Date: April 12, 1995

Case No. 88-ERA-33

In the Matter of

CASEY RUUD,
Complainant,

v.

WESTINGHOUSE HANFORD COMPANY,
Respondent.

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
OF DISMISSAL AND ORDER ON ALL
OTHER OUTSTANDING MOTIONS

Complainant filed a complaint in propria persona in the above-referenced matter, allegedly on February 28, 1988. The handwritten complaint alleges discrimination, harassment and termination of Complainant as a result of his testimony before Congress regarding safety issues at Respondent's plant. The Department of Labor, Wage and Hour Division, advised Complainant by letter that it would investigate the complaint under section 210 of the Energy Reorganization (hereinafter referred to as ERA), 42 U.S.C. 5851. In early July, 1988, Complainant secured legal representation through attorney Thomas E. Carpenter of the Government Accountability Project. On July 25, 1988, Complainant and Respondent apparently entered into a settlement agreement. An order of dismissal with prejudice was entered on August 3, 1988 based on belief of the Administrative Law Judge that all matters were in fact settled. This agreement was never ratified by an Administrative Law Judge, despite the Secretary of Labor's order to submit settlement dated February 14, 1990. On

August 15, 1994, Respondent filed a motion to dismiss on the basis of jurisdiction and timeliness of filing. Complainant filed a supplemental complaint on August 4, 1994. Complainant responded to Respondent's motion on August 12, 1994 and also filed a motion to supplement and or amend the complaint.

I. Jurisdiction

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Casey Ruud alleges that, on February 28, 1988, he filed his original handwritten complaint in propria persona before the Department of Labor's Wage and Hour Division. However, the complaint failed to set forth the basis for jurisdiction of the U.S. Department of Labor. The Wage and Hour Division initially determined that Mr. Ruud's complaint was filed under section 210 of the ERA. See Letter, Gordon O. Wilson to Casey O. Ruud's dated March 18, 1988: ALJ-1. Respondent alleges that, at the time of filing, the Department of Labor did not have jurisdiction to investigate the complaint and continues to have no jurisdiction to retain the complaint or to order a hearing on it.

The complaint stems from allegations of harassment and discrimination in retaliation for Complainant's testifying before Congress regarding safety issues at the Hanford Nuclear Reservation located in the state of Washington. Hanford is owned by the United States but is managed by private corporations pursuant to a contract with the Department of Energy (hereinafter referred to as "DOE"). See *Bricker v. Rockwell International Corporation, et al.*, 22 F.3d 871 (1993); Safety at DOE Nuclear Weapons Facility -- Hearings Before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representative, 100th Cong., October 22, 1987 and May 11, 1988, Serial No. 100-138.

In support of its motion, Respondent cites *Wensil v. B.F. Shaw Co.*, 87-ERA-12 (Sec'y March 29, 1990), affirmed sub nom, *Adams v. Dole*, 927 F.2d 771, 773 (4th Cir.), cert. denied, 112 S. Ct. 122 (1991) for the proposition that section 210 of the ERA did not apply to employees of DOE contractors at the time of Complainant's filing. In *Adams*, the Fourth Circuit held the following:

> The statutory interpretation adopted by the Secretary of Labor and the DOE, that section 210 protects only employee of NRC licensees and their contractors and not employees of DOE contractors, is in our judgement the correct one and certainly therefore a permissible one.[1]

Following *Adams*, I find that section 210 of the ERA does not apply to Complainant, who filed his claim before October 24, 1992. Therefore, I find that the Department of Labor does not have jurisdiction over this complaint under section 210 of the ERA. Respondent's motion to dismiss based on a lack of jurisdiction under section 210 of the ERA will be granted.

II. Motion to Supplement or Amend Complaint

Respondent's arguments regarding lack of jurisdiction under the ERA have merit. However, they are not dispositive of this matter. Regulation 29 C.F.R. 24(c) provides with respect to complaints that "[n]o particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation." 29 C.F.R. 24(c). Complainant's February 29, 1988 letter to the Wage and Hour Division of the Department of Labor, on its face, appears to meet the requirements of the regulations. It sets forth the discriminatory act complained of ("discrimination, harassment, and termination"), it gives the pertinent dates (ending with Complainant's termination on February 29, 1988), and it alleges a causal connection between the discriminatory act and the protected activity

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("...discrimination, harassment, and termination of myself by Westinghouse Hanford Company, *because* of my testifying before Congress concerning safety issues at the Hanford Nuclear Reservation in the state of Washington")[emphasis added]. Thus, I find that the complaint filed by Mr. Ruud meets the requirements set forth at 29 C.F.R. 24(c) regarding the form of a complaint.

Furthermore, at the time of filing, Complainant was acting pro se. It is well settled that a pro se complaint should not be held to the strict standards of pleadings that otherwise

apply to formal pleadings drafted by attorneys and that it cannot be dismissed for failure to state a claim unless it is "beyond doubt that the [complainant] can prove no set of facts in support of his claim which would entitle him to relief." *Chase v. Bancombe County, N.C.*, 85 SWD 4 (11-3-86), citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972); See also *Boyce v. Alizaduh*, 595 F.2d 948, 951 (4th Cir. 1979). On its face, it is possible that Complainant has alleged facts which, if proven to be true, would entitle him to relief under an environmental whistleblower statute other than the ERA.

Regulation 29 C.F.R. 18.5(e) provides in relevant part as follows:

> If and whenever determination of a controversy on the merits will be facilitated thereby, the administrative law judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints...if the administrative law judge determines that the amendment is reasonable within the scope of the original complaint.

Because the facts stated in the original complaint state a claim on which relief may be granted, an amendment to the complaint is unnecessary but, for reasons stated above, is allowed.

III. Timeliness of Complaint

Regulation 29 C.F.R. 24.3 provides in relevant part as follows:

> (b) Time of filing. Any complaint shall be filed within 30 days after the occurrence of the alleged violation. For the purpose of determining timeliness of filing, a complaint filed by mail shall be deemed filed as of the date of mailing.

The original complaint in this action was signed by Mr. Ruud on February 28, 1988. There is no evidence in the record of whether Mr. Ruud mailed his complaint or submitted it in person to the Wage and Hour Division. However, a photocopy of the complaint reveals the inverse imprint of a Wage and Hour stamp dated March 4, 1988. See ALJ-2. The presence of this stamp indicates a timely filing. Furthermore, Mr. Ruud received a letter from Paula V. Smith

of the U.S. Department of Labor Employment Standards Division, Washington, D.C. dated March 18, 1988, the contents of which resolve all doubt that Mr. Ruud's complaint was

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timely filed. The letter was drafted in response to Complainant's letter of February 28 and informed him that it appeared that his concerns "may fall within ERA" and that the complaint would be forwarded for action to the Seattle Wage and Hour Regional Office. See ALJ-3. Both the date of the inverse time stamp and the date of the March 18, 1988 letter fall within thirty days after the occurrence of the alleged violation date (last alleged violation date, February 29, 1988). Therefore, based on the March 4, 1988 date stamp and the March 18, 1988 letter, I find that the complaint was timely filed.

IV. Discovery Motions

Complainant has engaged in discovery, and Respondent has filed several outstanding motions, including the following:

a.
Motion to Quash
September 9, 1994

b.
Second Motion to Quash
October 6, 1994

c.
Third Motion to Quash
November 15, 1994

d.
Motion for Protective Order
October 6, 1994

e.
Second Motion for Protective Order
November 15, 1994

f.
Third Motion for Protective Order
December 19, 1994

What follows is a discussion of and rulings on the above listed discovery motions.

a. The motion to quash dated September 9, 1994 is in reference to a subpoena of Westinghouse employee Chris Jenson, whose deposition was scheduled for October 13, 1994. Mr. Jenson's deposition was in fact taken on October 13, 1994; therefore, this motion is now moot.

b. The motion to quash dated October 6, 1994 is in reference to a subpoena of former Westinghouse employee Edgar Allen Vickery, whose deposition was scheduled for October 13, 1994. Mr. Vickery's deposition was in fact taken on October 13, 1994; therefore, this motion is now moot.

c. The motion to quash dated November 15, 1994 is in reference to a subpoena of Whitney C. Walker, a former Rockwell International Corporation and Westinghouse employee, for a deposition scheduled for November 29-30, 1994. On November 25, Administrative Law Judge Jarvis received a letter from Complainant's Counsel, Robert A. Jones, which advised that the deposition of Whitney C. Walker was cancelled. Therefore, Respondent's motion is now moot.

d. On July 28, 1994, Complainant's Counsel requested that the then-presiding Administrative Law Judge sign five deposition subpoenas. Under the Administrative Procedure Act, an Administrative Law Judge presiding at a hearing has authority only to "issue subpoenas authorized by law," 5 U.S.C. § 556 (c)(2). The Secretary has held that the Secretary (or an Administrative Law Judge) has no power under the ERA to issue subpoenas or to punish with contempt for failure to comply with a subpoena. *Malpass v. General Electric Company*, 85 ERA-38 and 39 (Sec'y Mar. 1, 1994). As I lack authority to issue a

subpoena under the ERA, and as no other authority has been cited to me, Complainant's request, as it presently stands, must be denied.

e. Respondent has made three motions for protective orders, dated October 6, 1994, November 15, 1994 and December 19, 1994, respectively. In its motion dated October 6, 1994, Respondent requested a limitation on discovery or, in the alternative, a stay of discovery until an order is issued on Respondent's motion to dismiss. In its motion dated November 15, 1994, Respondent requested a protective order pending the outcome of its motion to dismiss. Finally, in its motion dated December 19, 1994, Respondent requested a stay of discovery pending the outcome of its motion to dismiss. I granted the last motion on March 21, 1995. However, now, there are no outstanding discovery issues before me. Therefore, Respondent's motions for protective orders are moot.

WHEREFORE, it is hereby recommended that Respondent's motion to dismiss the claim under section 210 of the ERA be GRANTED.

FURTHERMORE, it is hereby ordered that

1. Complainant's motion to amend complaint is GRANTED.

2. Respondent's pending motions regarding discovery issues are DENIED as MOOT.

3. Complainant's request for five signed deposition subpoenas is DENIED.

4. A conference call is scheduled for April 20, 1995 at 10:20 a.m. P.D.T. Any problems regarding this date and/or time should be referred to my legal technician, Ms. Louella Laguna (804-873-3099).

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FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/LMF
Newport News, Virginia

[ENDNOTES]

[1] In 1992, Congress enacted amendments to the Energy Reorganization Act of 1974 that provide whistleblower protection for employees at DOE nuclear facilities. However, these amendments provide only prospective relief; they apply to claims filed on or after October 24, 1992, the date of enactment.