

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 May 2012

CASE NO: 2012-CAA-00001

In the Matter of:

DEMETRIUS JOHNSON,
Complainant,

v.

FITZPATRICK CONTAINER COMPANY,
Respondent.

APPEARANCES: Howard K. Trubman, Esq.
 For Complainant

Charles V. Curley, Esq.
For Respondent.

BEFORE: Ralph A. Romano
 Administrative Law Judge

DECISION AND ORDER

Complainant Demetrius Johnson filed this case under the employee protection (“whistleblower”) provisions of the Clean Air Act (“CAA”), 42 U.S.C. §7622 (1994). The CAA prohibits employers from discriminating against any employee with respect to his or her compensation, terms, conditions, or privileges of employment because that employee engaged in protected activity as defined in the Act. Complainant alleges that he was unlawfully terminated by employer, Fitzpatrick Container Company.

I. STATEMENT OF THE CASE

Demetrius Johnson (“Complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) on March 18, 2010, alleging that his employer, Fitzpatrick Container Company (“Respondent”) terminated him for engaging in protected activity. Specifically, he asserted he was terminated after raising concerns about the possible presence of asbestos at his work site.

OSHA investigated the complaint and issued the Secretary's findings on September 14, 2011. OSHA determined that Respondent's actions did not constitute a violation of the Act. Complainant timely appealed, and the matter was assigned to me. I held a hearing on January 23, 2012 in Philadelphia, Pennsylvania. The following decision is based on the Act and its implementing regulations, and the evidence and testimony presented by the parties.

II. FINDINGS OF FACT

Respondent operates a corrugated sheet plant specializing in commercial shipping containers. (Tr. p. 44.) Beginning April 2009, Complainant was employed by a temporary staffing agency, McGraff Systems, to operate a forklift at Respondent's plant. (*Id.* p. 12.) In March 2010, Complainant became concerned for his health after spotting what he believed to be exposed asbestos insulation inside the plant. (*Id.* p. 15; CX 2.) On March 16, Complainant approached warehouse manager Mike Khan and asked to wear a respirator. (*Id.* pp. 19-20.) After speaking with Khan, Complainant left work to be examined by a physician. (*Id.* p. 21.) While at the physician's office, a McGraff representative notified Complainant that his position had been terminated. (*Id.* pp. 22-23.)

III. ANALYSIS

The CAA is a comprehensive scheme for reducing atmospheric air pollution. Under the statute, an "air pollutant" is defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters *the ambient air*." 42 U.S.C. §7602(g) (emphasis added). EPA regulations implementing the CAA define "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. §50.1(e). Thus, to constitute protected activity under the CAA's whistleblower provision, an employee's complaint about an air pollutant (in this case, asbestos) must be based upon a reasonable belief that the hazard violates EPA regulations or poses a risk of fouling the outdoor air. Kemp v. Volunteers of Am. of Pa., Inc., ARB Case No. 00-069 (December 18, 2000), slip op. at 4. Alternatively, if the complainant is concerned only with airborne pollutants as an occupational hazard, the employee protection provisions of the CAA would not be triggered and this Court would have no jurisdiction to hear the claim. *Id.*, citing Aurich v. Consolidated Edison Co. of N.Y., Inc., ALJ Case No. 86-CAA-2, Sec. Rem. Ord., Apr. 23, 1987, slip op. at 3-4.

After reviewing the documentary and testimonial evidence submitted in this claim, I find no evidence indicating Complainant had a reasonable belief that the asbestos at Respondent's plant would be emitted into the ambient air. Although Complainant's request to wear a respirator evidences a concern for his own health, nothing in the record suggests that he thought the asbestos posed any threat to the air outside of his workplace. Thus, I have no basis to conclude that Complainant engaged in activity protected by the CAA.

ORDER

For the foregoing reasons, it is ORDERED that the complaint of DEMETRIUS JOHNSON for relief under the whistleblower provisions of the CAA is DISMISSED.

A

Ralph A. Romano
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.