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Issue Date: 27 October 2015

CASE NO.: 2013-TSC-00001
2013-CAA-00003

In the Matter of

MICHAEL J. MADRY,
Complainant,

v.

EMLAB P&K, LLC,
Respondent.

ORDER DENYING SUMMARY DECISION

This is a whistleblower action under the Toxic Substances Control Act, 15 U.S.C. § 2622, and its implementing regulations at 29 C.F.R. Part 24.[1] Respondent moves for summary decision. It argues that Complainant Madry did not engage in activity that the statute protects; that even if he engaged in activity that ordinarily is protected, that activity was a routine part of his job duties and thus not protected as to him; and that any adverse action Respondent took was not in retaliation for any protected activity in which Complainant might have engaged. Madry opposes the motion. I find the motion without merit.

Facts[2]

In 2007, Complainant Madry was working for Aero Tech Laboratories as a quality assurance manager in Phoenix, Arizona. Aero Tech did industrial air quality testing. In 2007, it merged with a competitor that did similar work at a lab in San Bruno, California, where the company was headquartered, and at other locations. Madry continued his work, now for the newly formed result of the merger, EMLab P&K, LLC. His quality control efforts extended to the San Bruno and other labs,[3] as well as the Phoenix lab where he'd previously focused his efforts.

[1] On March 22, 2013, Complainant stipulated to Respondent's motion to dismiss his Clean Air Act claim. I dismissed that claim on March 25, 2013. The ARB affirmed the dismissal on June 6, 2014.

[2] As I must view the evidence in the light most favorable to Complainant as the non-moving party, drawing all reasonable inferences in his favor, and not weigh the evidence or make credibility determinations, the facts recited are for purposes of this motion only.

[3] In addition to Phoenix and San Bruno, Madry's work extended to labs in Fort Worth, Denver, Houston, Glendale, CA, Orange County, CA, Sacramento, San Diego, and Seattle.

Pleased with Madry's performance, in May 2008, EMLab's President Vega promoted him from Quality Assurance Specialist to Quality Assurance Manager. He continued to report to EMLab's director of quality, Edward Kot, as well as to Vega. His responsibilities were enlarged.

The Toxic Substances Control Act Schools provides that schools seeking federal assistance for asbestos abatement are ineligible unless the school uses an accredited lab for testing. 15 U.S.C. § 2646(e). Congress empowered the Administrator of the EPA to require the National Institute of Standards and Technology to develop accreditation standards for this asbestos abatement program. 15 U.S.C. § 2646(d). The National Institute of Standards and Technology audits labs under the National Voluntary Accreditation Program. It was part of Madry's job to assure compliance with various standards, including the National Voluntary Accreditation Program standards.[4]

In December 2008, the National Voluntary Accreditation Program audited Respondent's San Bruno lab. The auditor found what appeared to be an excessive number of samples analyzed per day, raising questions about accuracy. Another auditor of the Accreditation Program raised similar questions the following month about Respondent's Orange County lab.

In January 2009, Madry and another quality control expert investigated. They found that some lab analysts were using "keypads" or "speedpads" to enter default data rather than observed data when testing samples. In Madry's view, the use of default data failed National Voluntary Accreditation Program standards, citing NVLAP standard 5.4.5. Madry reported this as improper, and his opinion was communicated to EMLab's president Vega. President Vega, however, concluded (after consultation) that the use of speed pads or keypads did not violate National Voluntary Accreditation Program standards and should be continued.

Soon Madry and other quality assurance personnel received complaints from analysts testing asbestos that they were being pressured to test more samples faster. When this information was communicated to President Vega, she commented that there was nothing wrong with pressure to be productive and efficient.

On March 17, 2009, Madry's director, Dr. Kot, gave him a performance review. Though rated effective overall, Madry was coached that he must adapt to the way others do their jobs and be more tolerant of their needs.

In May 2009, Madry discovered additional data bringing the accuracy of asbestos testing into question. Specifically, over the past seven months when samples were tested a second time to confirm accuracy (a routine procedure), there was never any variation in the results. Madry considered this to be abnormal and scientifically almost impossible; there should be some minor variation at least on occasion. Then, in one instance, there was a 50 percent variation between the initial asbestos analysis and a duplicate.

[4] Madry was to ensure compliance with current ISO 17025 standards, the AIHA-LAP, LLC standard, the National Voluntary Accreditation Program accreditation policies, and additional accreditations as they applied.

A week later, Madry was involved in a telephone conference with President Vega and others to discuss all this, but the matter never was resolved. Madry wrote to other managers about his ongoing concerns. He complained to the parent company's human resources director, who referred him to the parent company's director of quality, Ray Frederici.

Madry called Frederici in June 2009 and expressed concern about the accuracy of asbestos testing at the San Bruno lab, describing the problems he had discovered.[5] He complained about what he saw as President Vega's undermining quality control's work. He tearfully expressed fear that EMLab would retaliate against him for his raising these concerns. Frederici agreed that Madry had correctly seen red flags and that someone other than San Bruno personnel should investigate.

In the end, Frederici investigated personally. The investigation included a number of steps. Frederici visited several of the labs to observe and talk to people. One of the people he talked with was a co-worker of Madry. She expressed detailed concerns very similar to Madry's.

On October 30, 2009, Frederici reported the results of his investigation. He found no "direct evidence of inappropriate or unethical practices in San Bruno." Though he found analysts were using speed pads, he seemed unconcerned, commenting that it "had only a small affect on there efficiency [sic]." Despite finding no "direct evidence" of inappropriate or unethical practices, he recited a list of "next steps." These included: the preparation of "a list of LabServe LIMS deficiencies/priorities"; "a list of Asbestos analysis observed best practices"; "a list of policy decisions that need to be formalized and that would address concerns raised"; and "Strengthen the ethics reporting process, so that allegations do not get suppressed or ignored." The need for these "next steps" implies that Frederici found deficiencies even if he chose not to characterize them as "direct evidence of inappropriate or unethical practices." One of the deficiencies concerned the suppression of or ignoring reports of ethics issues; another related to asbestos testing.

Meanwhile, on August 28, 2009, Madry's director, Dr. Kot, wrote to him and another quality control expert that their department was being seen as targeting the San Bruno lab. Madry's co-worker wrote to Frederici, complaining that the company was emphasizing revenue and expansion and neglecting quality and ethics, a concern to her given asbestos' "carcinogenic nature." The co-worker expressed concern about retaliation for bringing her concerns to light.

In October 2009, Vega gave Kot a "needs improvement" rating, advising him that his team needed to focus more on efficiency and to stop targeting the asbestos testing at the San Bruno lab. Kot told Madry about this and urged him to pay attention.

Following this discussion, Madry became concerned that Vega might target him. He emailed Vega to ask if she was satisfied with his performance. She replied that, in general, she was, but that Madry needed to stop construing the NVLAP standards so strictly.

[5] The complaints included management's suppressing independent investigation into asbestos testing in San Bruno, a lack of follow-through on corrective action based on the audits, the excessive number of tests being run (indicating shortcuts that jeopardize quality), using a speed pad inconsistent with criticism in prior audits, and a lack of any variability in original and duplicate test results.

EMLab contends that Madry's conduct was inappropriate during this time and into early 2010 because: (1) his complaints about the San Bruno lab seemed motivated by personal rivalry with the other company into which Aero Tech had been merged; (2) his time spent on the San Bruno lab kept him from his duties at other labs; and (3) he'd been told to spread his time across all of the labs, which meant that his continued focus on San Bruno was insubordinate.

In March 2010, Kot supplied Vega with a draft performance review for Madry. Vega was concerned that Kot did little to address what Vega saw as Madry's issues. She wanted Kot to list more examples to support a "needs improvement" rating. These included comments that Madry "extrapolate[d] on accreditation requirements and appl[ied] overly restrictive interpretations on labs." Kot revised the performance review to include these "suggestions."

On March 23, 2010, Dr. Kot gave Madry the performance review with a "needs improvement" rating, the first he'd ever received. It included the comments that Madry was "preoccupied with perceived quality issues relating to asbestos" and that his opinions about what was required for accreditation were "overly restrictive." Kot told Madry that Vega had pressured him into giving Madry the "needs improvement" rating and the comments.

Three days later, Vega travelled to Phoenix to demote Dr. Kot. Kot went on a medical leave a week later, never to return. He filed a whistleblower claim with OSHA, naming EMLab as respondent. Vega named a new director of quality for EMLab, Jennifer Shim. Shim was also to continue her duties as director of EMLab's "Lean Program." She was advised at the time that Madry was an "employee who would need a great deal of supervision."

Madry complained to the human resources department about his performance rating. As Kot had left, human resources recommended that Shim conduct an interim performance review in four to six months. Vega approved the plan.

In April 2010, Madry received a report that the San Bruno lab had produced and sent to a client purported results on asbestos testing when, in fact, it had never run the test. Believing this to present potentially serious public health and safety issues, Madry informed Shim. She told him to investigate.

During the investigation, Madry received inconsistent results from the Phoenix and San Bruno labs. He sent the samples to an outside vendor. Shim objected that he should not have done this without authorization. Madry "seemed scared" and apologized but stated that Shim had approved this; she had told him to investigate. Shim disputed that she had approved going out of the Company and informed Vega. On July 22, 2010, Shim directed Madry to stop investigating asbestos testing at San Bruno altogether.

About this time, EMLab received two client complaints about Madry. The first was that Madry had sent incorrect sampling devices for radon analysis or, at least, given the client incorrect information about the devices. The client complained that Madry's "behavior" was "totally unprofessional" and resulted in harm to the client's reputation. The second complaint concerned Madry's failure over about 18 months to apply for a certain accreditation for a client, work that

he was twice asked to do. President Vega had to intervene to resolve the situation with the state accreditation office. Madry's response on the second complaint was that he was asked to do it only once – much more recently than 18 months ago – and that he did email a request for the accreditation 7 months before the problem arose. Vega did not believe Madry.

On July 7, 2010, Madry received an email from the Central Region Laboratory Director. She worked out of the Phoenix lab, where Madry worked. She said that Vega had called her and asked if she knew of anyone who was having problems with Madry.

On July 22, 2010, Vega wrote a lengthy memo about giving Madry a written warning. She detailed the incidents described above, other incidents, and comments from Shim that suggest Madry's becoming increasingly short-fused and giving Shim dismissive responses when she disagreed with him. Vega characterized these as "emotional outbursts and obvious instability." She noted that Shim was uncomfortable about approaching Madry in person to administer the written warning, "given his increasingly immature and hostile responses to [Shim]." Vega also wrote: "I am also concerned that any disciplinary action will result in a claim from [Madry] that the action is in retaliation for the many perceived issues he has brought us."

On August 1, 2010, Vega began working with Human Resources and Shim to prepare an expedited performance review that would be administered a month earlier than they and Madry had agreed when Madry had protested the review Kot gave him.

On August 4, 2010, Vega sent Shim a draft of the review. The draft gave Madry an overall "unsatisfactory" rating and rated him as "unsatisfactory" or "needs improvement" in all but three of the 14 criteria, leaving him as "exceptional" in none and "fully successful" only in "detail oriented," "organized," and "safety awareness." The draft included a written warning notice for "violations" described as "conduct," "insubordination," "disregard to Company policy," and "unprofessional behavior."

Shim responded that day by resigning her duties as director of quality assurance (but continuing as director of the Lean Program). She said she was concerned about her personal safety and that EMLab had not agreed to a plan that left her confident that Madry would not be violent when she administered the performance review and written warning. She had wanted her manager or someone from corporate human resources to accompany her, but they refused. To her, it seemed that "Corporate HR seems to believe that my concerns are unfounded or exaggerated and maybe they are."

Actually, nothing on the extensive record that the parties submitted on this motion suggests that Madry had any history of workplace or other violence. On the contrary, EMLab managers at times criticized Madry because, when they disagreed with him or confronted him around this time, he would become quiet, withdraw, and unresponsive. Company officials viewed this as unprofessional.

On August 20, 2010, Madry emailed Vega that he was experiencing a hostile work environment and wanted to talk to her. She responded that he should "adopt a different attitude," but she agreed to meet with him on September 2, 2010, when she would be in Phoenix.

On September 2, 2010, Vega and the Human Resources Director saw Madry in Phoenix, but not to discuss his allegations about hostile work environment. Instead, they administered the "unsatisfactory" performance evaluation, a performance improvement plan, and the written warning. They told him that he was required to report to EMLab's employee assistance program and follow any recommendations they made. (The EAP required Madry to undergo a psychological examination.)

Madry became emotional and disagreed with the evaluation. He repeated that he was being subjected to an intimidating, offense, hostile work environment. When asked to specify what was hostile, he became quiet and did not answer.

Several days later, Madry wrote to EMLab's parent company's human resources director. He disagreed with the performance evaluation and alleged a hostile environment in retaliation for the issues he had been raising. The HR director asked for specific examples of discrimination and for Madry to document these.

Madry contacted Frederici on September 20, 2011. He said that the performance review and the meeting during which it was administered was an example of the harassment to which he was being subjected. Frederici referred Madry back to HR. Madry called the HR director again. He mentioned that Vega kept him under scrutiny and criticized him with "nitpicking" comments. He asserted that the performance evaluation and performance improvement plan were further examples of harassment. The HR director responded by asking him more than a dozen times for documentation.

Actually, through Vega, EMLab had enough understanding to investigate Madry's allegations of hostile work environment had the Company wanted to do so. When Madry reported that San Bruno was failing to comply with National Voluntary Accreditation Program standards and otherwise producing questionable results, Vega rejected his views. Madry involved the parent company's quality assurance director. Inconsistent with Vega's views, the director acknowledged that Madry had correctly seen red flags that required investigation. The quality assurance director notified EMLab that a number of "next steps" were required.

As signs of inaccurate testing continued at San Bruno, EMLab initially asked Madry to investigate but then took him off the investigation. It removed all of his responsibility for quality control of asbestos testing at San Bruno. Vega knew that she pressured Kot into giving Madry the first negative review Kot ever gave him. Madry then watched as, following on the heels of his negative review, Vega demoted his manager (Kot), and Kot left on a medical leave, never to return.

Vega agreed to wait until October 2010 for an interim performance review. She told Madry that his work was fine, except that he should be more flexible about accreditation standards – a significant exception here. She agreed to meet with Madry to discuss his hostile work environment allegations. But when she came to the meeting, she brought EMLab's HR director, gave Madry a failing performance review, and put him on a performance improvement plan. President Vega, and thus EMLab, knew all this when Madry alleged at the performance review

that this was a hostile environment. That was enough information to begin an investigation without asking Madry more than a dozen times if he could document his allegations with something in writing. But EMLab did not investigate.

On September 22, 2010, Madry's psychiatrist notified EMLab that he was taking Madry off work until October 13, 2010. EMLab put Madry on a Family & Medical Leave Act leave. They extended the leave repeatedly, though they filled Madry's job with a replacement. Eventually, when Madry stopped arranging for letters from his psychiatrist to extend the leave beyond June 15, 2011, EMLab warned Madry, and then terminated the employment on June 30, 2011. Madry contends that EMLab constructively discharged him.

Discussion

On summary decision, I must determine if, based on pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. § 18.40(d); Fed. R. Civ. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed. R. Civ. P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 29 C.F.R. § 18.40(c). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252. EMLab has not met this standard.

Under the Act, Madry

> Must establish that his protected activity was a motivating factor in an adverse action that he suffered. An employer may avoid liability by demonstrating by a preponderance of the evidence that it would have discharged the complainant even if he had not engaged in protected activity.

Tomlinson v. EG&G Defense Materials, Inc., ARB Nos. 11-024, 11-207 (Jan. 31, 2013) (citations omitted).

I. Madry Has Established Genuine Issues of Material Fact Going to His *Prima Facie* Case.

> The TSCA provides for the testing of chemical substances and mixtures that "may present an unreasonable risk of injury to health or the environment" through their manufacture, distribution in commerce, processing, use, or disposal, or a combination of such activities. 15 U.S.C. § 2603(a).

Devers v. Kaiser-Hill Co., ARB No. 03-113 (Mar. 31, 2005) at 11-12.

As discussed above, the Act includes a regime to test asbestos under certain accreditation standards. Those standards include the National Voluntary Accreditation Program standards that were the focus of Madry's complaints about EMLab's testing in San Bruno and elsewhere. They were the subject of the audits in San Bruno and Orange County that opened the entire quality and thus safety issue in which Madry became involved. No evidence brings into question that Madry in fact perceived violations of those standards. He reported the violations to EMLab's director of quality assurance (Kot) as well as the parent company's director of quality assurance (Frederici), not to mention President Vega. Madry is not a lawyer and need not identify specific statutory provisions when he complains. He need not, in the end, be correct that the statute or its regulatory regime have been violated so long as he believes the conduct is inconsistent with that regime and his belief is objectively reasonable.[6] Mr. Frederici's agreement that Madry had correctly perceived "red flags" demonstrates the objective reasonableness of Madry's subjective belief that violations were occurring. This is activity that the Act protects.[7]

The fact that Madry's job duties included quality control of testing and reports of improper testing does not remove the Act's protection. As the Supreme Court observed in a Sarbanes-Oxley case, the Act's whistleblower protection provision was needed, not just to protect those who worked for the employer, but also the outside contractor attorneys and accountants whose job it was to find and expose irregularities. *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1169-71(2014). The failure of such employees to expose excesses and fraud made them complicit in the Enron debacle that led to the statute's enactment. Yet those who were faithfully questioning Enron's fraud or improper accounting practices found themselves punished by Enron's contractors such as Merrill Lynch and Arthur Anderson. 134 S. Ct. at 1170. Thus, to be effective, the whistleblower statute must extent to those whose job it is to expose the unlawful activity.

As all of the events material to this case occurred in Arizona or California, the Ninth Circuit and ARB are the controlling sources of law. Neither requires employees to "step outside" their usual job requirements to gain protection under the Act or under similar whistleblower statutes. Thus, when quality control inspectors at a nuclear facility made internal complaints, the complaints were protected activity under the Energy Reorganization Act. *See Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). As the court held, "If the Nuclear Regulatory Commission's regulatory scheme is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems." *Id.* at 1163. They could not be discharged simply "because they [did] their jobs too well." *Id.* Faced with same issue, the ARB came to the same conclusion in Sarbanes-Oxley case, finding no textual support in the Act to support the same proposition or its authority that Respondent now advances and cites. *See Robinson v. Morgan Stanley et al.*, ARB Case No. 07-070, ALJ Case No. 2005-

[6] *See Melendez v. Exxon Chemical Americas*, ARB No. 96-051 (July 14, 2000) (TSC and CAA) at 32.

[7] "'Internal reporting of safety concerns and procedures' at the specific industries TSCA covers falls well within the scope of the activity protected by the whistleblower provisions of the Environmental Acts." *Tomlinson, supra*, citing *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, slip op. at 11 (Sept. 29, 1998).

SOX-00044 (Jan. 10, 2010) at 13-14.[8] Madry does not lose the Toxic Substances Control Act's protection for doing his job too well.

II. There Are Disputed Issues Going to Causation.

Summary decision is appropriate only when there are no genuine disputes of material fact and one party is entitled to a favorable decision as a matter of law. Otherwise, the parties are entitled to a full hearing. For that reason, as discussed above, on summary decision I must view the evidence in the light most favorable to the non-moving party. I draw all reasonable inferences in Madry's favor and do not weigh the evidence or make credibility determinations. Only if EMLab is entitled to a favorable decision on that reading of the evidence may I grant the motion.

I recited the evidence in the "Facts" section above, viewing it as required for summary decision. Madry has offered far more than what is necessary to raise a genuine issue of material fact to show that his protected activity was a motivating factor or cause of EMLab's adverse actions. Drawing all reasonable inferences in Madry's favor, it appears not only possible, but likely, that Vega viewed Madry as an annoyance, who threatened profits with his complaints about a lab she had been associated with for years, when Madry was a newcomer brought in through the merger. After trying to get Madry to be more "adaptive" (partly by pressuring Kot), then trying to get him to be less focused on San Bruno, then taking him off a particular investigation of the San Bruno lab, then removing his responsibility for quality assurance on asbestos testing in San Bruno altogether, Vega finally decided that EMLab would do better without Madry. With the evidence viewed in the light most favorable to Madry, Madry's ongoing complaints about San Bruno's asbestos testing were at the least one reason Vega went down this path to its end.

Order

The motion for summary decision is DENIED.

SO ORDERED.

Digitally signed by STEVEN BERLIN
DN: CN=STEVEN BERLIN, OU=ADMIN LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

STEVEN B. BERLIN
Administrative Law Judge

[8] EMLab misplaces its reliance on *Sasse v Dep't of Labor*, 409 F.3d 773, 779-80 (6th Cir. 2005). This out-of-Circuit decision is not controlling. *Sasse* does not address the considerations that the Supreme Court emphasized in *Lawson.* In addition, the Sixth Circuit reasoned that, as an attorney, Sasse had a fiduciary duty to engage in the conduct at issue as an Assistant U.S. Attorney's duty to investigate and prosecute crimes. Madry is not an attorney and had no fiduciary duty to EMLab.