



**Issue Date: 13 June 2018**

OALJ Case No.: 2017-ERA-00009  
OSHA Case No.: 3-0050-14-115

*In the Matter of:*

**LAWRENCE CRISCIONE,**  
*Complainant,*

v.

**UNITED STATES NUCLEAR REGULATORY COMMISSION,**  
*Respondent,*

**ORDER DISMISSING COMPLAINT ON SUMMARY DECISION  
FOR LACK OF SUBJECT MATTER JURISDICTION**

**Background**

On May 20, 2014, Lawrence Criscione (“Complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging the Nuclear Regulatory Commission (“Respondent” or “NRC”) violated the employee protection provisions of the Energy Reorganization Act (“ERA” or “Act”), 42 U.S.C. § 5851.<sup>1</sup> Complainant alleges he was denied consideration for NRC positions he was otherwise well qualified for because of disclosures he made relating to a reactivity management incident at the Callaway Nuclear Generating Station Plant in Missouri and safety concerns at the Oconee Nuclear Power Plant in South Carolina. On May 26, 2017, OSHA dismissed the complaint finding that Respondent is not a covered employer under the Act. Complainant objected to the findings and, on August 28, 2017, requested a hearing before the U.S. Department of Labor, Office of Administrative Law Judges (“Office” or “OALJ”) pursuant to 29 C.F.R. § 24.106.

On October 6, 2017, I issued a *Notice of Assignment and Hearing*, setting the matter for formal hearing on May 23, 2018 in Washington, D.C. On October 20, 2017, I issued an *Order Suspending Prehearing Deadlines* pending a ruling on a forthcoming motion to dismiss. On October 23, 2017, Respondent filed a *Memorandum of Points and Authorities in Support of Respondent’s Motion to Dismiss* (“Motion to Dismiss”). On October 31, 2017 I granted Complainant an extension to file a response to Respondent’s Motion to Dismiss. On November 15, 2017, Complainant filed an *Opposition to the Respondent Nuclear Regulatory Commission’s*

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<sup>1</sup> The procedural regulations implementing the ERA are found at 29 C.F.R. Part 24.

*Motion to Dismiss* (“Opposition”). Complainant filed a corrected version of the Opposition on November 17, 2017.<sup>2</sup>

On May 4, 2018, given that Respondent’s Motion to Dismiss was still under advisement, I issued an order cancelling the hearing date. On May 9, 2018, Complainant filed a *Motion to Vacate Hearing Date and Commence Discovery* (“Motion to Vacate”). Respondent filed its opposition to Complainant’s Motion to Vacate on May 18, 2018.

For the reasons set forth below, Respondent’s Motion to Dismiss for lack of subject matter jurisdiction is granted.

### **Summary of the Parties’ Positions**

Respondent submits that this case must be dismissed for lack of subject matter jurisdiction because Congress has not unequivocally waived sovereign immunity against federal agencies, including the NRC, under the ERA. (Motion to Dismiss at 3.) Absent a waiver, sovereign immunity shields the NRC from suit. Respondent identifies several decisions from the Administrative Review Board (“ARB”) finding that the ERA does not contain a waiver of sovereign immunity.<sup>3</sup> (Motion to Dismiss at 5, 14-15, 18.) Accordingly, Respondent contends that relief in the form of monetary damages and equitable remedies is foreclosed. (Motion to Dismiss at 5, 9, 10-18.)

Complainant contends that the text of the ERA unequivocally waives sovereign immunity and that Respondent’s reliance on the ARB’s decisions is misplaced.<sup>4</sup> (Opposition at 15.)

Both Respondent and Complainant provide detailed interpretation and analysis of the relevant ERA provisions.<sup>5</sup>

### **Findings of Fact**

1. The Nuclear Regulatory Commission is an independent agency of the United States government tasked with protecting public health and safety relating to nuclear energy. Established by the Energy Reorganization Act of 1974, the NRC began operations on

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<sup>2</sup> This order discusses only the corrected Opposition, as it was intended to replace Complainant’s earlier filing.

<sup>3</sup> Respondent cites *Pastor v. Dep’t of Veterans Affairs*, ARB No. 99-071, ALJ No. 1999-ERA-011 (ARB May 30, 2003) and *Mull v. Salisbury Veterans Administration Medical Clinic*, ARB No. 09-107, ALJ No. 2008-ERA-008 (ARB Aug. 31, 2011), both of which are discussed below.

<sup>4</sup> In his brief, Complainant also details specific activities he alleges are protected under the ERA as well as the adverse actions taken against him by the NRC in this matter. (Opposition at 1-13.) However, given my ruling below that the NRC is immune from jurisdiction of this court, it is not necessary to discuss the merits of his underlying claim, under existing controlling precedent.

<sup>5</sup> I find it unnecessary to provide the details of the parties’ interpretations of the ERA, given that the ARB has already decided the relevant issues, as explained below.

January 19, 1975 as one of two successor agencies to the United States Atomic Energy Commission.

2. Complainant was hired by NRC in 2009 as a reliability & risk engineer.
3. Complainant filed a whistleblower retaliation action under the Energy Reorganization Act against the NRC in 2014.

### **Legal Framework**

Generally, the ERA protects from retaliation<sup>6</sup> employees who provide information, refuse to engage in unlawful practices, and testify or assist in proceedings related to violations of the ERA or the Atomic Energy Act of 1954 (“AEA”). Section 5851(a)(2) enumerates covered employers. The ERA was amended in 2005 to include the NRC and the Department of Energy (“DOE”) in the enumerated list of employers. § 5851(a)(2)(F), (G).

The ARB has held, both before and after the ERA’s 2005 amendments, that Congress has not unequivocally waived sovereign immunity under the ERA. In *Pastor v. Dep’t of Veterans Affairs*, decided before the 2005 amendments, the ARB held that the Department of Labor lacked jurisdiction over a claim brought under the ERA against the Department of Veterans Affairs because the complainant’s “claim for monetary damages is barred by sovereign immunity.” *Pastor*, PDF at 1. The ARB applied the “specific waiver requirement,” which dictates that waivers of federal sovereign immunity must be “unequivocally expressed.” *Id.* at 6.<sup>7</sup> In finding that a waiver was not unequivocally expressed, the ARB reasoned that the terms “person” and “employer” in the ERA are not interchangeable, *id.* at 15-18, and that the use of the word “person” in the remedy provisions of § 5851 does not clearly encompass federal agencies, *id.* at 18-20.

In *Mull v. Salisbury Veterans Administration Medical Center*, ARB Case No. 09-107 (August 31, 2011), issued after the 2005 amendments, the ARB again “conclude[d] that [the ERA] does not contain any language that expresses congressional intent to waive the federal government’s sovereign immunity,” and that “it is self-evident that there is no statement that ‘federal sovereign immunity’ is waived.” *Mull*, ARB No. 09-107, ALJ No. 2008-ERA-008, PDF at 9 (ARB Aug. 31, 2011). Although the ARB acknowledged the ERA’s 2005 amendments,<sup>8</sup> it

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<sup>6</sup> Section 5851(a)(1) provides, in pertinent part, that “[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee” engaged in a protected activity.

<sup>7</sup> See *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990).

<sup>8</sup> The ARB states:

[W]e disagree with the Assistant Secretary’s Argument that Congress’ amendment of Section 211 to specifically include the DOE and the NRC within the definition of “employer” necessarily bolsters the conclusion that the ERA waives federal sovereign immunity. The opposite argument could also be made, that since Congress amended the definition of “employer” in 2005 and was aware of the Board’s 2003 decision in *Pastor*, Congress was validating *Pastor*’s holding that federal sovereign immunity was not waived under the ERA. If Congress intended to waive

found that, nonetheless, Congress had not unequivocally waived federal sovereign immunity. *Id.* at 12.

Administrative law judges of the U.S. Department of Labor are bound by ARB precedent that is directly applicable and not reversed or superseded.<sup>9</sup> The ARB's holding in *Mull* is on point, has the force of law, and is controlling in this matter.<sup>10</sup> As Complainant has not met his burden to overcome *Mull*, it is unnecessary to further discuss the arguments of the parties. I find the United States has not waived sovereign immunity for whistleblower retaliation complaints under the ERA.

### **ORDER**

Accordingly, Lawrence Criscione's above-captioned complaint is hereby DISMISSED.<sup>11</sup>

**SO ORDERED.**

**STEPHEN R. HENLEY**

Chief Administrative Law Judge

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sovereign immunity, then it can be argued that in light of *Pastor* Congress would have also amended the ERA to include a definition of "person" that included the federal government or otherwise amended the statute to effectuate that purpose.

*Mull* at 11.

<sup>9</sup> See Secretary's Order 02-2012, 77 Fed. Reg. 69,378 (Nov. 16, 2012) (stating that "the Board shall adhere to the rules of decision and precedent applicable . . . until and unless the Board or other authority explicitly reverses such rules of decision or precedent."). See also *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (declaring that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.")

<sup>10</sup> I note that, in 2015, the U.S. Court of Appeals for the Ninth Circuit issued an order that suggests that Congress waived federal sovereign immunity for remedies under the whistleblower provisions of the ERA as applied to the DOE. *Tamosaitis v. URS Inc.*, 781 F.3d 468 (9th Cir. 2015) (affirming the dismissal of the DOE as a named respondent in a complaint brought under the whistleblower provisions of the ERA on grounds of failure to exhaust administrative remedies, with no mention of lack of subject matter jurisdiction or federal sovereign immunity).

<sup>11</sup> Any remaining outstanding motions are hereby dismissed as moot.

**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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

The date of the postmark, facsimile transmittal, or e-filing 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 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.

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.

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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.