



Issue Date: 03 August 2006

CASE NO.: 2006-ERA-00025

In the Matter of:

**ROBERT ANDY NESTER,
Complainant,**

v.

**CHAMPIONS CLUB APARTMENTS,
Respondents.**

ORDER OF REMAND

The instant case, which has been brought by Complainant Robert Andy Nester (“Complainant”) based upon alleged retaliatory action taken by his employer, Champions Club Apartments (“Respondent”), has been assigned to the undersigned administrative law judge for disposition. Although ordinarily a hearing would be scheduled, this matter is being remanded because there is no apparent basis for jurisdiction under the employee protection (whistleblower) provisions of the Energy Reorganization Act, and the facts set forth in the complaint may state a basis for jurisdiction under the employee protection provisions of one or more other statutes, such as the Clean Air Act.

BACKGROUND

The Complainant asserts that, because he “blew the whistle” and reported an intentional release of Freon (R-22 refrigerant) into the environment, he was terminated on March 10, 2006. Complainant is unrepresented. His March 13-27, 2006 complaint (dated “March 13th & 20th & 27th – 06”) recites pertinent facts but does not state the statute upon which jurisdiction is premised.¹ The June 2, 2006 investigative report of the Occupational Safety and Health Administration (OSHA), the first page of which has been provided to this tribunal, read into the complaint an allegation that the Freon release constituted a violation of the Clean Air Act, a reasonable assumption based upon the facts alleged.

¹ Under 20 C.F.R. §24.3(c), *Form of complaint*: “No 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 violations.” The complaint appears to satisfy these criteria, particularly in view of Complainant’s pro se status.

Following the investigation, however, by letter of June 23, 2006, the Regional Administrator for OSHA in Philadelphia, on behalf of the Secretary of Labor, stated that the complaint was brought under the Energy Reorganization Act, 42 U.S.C. §5851 (the “ERA”) and found that “there is no reasonable cause to believe that Respondents violated the ERA.” Furthermore, the Secretary’s Findings specifically stated: “Respondent is a company within the meaning of Section 211 of the Energy Reorganization Act, 42 USC §5851.” However, in the body of the Secretary’s Findings, it was also stated that “Complainant contacted no outside agencies to report any violations and never specifically mentioned the Clean Air Act to management.” The Clean Air Act was not otherwise mentioned. At the conclusion of the June 23, 2006 letter, the Regional Administrator referenced “rules and procedures for the handling of ERA cases.”

The same regulations, which appear at Part 24 of Title 29 of the Code of Federal Regulations, are applicable to the employee protection (whistleblower) provisions of both statutes, but there are special provisions relating to the investigation of ERA complaints. *See* 29 C.F.R. §24.5. Consistent with the statute, there are also ERA-specific criteria that must be satisfied for a complainant to establish a violation of the ERA. *See* 29 C.F.R. §24.7(b).²

Complainant’s appeal of the Secretary’s Findings was received by facsimile transmission on July 24, 2006 and docketed as an ERA case, under the above docket number, on the same date. Under 29 C.F.R. §24.4(a), the Assistant Secretary’s notice of determination is required to include “notice to the complainant and the respondent that any party who desires review of the determination or any part thereof, including judicial review, shall file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination.” [Emphasis added.] However, the letter from the Regional Administrator erroneously stated that “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).” [Emphasis added.] Complainant did not indicate when he received the Secretary’s Findings.

DISCUSSION

Putting aside the issue of the timeliness of the hearing request, I find that a remand to OSHA is required because a determination was apparently made under the wrong statute. Although arguably such an error might be harmless if one of the other environmental statutes were erroneously cited, the special provisions applicable to the whistleblower section of the Energy Reorganization Act preclude correction of the error at this level. Moreover, as the apparent error was OSHA’s, not the Complainant’s, there is no basis for dismissal of the complaint, and this case should be remanded. While rare, because review by administrative law judges is de novo in nuclear and environmental whistleblower cases, remands are appropriate under certain circumstances. *See generally* *Floyd v. Arizona Public Service Co.*, 1990-ERA-023 (ALJ March 19, 1990), *citing* *Bassett v. Niagara Mohawk Power Co.*, 1986-ERA-002 (Sec’y

² Subsection 24.7(b) also provides that “[n]either the Assistant Secretary’s determination to dismiss a complaint subject to §24.5 without conducting an investigation nor the Assistant Secretary’s determination not to dismiss a complaint is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an investigation on the basis that such a determination to dismiss was made in error.” Here, an investigation was conducted so these provisions are inapplicable.

July 9, 1986). *See also Lunsford v. University of Missouri-Rolla*, 2000-TSC-001 (ALJ, April 7, 2000). Remand is warranted where, as here, OSHA considered the complaint under the wrong statute, even though neither the statute nor a factual predicate for jurisdiction under the statute was cited by the complainant.

The employee protection, or whistleblower, provisions of the ERA (appearing at section 211 of the ERA and codified at 42 U.S.C. §5851) provide, in pertinent part:

§ 5851. Employee Protection

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)--

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

(2) For purposes of this section, the term "employer" includes--

(A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);

(B) an applicant for a license from the Commission or such an agreement State;

(C) a contractor or subcontractor of such a licensee or applicant; and

(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344.

The provision generally relates to “protection of nuclear industry whistleblowers against harassment and other retaliatory treatment.” House Rep. No. 101-474 (reproduced in 1992 U.S. Code Cong. & Admin. News, 1953, 2296-97).³

In the instant case, the Respondent is an apartment complex and there is no indication that it is a licensee, license applicant, or contractor subject to the Atomic Energy Act, and no apparent violation of the Atomic Energy Act or the ERA has been alleged. As Freon is a fluorocarbon used as a refrigerant, not a radioactive or nuclear substance, there is no apparent basis for bringing its challenged release under the provisions of the ERA. If the citation to the ERA was intentional, notwithstanding the complaint’s failure to allege facts supporting a violation of the ERA, the determination letter should have stated a basis for that conclusion. If, on the other hand, the ERA was cited due to an administrative error, a determination must be made under the correct environmental statute(s), which would appear to include the Clean Air Act; however, other environmental statutes may also be pertinent.⁴

The employee protection provision in the Clean Air Act (“CAA”) provides, in relevant part:

(a) Discharge or discrimination prohibited

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration of enforcement of any requirement imposed under this chapter or under any applicable implementation plan,

(2) testified or is about to testify in any such proceeding, or

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

42 U.S.C. § 7622. Almost identical wording appears in this provision’s counterparts in the Safe Drinking Water Act, 42 U.S.C. § 300j-9 (“SDWA”) and the Toxic Substances Control Act, 15 U.S.C. § 2622 (“TSCA”). A similar provision appears in the Solid Waste Disposal Act (also know as the Resource Conservation and Recovery Act), 42 U.S.C. § 6971 (“SWDA”); the Water Pollution Control Act (or Clean Water Act), 33 U.S.C. § 1367 (“WPCA”); and the Superfund law, 42 U.S.C. § 9610 (“CERCLA”).

In view of the above, a remand to the Regional Administrator of OSHA in Philadelphia, PA, is necessary for a new determination to be made under the appropriate statute. On remand,

³ Excerpts from the House Report appear at the Office of Administrative Law Judges website, www.oalj.dol.gov.

⁴ The employee protection provisions of other environmental statutes are mentioned below.

OSHA may conduct an additional investigation, but is not required to do so. However, unless there is some articulated rationale for jurisdiction to be premised upon the ERA, the Regional Administrator on behalf of the Assistant Secretary (or the Assistant Secretary) shall make a determination based upon the pertinent environmental statute, including, but not limited to, the Clean Air Act. Thereafter, the Regional Administrator or the Assistant Secretary shall issue a new determination letter which (1) states OSHA's rationale for naming the particular statute or statutes addressed and (2) makes a determination based upon the criteria applicable to the named statute(s). Accordingly,

ORDER

IT IS HEREBY ORDERED that the above-captioned matter be, and hereby is, **REMANDED** to the Occupational Safety and Health Administration for a determination to be made under the employee protection (whistleblower) provisions of the pertinent statute(s), consistent with the above discussion.

A
PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.