



Via Electronic Mail

June 25, 2021

Naval Engineering and Facilities Command (NAVFAC)
c/o Daniel J. Monahan, Senior Trial Attorney, Naval Litigation Office and
Tracey Rockenbach, Assistant Director, Naval Litigation Office
720 Kennon St. SE, Bldg. 36, Rm. 233
Washington Navy Yard, DC 20374
daniel.j.monahan2@navy.mil
tracey.rockenbach@navy.mil

Re: U.S. Navy – Fagan - 9-3290-18-529

Dear Mr. Monahan and Ms. Rockenbach:

This is to advise you that we have completed our investigation of the above-referenced complaint filed on July 18, 2018, under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9610; the Safe Drinking Water Act (SDWA), 42 U.S.C. §300j-9(i); the Clean Air Act (CAA), 42 U.S.C. §7622; the Toxic Substances Control Act (TSCA), 15 U.S.C. §2622; the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1367; and the Solid Waste Disposal Act (SWDA), 42 U.S.C. §6971, hereafter referred to as the Acts.

In brief, the complaint alleges that on June 18, 2018, Respondent Navy (Respondent) discharged Complainant Shannon Fagan (Complainant), an Attorney for Respondent's Base Realignment and Closure (BRAC) program, in retaliation for engaging in protected activity under the Acts. More specifically, Complainant advised Respondent that it was not currently in compliance with CERCLA and the SDWA, as those Acts pertain to the treatment polyfluoroalkyl substances (PFAS) and the testing for radiological contamination during BRAC operations, and Respondent needed to take further action to come into compliance before the BRAC program could convey Naval property.

Following an investigation by a duly-authorized investigator, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region IX, finds there is reasonable cause to believe that Respondent violated the Acts and issues the following findings:

Secretary's Findings

The complaint alleges that on or about June 18, 2018, Respondent discharged Complainant, thereby causing her to suffer an adverse employment action. On July 18, 2018, Complainant filed a complaint with the Secretary of Labor alleging retaliation in violation of the Acts. As this complaint was filed within 30 days of the alleged adverse action, it is deemed timely.

- Respondent is a person within the meaning of 1 U.S.C. §1 and 42 U.S.C. §9610 and Complainant is an employee within the meaning of 42 U.S.C. §9610.
- Respondent is a person within the meaning of 1 U.S.C. §1 and 42 U.S.C. §300j-9(i)(1) and Complainant is an employee within the meaning of 42 U.S.C. §300j-9(i)(1)
- Respondent is an employer within the meaning of 42 U.S.C. §7622 and Complainant is an employee within the meaning of 42 U.S.C. §7622.
- Respondent is an employer within the meaning of 15 U.S.C. §2622 and Complainant is an employee within the meaning of 15 U.S.C. §2622.
- Respondent is a person within the meaning of 1 U.S.C. §1 and 33 U.S.C. §1367 and Complainant is an employee within the meaning of 33 U.S.C. §1367.
- Respondent is a person within the meaning of 1 U.S.C. § 1 and 42 U.S.C. §6971 and Complainant is an employee within the meaning of 42 U.S.C. §6971.

As a result of the investigation, OSHA has determined that reasonable cause exists to believe that a violation of the Acts occurred. Specifically, after evaluating all of the evidence provided by Respondent and the Complainant, OSHA finds reasonable cause to believe that Complainant's protected activity was a motivating factor in Respondent's adverse employment action decision. Complainant established that she engaged in protected activity on multiple occasions when she complained that Respondent's treatment of PFAS and testing of radiological materials were not in compliance with the Acts, and advised that further action needed to be taken before Respondent could complete Naval base closure and property conveyance. Knowledge is established as Respondent's managers knew of Complainant's protected activity, which took place in internal emails, discussions, teleconferences, and work product. Animus is established by Respondent's own admission that it believed Complainant's refusal "to agree that CERCLA and the law can bend to accommodate" Respondent to be a basis for discharge. Animus is also established by the timing of Complainant's protected activity and her discharge.

Respondent asserts that Complainant's complaints and advice to take action are not protected by the Acts because they did not establish that Respondent violated or was about to violate the Acts, but rather concerned mere opinion regarding grey areas of the law. Respondent further argues that even if Complainant established a prima-facie case, its decision to discharge was not unlawfully motivated as it discharged Complainant because she was difficult to work with, and failed to get along with her peers. However, the investigatory evidence indicates that Respondent did not discharge other employees who behaved similarly. As such, Respondent has not established that it would have reached the same decision even if the Complainant had not engaged in protected activity.

In light of the above, OSHA issues the following order:

ORDER

Upon receipt of this Secretary's Finding and order:

Respondent shall immediately reinstate Complainant to her former position at the pay scale of GS-14, Step 10 for the San Francisco, California pay locality. Such reinstatement shall include all rights, seniority, and benefits that Complainant would have enjoyed had she never been discharged.

Respondent shall pay Complainant back pay with annual cost of living and locality pay adjustments, minus interim earnings, at the pay scale of GS-14, Step 10, for the period June 19, 2018, until Respondent makes Complainant a bona fide offer of reinstatement. As of June 21, 2021, this amounts to \$503,695.68.

Respondent shall pay interest on the back wages in accordance with 26 U.S.C. 6621. As of June 21, 2021, this amounts to \$39,332.95.

Respondent shall pay Complainant compensatory damages in the amount of \$75,769.32, for the following:

- Out-of-pocket expenses due to a loss of a home and moving expenses and medical expenses in the amount of \$29,758.35.
- Pain and suffering, including mental distress in the amount of \$50,000.

Respondent shall pay Complainant's attorney's fees in the amount of \$66,295.00.

Respondent shall expunge Complainant's employment records of any reference to the exercise of her rights under the Acts.

Respondent shall not retaliate or discriminate against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to the Acts.

Respondent shall post immediately in a conspicuous place in or about Respondent's facility, including in all places where notices for employees are customarily posted, including Respondent's internal web site for employees or e-mails, if Respondent customarily uses one or more of these electronic methods for communicating with employees, and maintain for a period of at least 60 consecutive days from the date of posting, the attached notice to employees, to be signed by a responsible official of Respondent and the date of actual posting to be shown thereon.

Respondent and Complainant have 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Primary method - via email to: OALJ-Filings@dol.gov

Secondary method - (if unable to file via email) via hard copy submission to:

Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Department of Labor
800 K Street NW, Suite 400 North
Washington, D.C. 20001-8002
Phone: (202) 693-7300

Fax: (202) 693-7365

With copies to:

Shannon Fagan
c/o Paula Dinerstein
Public Employees for Environmental Responsibility
(PEER)
962 Wayne Ave., Suite 610
Silver Spring, MD 20910
pdinerstein@peer.org

Jim Wulff
Acting Regional Administrator
U.S. Department of Labor – OSHA
90 7th Street, Suite 2650
San Francisco, CA 94103
Email: OSHA-REG09-WB@DOL.gov

In addition, please be advised that the U.S. Department of Labor does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an ALJ in which the parties are allowed an opportunity to present their evidence for the record. The ALJ who conducts the hearing will issue a decision based on the evidence and arguments presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under the Act. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint.

The rules and procedures for handling cases under the Act(s) can be found in Title 29 of the Code of Federal Regulations, Part 24 and may be obtained at www.whistleblowers.gov.

Sincerely,

Ryan Himes
Assistant Regional Administrator

cc: Paula Dinerstein, Public Employees for Environmental Responsibility (PEER)
Chief Administrative Law Judge, USDOL
U.S. Environmental Protection Agency