is a nuclear weapons facility in Oak Ridge, TN that was operated by respondent Lockheed Martin Energy Systems (LMES) as a contractor for the United States Department of Energy from April 1, 1984 to October 31, 2000. On November 1, 2000, respondent BWXT Y-12 L.L.C (BWXT) took over as the contractor operating the plant. (TR 112) Complainant Hugh Turpin has worked at the plant since 1969, except for a three year hiatus, and became a radiological control technician (RCT) in approximately 1986. (TR 375-76) As part of his duties as an RCT, complainant checked for radiation of workers' clothing in laundry buggies using an Eberline RO-2 Ion Chamber. (TR 289, 420-21, see RX 2) Each RO2 has a calibration expiration date affixed to it after which the equipment should not be used. (TR 405, 417, see RX 1)

On nine occasions between March 2 and March 15, 2000, complainant used an RO2 with a calibration date of March 1, 2000, instead of following the proper procedure of placing a red tag on the instrument indicating that it could not be used and needed to be recalibrated. (TR 406-8, RX 6, RX 30, p. 2) Complainant was unable to explain why he made these errors but maintained that they were unintentional. (TR 385) However, the last time he used the equipment on March

15, complainant removed a red tag he had attached to the equipment and then reattached the red tag after using the RO2. (TR 400) On the same day, complainant informed his supervisor, Marita Barnes, of the use of the RO2 with the outdated calibration date, and when she asked why he had removed the red tag the last time he used the RO2, his reply was "What's one more day?" (TR 412) Barnes reported Turpin's errors to her supervisor, Scott Wical, the RADCON field office manager at the plant, Dr. James Barker, the Manager of Radiological Control, and Steven Weaver, the Manager of Employee Relations at Y-12. Dr. Barker testified that complainant's errors seriously jeopardized the plant's safety procedures, even though it was later determined that the equipment complainant used had been properly calibrated. (TR 258-259, 292)

Weaver and Barnes met with complainant on March 20, 2000, to discuss his use of equipment with an expired calibration date. (TR 169-70; see RX 9, 10) Turpin admitted that he had not followed proper procedure but denied that it would have any impact. (TR 170-71) After reviewing Y-12's discipline policy, Weaver, Barker, and Wical decided that decision making leave (DML) was appropriate for Turpin. (RX 18, TR 184) Under DML, an employee is required to take a day off with pay and then is placed on probation for twelve months. Prior to placing complainant on DML, he was referred to Dr. Howard Friedman, the staff clinical psychologist, who found no psychological basis for not putting Turpin on DML. (TR 634, RX 28, pp. 18-19) On March 27, 2000, Barker, Weaver, and Wical met with complainant and informed him that he was being placed on DML, and explained that during his twelve month probation he would be required to follow all safety, health, and operating procedures, perform his work diligently and accurately, and maintain his job performance at a fully acceptable level. (See TR 189, RX 8) He was also told that failure to meet these standards would result in his termination. (See Id, TR 191) Turpin signed the memo from Barker setting forth these standards. (RX 19)

On March 20, 2000, the date Turpin first met with Weaver about his improper use of the RO2, he sent the first of a series of e-mails describing flaws in the radiation equipment recall notification system. (See CX 2A, 2B, 2C) (Turpin had earlier sent an e-mail to Barnes on February 9, 2000 referring to a problem with the date on the recall notice on one instrument.) (See RX 14) In the e-mails, complainant defended his use of the RO2s with outdated calibration dates and blamed flaws in the recall system for his errors. (Id, TR 468) He continued to send e-mails regarding the recall system after being placed on DML. (CX 3A, 3B, 4A) Turpin met with Barker about the recall problems and as a result the employees were given remedial training and the software was modified to correct the system's flaws. (TR 383, 256, 360-62, 603-05) Between February and July 2000, complainant also filed thirty three radiological awareness reports (RAR) dealing mainly with the contaminated contents of laundry buggies.¹ (TR 377-378) Barker testified that he sees only a quarterly summary of the RARs and was not aware of any individual RARs filed by complainant. (TR 682-83)

¹RARs are reports generated by employees at Y-12 that are designed to correct problems in the use of radiological controls. (See RX 59)

After complainant returned to work after his one day of DML, which was March 28, 2000, Barnes noticed that he was continuing to make errors. He unexplainedly delayed in responding to her request for information, (RX 37, pp. 10-11) failed to return a radiation source to the instrumentation area, (TR 437-38, 507-509) and waited six days to comply with her request to assist a fellow employee in surveying computer equipment (TR 506-07) In addition, Turpin did not fill out all the required information on the green tags placed on equipment allowed to leave the plant. Fifty three out of eighty nine green tags filled out by complainant had missing information. (TR 502-03) Material release forms were also improperly completed by complainant. (TR 512-13)

Due to Turpin's continuing errors, Weaver and Barker felt that he should be reevaluated by Dr. Friedman. (TR 196) Dr. Friedman saw complainant on July 10, 2000, but he was unable to offer an explanation for his repeated errors. (RX 28, pp. 17-19) Dr. Friedman decided to refer Turpin to Dr. Leonard Handler, a psychologist in private practice, for a neuropsychological evaluation. (TR 620) After evaluating complainant, Dr. Handler diagnosed 1. Brain dysfunction, Mild, Diffuse, and 2. Personality Disorder, NOS, with Obsessive-Compulsive, Schizoid, and Dependent Traits. He recommended that Turpin be given a less complex position at Y-12 that did not involve safety issues, and that he have weekly psychotherapy to deal with his "anxiety and suspicion". (DX 28 p. 40) After receiving this report, Dr. Friedman restricted Turpin to the less highly secured east end of the Y-12 facility.

On October 4, 2000, Dr. Friedman met with Weaver, Wical, Dr. David Wehrly, the Medical Director of Y-12, and others regarding complainant's inadequate job performance. (See DX 21) It was determined that in light of Turpin's continuing errors, he should not be returned to his job as an RCT, and that alternative work should be found for him at Y-12. Due in part to the transition from LMES to BWXT as the Y-12 contractor, no suitable jobs were found for Turpin. (TR 210-11) A second meeting reviewing Turpin's situation was held on October 18, and it was decided to place him on Short Term Disability Leave (STD L) for six months. (TR 204, RX 22) Pursuant to STD L, an employee receives full pay for up to six months if he is unable to work due to illness or injury. (See RX 74, p. 86) On October 20, 2000, Wical and Wehrly met with complainant. (DX 26) Because of Dr. Handler's diagnosis of brain dysfunction, the option of STD L was chosen instead of termination. Wehrly recommended to Turpin that he: 1) follow up with Dr. Handler for a complete explanation of his findings; 2) arrange for the therapy recommended by Dr. Handler; 3) be reevaluated for a return to work if his therapist feels that he has made sufficient progress; and 4) be off work for the duration of his STD L. (DX 26, TR 722)

During the period on STD L, complainant saw his personal psychiatrist once every three months but did not attend weekly psychotherapy sessions as recommended by Dr. Handler. (TR 445) On April 23, 2001, six months after he was placed on STD L, complainant returned to Y-12 and met with Dr. Russ Reynolds, who had succeeded Dr. Friedman as the staff clinical psychologist. (TR 446) Dr. Reynolds then reviewed complainant's medical records and noted that he had not received the weekly psychotherapy sessions recommended by Dr. Handler. (TR

748-49) On the same day, Dr. Reynolds wrote to complainant outlining the previously stated conditions, including weekly psychotherapy, that he must meet to be considered for a return to work. (DX 28, p. 26) He urged Turpin to begin treatment immediately. *Id.* After meeting with Turpin on May 4, 2001, Dr. Handler wrote to Dr. Reynolds advocating that complainant receive weekly psychotherapy but urging that he return to work during his treatment. (RX 28, p. 27) In light of Dr. Handler's recommendation, Dr. Reynolds slightly altered the conditions of complainant's return to work to allow him to begin a weekly course in psychotherapy, rather than requiring him to complete the psychotherapy before returning. (TR 755-56, RX 28, p. 30) On June 18, 2001, Dr. Reynolds faxed to complainant the names of three therapists. (TR 757, RX 28, p. 29) However, complainant has never begun a course of weekly psychotherapy. (TR 450) Since April 23, 2001, Turpin has been on Long Term Disability Leave (LTDL), under which he receives sixty percent of his regular salary. (TR 450) Dr. Dick Stallings, complainant's family physician, believes that complainant can return to work without any limitations. (CX 1A) Dr. Paine, complainant's psychiatrist, stated that complainant's psychiatric problems are in remission and that he is doing well. (CX 1B)

Conclusions of Law

The ERA prohibits employers from discharging or otherwise discriminating against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee engaged in activity protected under the Act. 42 U.S.C. § 5851. A complainant must first make a *prima facie* case of retaliatory action by the respondent by establishing that he engaged in protected activity, that he was subject to adverse action, and that respondent was aware of the protected activity when it took the adverse action. In addition, a complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Zinn v. University of Missouri*, 1993-ERA-34 and 36 (Sec'y Jan. 18, 1996), *Carroll v. Bechtel Power Corp.*, 1991-ERA-46 (Sec'y February 15, 1995), *affirmed sub nom Carroll v. U. S. Department of Labor*, 78 F. 3d 352 (8th Cir. 1996). The respondent may rebut the *prima facie* case by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The complainant bears the ultimate burden of proving by a preponderance of the evidence that the respondent's proffered reason was not the true basis but was a pretext for discrimination, and that the adverse action was in retaliation for the protected activity. *Zinn supra*, *Carroll v. U. S Department of Labor* at 356. In a recent case, the Administrative Review Board ruled that once a case has been tried on the merits, it no longer serves any analytical purpose to address and resolve the issue of whether the complainant presented a *prima facie* case. Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. *Adornetto v Perry Nuclear Power Plant*, 1997-ERA-16 (ARB Mar. 31, 1999).

Complainant was placed on DML after using an RO2 with an expired calibration date on nine occasions in a two week period, the last occasion constituting a knowing violation. (I assume for the sake of argument that placing complainant on DML was an adverse employment action even though his pay was not reduced and he was not initially reassigned to other duties).

Although complainant attempts to trivialize these errors, his use of radiological detection equipment with outdated calibration dates potentially jeopardized the public health, and LMES was justified in taking appropriate disciplinary action. *See Jain v. Sacramento Municipal Utility District*, 1989-ERA- 44 (Sec'y, Oct. 26, 1992). Moreover, complainant's cavalier attitude regarding his improper use of equipment further warranted his employer's response. Complainant's counsel has referred to actions of other Y-12 employees who supposedly made serious errors and were not disciplined, but there has been no substantiation of any other employee besides complainant who made the same type of errors that he made and received more lenient treatment. *Olsovsky v. Shell Western E & P, Inc.*, 1996-CAA-1 (ARB Apr. 10, 1997). (Barnes's signing of complainant's paperwork indicating that he had improperly used equipment with expired calibration dates does not rise to the level of complainant's egregious errors. [See TR at 86]) Complainant's complaints about the instrument recall notification system were clearly designed to deflect criticism from him, and the evidence fails to prove that this activity, rather than his repeated mistakes, motivated LMES to place him on DML.

After he returned to work following DML, complainant continued to make errors, mostly by not filling out green tags and material release forms completely. These were not isolated instances but occurred, for example, on sixty percent of the green tags he filled out. Complainant's efforts to minimize these errors are unconvincing as he had been admonished to perform his job diligently and accurately and at a fully acceptable level during his probationary period and failed to do so. LMES's decision to refer complainant to Dr. Friedman and then to Dr. Handler was an effort to discover whether there were psychological reasons for his repeated mistakes and can not be deemed retaliatory. *See Miller v. Tennessee Valley Authority*, 1997-ERA-2 (ARB Sept. 29, 1998) After Dr. Handler attributed complainant's repeated errors to brain dysfunction, it was decided that STDL was appropriate. This was certainly a reasonable option and a less draconian one than termination which would have been fully justified considering complainant's continuing substandard performance. There is no evidence in the record supporting complainant's position that placing him on STDL was a pretext for discrimination.

After six months on STDL, respondent BWXT refused to allow complainant to return to work and instead placed him on LTDL due to his failure to follow Dr. Handler's recommendations that he attend weekly psychotherapy sessions. BWXT even modified its conditions for complainant's return to Y-12 by allowing him to return if he began psychotherapy rather than completed psychotherapy as it had first required. Although one may disagree with this decision, BWXT was entitled to impose reasonable conditions on complainant's return; there is no evidence that its decision was retaliatory. *See Keene v. Ebasco Constructors, Inc.*, 1995-ERA-4 (ARB Feb. 19, 1997). It was also under no obligation to adhere to the vague assessments of complainant's family physician and psychiatrist that complainant was not disabled and could return to work, but had the option of exercising its business judgment and declining to allow complainant's return other than on its own terms. Finally, respondent LMES's quick efforts to correct the flaws pointed out by complainant in the instrument recall notification system confirms the absence of a retaliatory motive. *Odom v. Anchor Lithkemko*, 1996-WPC-1 (ARB Oct. 10, 1997). Rather than retaliating against complainant, respondents took steps to remedy the

problems he cited.

After reviewing the entire record, I find no evidence that the respondents' actions with regard to placing complainant on DML, STDL, or LTDL or refusing to allow his return to Y-12 were pretexts for discrimination against him on account of any of his protected activity.² The complaints will therefore be dismissed.

ORDER

IT IS ORDERED THAT the complaints of Hugh K. Turpin are hereby DISMISSED.

A

DANIEL L. LELAND
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§§§ 24.7(d) and 24.8.

²Complainant argues that this is a dual motives case and that respondents must prove that they would have taken the same action against him in the absence of protected activity. However, as I have found that there is no evidence that discriminatory intent played any role in respondents' actions, this is not a dual motives case and respondents need not satisfy the difficult burden of proof in such cases. *See Zinn, supra, Dartey v. Zack Company of Chicago*, 1982-ERA-2 (Sec'y Apr. 25, 1983).