IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RANDALL LYKINS,

Plaintiff,

vs. Case No. 11-2133-JTM

CERTAINTEED CORPORATION, AND SAINT-GOBAIN CORPORATION,

Defendants.

MEMORANDUM AND ORDER

This is an action by plaintiff Randall Lykins alleging that his employment was terminated by the defendants for his opposition to their environmental practices. The defendants have moved for summary judgment, and the court finds that the plaintiff has failed to demonstrate two of the essential elements of a *prima facie* case of whistleblower retaliation under Kansas law. Specifically, Lykins' complaints were generic and subjective impressions of his feelings about environmental practices in the workplace, and Lykins never expressed his concerns to any higher corporate management.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the court must examine all evidence in a light most favorable to the opposing party. *McKenzie v. Mercy Hospital*, 854 F.2d 365, 367 (10th Cir. 1988). The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a reasonable doubt. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985). The moving party need not disprove plaintiff's claim; it need only establish that the factual

allegations have no legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319, 1323 (10th Cir. 1987).

In resisting a motion for summary judgment, the opposing party may not rely upon mere allegations or denials contained in its pleadings or briefs. Rather, the nonmoving party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party has carried its burden under Rule 56(c), the party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a **genuine issue for trial**.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P. 56(e)) (emphasis in *Matsushita*). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The court's findings exclude requested facts that are not materially relevant to the issues raised by defendant's motion. That motion addresses the *specific content* of Lykins' comments in 2010, and the *identity* of the persons he spoke to. Further, the court's findings exclude asserted facts which find no support in the admissible evidence tendered to the court, *Tungol v. CertainTeed*, 202 F.Supp.2d 1189, 1193 (D. Kan. 2002), or which fail to reflect evidence based on personal knowledge. *See Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1200 (10th Cir. 2006). Further, these findings exclude information raised for the first time in response to the request for summary judgment, where that information was not disclosed in response to specific discovery requests, or reflects a radical and unexplained departure from prior sworn deposition admissions. *See Juarez v. Utah*, 263 Fed. App'x 726, 735 (10th Cir. 2008); *Burns v. Bd. of County Com'rs of Jackson County*, 330 F.3d 1275, 1282 (10th Cir. 2003); *Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 854 (10th Cir. 1999).

Findings of Fact

CertainTeed is a manufacturer of building materials, including roofing, vinyl and fiber cement siding, trim fence, railing, decking foundations, insulation, gypsum, ceilings, and pipe products.

The CertainTeed facility located in Kansas City, Kansas manufactures various forms of fiberglass insulation for residential and industrial use. The plant has electrostatic precipitators which take contaminants out of the air. The precipitators give off dust, which is converted into pellets ("EP pellets") and reused in the manufacturing process as a raw material. The EP pellets that are not reused are treated as hazardous waste and disposed of according to environmental law.

In 1998, the plant completed the construction and began operating the K-21 mat insulation production line. The K-21 line has a washwater system that works with the electrostatic precipitators to remove contaminants from the air. Most of the water is recycled within the system, though it is not designed to operate in a completely closed loop.

In 2005, CertainTeed purchased a portable pump called a "Godwin pump" to help control the level of water in the K-21 washwater system. The Godwin pump is to be used for situations in which there is too much water in the K-21 washwater system, which presents a risk of flooding.

CertainTeed has a permit for its K-21 line washwater system issued by the Unified Government of Wyandotte County and Kansas City, Kansas, which allowed CertainTeed to discharge wastewater directly to the sewer system. This permit outlines the parameters of the discharge for certain chemicals and other materials contained at the plant. In 2010, the permit included limits on the amount of daily discharge for materials such as arsenic, chromium, lead, mercury, and cyanide, but contained no limits on materials such as total suspended solids, phenol, and phosphorus, so long as the amount of discharge did not “interfere with the proper functioning of the sewer treatment works.”

Pursuant to the wastewater discharge permit, testing was to be done on CertainTeed's discharge of wastewater over a period of two days every six months, and CertainTeed was never

found to be in violation of its Wastewater Discharge Permit in 2010. In fact, during that year CertainTeed was awarded the Gold Star Award for Wastewater Discharge from the Kansas Water Environment Association for "complete and consistent" compliance with its industrial discharge permit.

All new CertainTeed employees, including Lykins, receive a copy of the Code of Ethics and Business Conduct Guidelines and received training on its provisions. Among other things, the CertainTeed Code of Ethics emphasizes that employees are responsible for being good stewards of the environment. The Code puts the responsibility on all employees, both in management and non-management positions, to ensure the company is complying with its legal and ethical obligations.

To assist employees in reporting suspected violation of the Code or any applicable law, CertainTeed provides a variety of way to communicate with managers outside any particular plant, including a confidential hotline and specific email addresses designated for employees to report unethical or illegal conduct.

Despite the fact that he received two copies of the Code (in 1997 and 2001), acknowledged in writing that he understood the Code, and received training on the Code, Lykins testified he never read the Code, justifying his failure to do so because “if you're an ethical person, you don't have to worry about it.” Lykins knew he could call CertainTeed's corporate offices in Valley Forge, Pennsylvania, to report known or suspected violations of the Code or other illegal or unethical activities.

CertainTeed initially hired Plaintiff on September 16, 1997, as a Production Supervisor at its Kansas City, Kansas plant. He voluntarily resigned his position with CertainTeed on January 18, 2000, and was rehired on March 1, 2001, as a Production Supervisor.

On November 1, 2005, CertainTeed promoted Plaintiff to Shift Manager. From January 2010 until March 2010, Plaintiff served as interim Production Superintendent, reporting to Tim Miller, while Miller was out of the facility participating in union negotiations. As the interim Production

Superintendent, all Shift Managers reported to Lykins and Miller, who shared the reporting responsibility. When Miller returned to the plant full-time in March 2010, Lykins became a utility day-time-only ("DTO") Shift Manager; his duties remained similar to those he had as interim Production Superintendent in that he continued to provide direction to Shift Managers, but he did not have a shift of hourly employees he directly supervised on his own.

Lykins returned to the Shift Manager position (on C-Shift) on July 9, 2010, under the direct supervision of Production Superintendent Don Roberts.

Following an adverse evaluation on August 16, 2010, CertainTeed terminated Lykins' employment. The validity of that evaluation is disputed between the parties, but is not material to the issues raised by the present motion.

Lykins has testified that, during his employment from March 2001 through August 2010, his responsibilities included, first, the "safety/environmental, quality and productivity of world's largest fiberglass insulation production line," and second, "ensuring all environmental programs and policies [were] followed on a daily basis." As to the former, Lykins believed it was his responsibility to inform upper management of major issues with respect to environmental concerns he saw on the floor. As to the latter, he stated that part of his job was to ensure that he made upper management aware of any issues that he could not control — "that basically [were] out of [his] pay grade."

In his Complaint and Pretrial Order, Plaintiff contends that, in 2010, CertainTeed and Saint-Gobain engaged in activities that violated rules, regulations, or the law pertaining to public health or safety and the general welfare through: "(1) the frequent use of the Godwin pump to pump polluted waste water from the K21 sump pit to the municipal sewer and (2) the improper storage and handling of chromium containing material at the KCK Plant."

In his deposition, Lykins testified that the problem was not caused by workers at the plant, stating that the lack of maintenance "wasn't because somebody decided, hey, I'm not going to do my job today. As far as I'm concerned the operators tried to do the best they could with the equipment they had available to them." Rather, the problem was "upper management because they don't want

to spend any money" to maintain the environmental equipment. Lykins also believed that large amounts of batch containing EP pellets were being spilled on the roof in 2010 because the plant's upper management refused to spend money to maintain the conveyor belt equipment that transported the batch across the roof. And he believed that sacks of EP pellets shipped to the KCK facility from another CertainTeed facility were being improperly stored at the plant.

Plaintiff believed that "upper management" was responsible for these violations. Specifically, he named the following "perpetrators":

a. Plant Manager Eric Schramm, Production Superintendent Tim Miller, and Maintenance Manager/Production Superintendent Donnie Roberts were responsible for the Godwin pump being used "on almost a daily basis from March 2010";
b. Schramm, Miller, Roberts, Former Hot End Manager Ken Breedlove, and Quality Manager Joe Patterson, were responsible for "waste being pumped from the Solvent Building and the Oven EP into the K21 sump pit"; and
c. Schramm, Miller, Roberts, and Human Resources/Safety Manager Dave Stehly were responsible for "improper storage and disposal of EP Pellets."

In his deposition, Lykins stated that the spoke about the allegedly unlawful conduct with Schramm, Roberts, and Miller, and former Hot End Manager Jeff Chevalier in morning production meetings. In his interrogatory responses, Lykins also states he discussed the unlawful conduct with Environmental Coordinator/Process Engineer Loretta Francis. According to Lykins, he reported his concerns to:

a. Schramm, as Plant Manager, who had the ultimate responsibility for the plant;
b. Roberts, Miller, and Chevalier, who all reported directly to Schramm; and
c. Francis, who reported directly to Engineering Manager Ron Rodvelt, who in turn reported directly to Schramm.

Schramm, Roberts, Miller, Chavalier, Francis and Rodvelt all deny that Lykins made any such complaints.

In 2010, Lykins sent only one email that suggested using the Godwin pump may have an impact on the environment. Lykins sent the email to his fellow Shift Managers, echoing an email Joe Patterson had sent the previous week, and Jeff Chevalier responded to the email the same day with suggestions on running the washwater system.

Lykins testified that he did not send emails to his supervisors regarding environmental concerns but instead

> would bring them up in the morning production meeting [because] that was the way that the plant was ran. The morning production meeting is where issues were brought up.... [D]uring the morning meeting, you know, we would talk about wash-water upsets, what was causing them. The Godwin pump would always come up.

In his deposition, Lykins admitted that he did not know what environmental laws, if any, were violated, but that he "felt" that "discharge laws" were violated, because he knows "what is right and what is wrong." "I don't know the specific law or permit or anything," he testified, but felt the alleged actions of the defendants were "not right.". Lykins further admitted that he had never read CertainTeed's Wastewater Discharge Permit; he had no idea what agency issued it; he did not know whether a certain amount of discharge was allowed; and he made no attempt to find out what the permit allowed. He was "going with his gut" in making his complaints.

Lykins also admitted that he did not know what laws CertainTeed allegedly violated regarding its storage and disposal of EP pellets. Although he believed that sacks of EP pellets shipped to the Kansas City, Kansas plant were being improperly stored, he had no knowledge regarding what was actually in the sacks and had never seen EP pellets stored in this manner.

In or around June of 2010, Lykins took pictures of conditions at the plant that he believed violated the law because he "didn't want to go to jail" and he "felt like there was some legal issues here that [he] didn't want to be a part of." He did not show these pictures to anyone, either inside or outside of the plant.

Around the same time, Lykins wrote down in his day-planner the telephone number of the "Kansas EPA," but he did not contact the agency or any other outside agency prior to the termination of his employment to report that he believed environmental programs or policies were being

violated. Lykins also knew that he could call the corporate offices in Valley Forge, Pennsylvania to report known or suspected violations of its Code or other illegal or unethical activities, but he never did. He never called the CertainTeed/Saint-Gobain Hotline number available to report known or suspected violations. And he never used the CertainTeed/Saint-Gobain email addresses available to report known or suspected violations.

The court notes that much of Lykins' Response addresses the general environmental condition and history of the plant, or involves specific and different environmental problems — such as the release of "cullet" and "wet sludge" (byproducts of the fiberglass production process). These new allegations were not the subject of Lykins' 2010 supposed whistleblowing, and are unrelated to the claims Lykins actually advanced in his Complaint and the Pretrial Order, which are restricted to the use of the Godwin pump to release wastewater, and the release of chromium containing pellets. The evidence is thus unrelated to the two narrow issues now before the court: what specifically did Lykins say in his 2010 comments, and to whom were these comments made.

Conclusions of Law

As an exception to the general rule of at will employment — permitting employers to terminate workers for "good cause, for no cause, or even for the wrong cause," Kansas recognizes a cause of action for workers who have been terminated for whistleblowing activities. *See Goodman v. Wesley Med. Ctr.*, 276 Kan. 586, 589, 78 P.3d 817 (2003). The exception for retaliation against whistleblowers is a narrow one, however, and requires proof "by clear and convincing evidence" **that**

> '[a] reasonably prudent person would have concluded the employee's coworker or employer was engaged in activities in violation of the rules, regulations, or the law pertaining to public health, safety, and the general welfare; the employer had knowledge of the employee's reporting of such violation prior to the discharge of the employee; and the employee was discharged in retaliation for making the report.'

276 Kan. 589-90, 78 P.3d at 821 (quoting *Palmer v. Brown*, 242 Kan. 893, 900, 752 P.2d 685 (1988)).

The alleged whistleblowing must be directed at "violations of specific and definite rules, regulations, or laws." 276 Kan. at 59, 78 P.3d at 822 (citations omitted). The court cautioned that such claims must go beyond the subjective impressions of the plaintiff :

> It would be both troublesome and unsettling to the state of the law if we were to allow a retaliatory discharge claim to be based on a personal opinion of wrongdoing. Such a holding, under these circumstances, would effectively do away with the employment-at-will doctrine, which has become a part of Kansas public policy.
>
> Public policy cannot be determined on a subjective basis. Instead, public policy "'should be so thoroughly established as a state of public mind so united and so definite and fixed that its existence is not subject to any substantial doubt.'" *Palmer*, 242 Kan. at 897, 752 P.2d 685 (quoting *Noel v. Menninger Foundation*, 175 Kan. 751, Syl. ¶ 4, 267 P.2d 934 [1954]).

276 Kan. at 592, 78 P.3d at 822-23. Thus, to support a retaliatory discharge claim, the public policy must be "'so definite and fixed that its existence is not subject to any substantial doubt.'" 276 Kan. at 893, 78 P.3d at 823 (quoting *Palmer*, 242 Kan. at 897). *See Conrad v. Board of Johnson County Com'rs*, 237 F.Supp.2d 1204 (2002) (recognizing that "[t]he Kansas Supreme Court has made it clear that this is a very hard test to satisfy").

The allegations advanced by Lykins in his Complaint and the Pretrial Order fail to meet this standard. To the contrary, those claims — that the plant used the Goodwin pump to release waste water improperly into the sewer and that the plant mishandled chromium-laden EP pellets are based on his own impressions, "going on his gut" about "what is right and what is wrong."

Lykins had not read and was not familiar with the details of the plant's Wastewater Discharge Permit. He did not know which agency had issued it, and did not know whether the Permit allowed a certain amount of discharge. Similarly, Lykins has admitted that he did not know what specific laws defendants allegedly violated as to the EP pellets.

As noted earlier, Lykins in his Response attacks a wide variety of environmental practices at the plant. But those allegations are new and unrelated to the issue now before the court, which is whether the plaintiff has presented "clear and convincing evidence" satisfying the standard expressed in *Palmer* and *Goodman* — whether the complaints actually presented in 2010 related to

"violations of specific and definite rules, regulations, or laws." Lykins unequivocally admitted in his deposition that they were not, and these admissions are fatal to his claim.

Second, even if Lykins had satisfied this element of a retaliatory discharge claim, summary judgment would be warranted because of his failure to show that he blew the whistle other than to the alleged wrongdoers themselves.

That is, the plaintiff in a Kansas whistleblower action must show by clear and convincing evidence that he reported the wrongdoing to "either company management or law enforcement officials." *Palmer*, 242 Kan. at 900. If the plaintiff reports the wrongdoing to corporate management, he must do so to management higher than that of the wrongdoer. *Shaw v. Southwest Kan. Groundwater Mgt. Dist. Three*, 42 Kan.App.2d 994, 1002, 219 P.3d 857, 863 (2009) ("internal whistleblowing is recognized ... where the employee seeks ... intervention of a higher authority inside the company"); *Fowler v. Criticare Home Health Serv.*, 27 Kan. App.2d 869, 876, 10 P.3d 8, 15 (2000) (plaintiff "must seek out the intervention of a higher authority, either inside or outside of the company").

Lykins argues that he was not required to report the environmental conditions to higher corporate management. Citing *Connelly v. State Highway Patrol*, 271 Kan. 944, 26 P.3d 1246 (2001), he argues that it was sufficient that he reported the environmental conditions within the proper chain of command. But *Connelly* involved a law enforcement agency, not a private employer, and the complaints by the plaintiffs that the Highway Patrol had adopted a policy of not ticketing farm trucks. The court noted the Highway Patrol's "paramilitary structure," and ultimately concluded that the plaintiffs acted by reporting their concerns "within their chain of command to other 'law enforcement officials' illegal activity in not enforcing the laws designed for public safety." 271 Kan. at 969. *Connelly* thus represents no departure from the standard originally expressed in *Palmer*, that the plaintiff must have reported the alleged wrongdoing to "either company management *or law enforcement officials*." 242 Kan. at 900 (emphasis added).

Lykins has pointed to no subsequent decisions which have construed *Connelly* as changing the rule with respect to internal whistleblowing by private employees. To the contrary, subsequent to *Connelly*, courts have continued to find that internal whistleblowing occurs if the complaints are made to a management entity higher than the wrongdoer. *See Shaw*, 42 Kan.App.2d at 1002 (under *Fowler*, "the whistleblower must seek to stop unlawful conduct through the intervention of a higher authority, either inside or outside the company"); *Rowland v. Franklin Career Serv.*, 272 F.Supp.2d 1188, 1210 (D. Kan. 2003) (denying summary judgment because of evidence showing that plaintiff "sufficiently reported the infractions to upper management"); *Conrad*, 237 F.Supp.2d at 1268 ("any objection or complaint that Plaintiff made to [the wrongdoer] herself or to [her] subordinates would not qualify as a report to higher management or to law enforcement"). As Judge Brown held, subsequent to *Connelly*, "[t]he only reasonable interpretation of *Fowler*'s requirement of seeking out a 'a higher authority' or 'higher management' is that it requires the plaintiff to report the wrongdoing to someone in authority above the wrongdoer." *Goenner v. Farmland Industr.*, 175 F.Supp.2d 1271, 1280 (D. Kan. 2001).

This Lykins did not do. As he stated in his deposition, the Goodwin pump was faulty because "upper management" failed to authorize proper maintenance. But Lykins only brought up his concerns about the pump and the EP pellets to other managers at the plant, managers that he separately identified as the "perpetrators" of the environmental failings at the plant. Lykins sent one e-mail mentioning the pump's use "could be an environmental concern," but this was also sent to other managers in the plant. Of the persons Lykins allegedly made his concerns known to, all were subordinates to Schramm, the Plant Manager and one of the alleged "perpetrators" of the environmental violations.

In response to the defendants' summary judgment motion, Lykins has attempted to shift some of the blame by identifying various environmental misdeeds by subordinate employees. But this cannot save his claim, since the fact remains that Lykins only reported the alleged

environmental conditions at the plant to the other managers at the plant, the very persons who were otherwise helping as "perpetrators" of those conditions.

It is uncontroverted that Lykins did not telephone or email the outside management contacts provided for the reporting of environmental concerns. He made no reports to the police or any official agency. Lykins knew he had numerous options to take remedial action, but chose not to use them. Lykins kept a journal and took some photographs of the plant, but essentially kept these secret, since he "didn't want to go to jail" and "felt like there was some legal issues here that [he] he didn't want to be a part of."

IT IS ACCORDINGLY ORDERED this 9th day of November, that the defendants' Motion for Summary Judgment (Dkt. 135) is hereby granted.

s/ J. Thomas Marten

J. THOMAS MARTEN, JUDGE