



Issue Date: 13 July 2017

In the Matter of

MICHAEL S. PECK

Complainant

v.

Case Number: 2017- ERA- 00005

NUCLEAR REGULATORY COMMISSION

Respondent

BILLIE PIMER GARDE, ESQUIRE

FOR COMPLAINANT

JACK MCKIMM, ESQUIRE

FOR RESPONDENT

ORDER

SUMMARY DECISION AS TO JURISDICTION

CLAIM DISMISSED

A hearing was scheduled for August 17, 2017 in Knoxville, Tennessee, pursuant to the Energy Reorganization Act of 1974, as amended ("ERA"), which provides whistleblower protections to certain employees for engaging in certain protected activities. After I held a telephone conference, Respondent filed a Motion to Dismiss based on sovereign immunity and precedential case law. The Complainant filed a response in the nature of an objection.

Jurisdiction is a threshold matter. Under 29 CFR § 18.72 Summary decision:

- (a) *Motion for summary decision or partial summary decision.* A party may move for summary decision, identifying each claim or defense—or the part of each claim or defense—on which summary decision is sought. The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. The judge should state on the record the reasons for granting or denying the motion.

Section § 5851 (a) of the Act as amended prohibits discrimination against an employee by an employer for notifying an employer of allegations of violations this Act or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq. or AEA)); if an employee refused to engage in any unlawful activity under this Act or the AEA; testified before Congress or at any Federal or State proceeding regarding

any provision of this Act or the AEA; commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the AEA or a proceeding for the administration or enforcement of any requirement imposed under this Act or the AEA; testified or is about to testify in any such proceeding; or 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 Act or the AEA.

...
(2) For purposes of this section, the term “employer” includes—

- ...
(F) the Commission; and
(G) the Department of Energy.

...
(b) Complaint, filing and notification.

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the “Secretary”) alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint, the Commission, and the Department of Energy.

(2) (A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. Upon the conclusion of such hearing and the issuance of a recommended decision that the complaint has merit, the Secretary shall issue a preliminary order providing the relief prescribed in subparagraph (B), but may not order compensatory damages pending a final order. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys’ and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

42 U.S.C. § 5851.

I am advised by Respondent that when Congress amended the Act in 2005 to include the NRC within the definition of “employer” in § 5851(a), it did not amend the remedies section of the Act, § 5851(b), which only allows “persons” to be held liable, to expressly include the NRC as a “person” under the Act.

I am directed to *Mull v. Salisbury Veterans Admin. Med. Clinic*, ARB No. 09-107, ALJ No. 2008-ERA-008, slip op. at 9 (ARB Aug. 31, 2011). In that case, the complaint alleged that the Respondent, Salisbury Veterans Administration Medical Center (SVAMC), terminated his employment in violation of the employee protection provisions of the Energy Reorganization Act, 42 U.S.C.A. § 5851 (ERA), because he complained that SVAMC intended to hire an unqualified Radiation Safety Officer in violation of applicable regulations. SVAMC filed a Motion to Dismiss the complaint on the grounds of sovereign immunity. On April 13, 2009, Judge Kenneth Krantz ruled that the federal government had waived sovereign immunity with regard to the equitable remedies being sought and denied the Respondent’s motion to dismiss. The Respondent sought and obtained interlocutory review of that ruling by the Administrative Review Board (“ARB”). On August 31, 2011, the Board reversed Judge Krantz’ ruling and remanded the complaint for proceedings consistent with its decision. After hearing argument from all of the parties including the Department of Labor, The ARB compared the statutory language of the EPA with the language of three other environmental whistleblower statutes where sovereign immunity was expressly waived¹:

The ERA is decidedly different than these three examples, because unlike each of them, the ERA never defines “person,” the entity employees are permitted to sue, anywhere in its language. Neither does it direct us to seek that definition elsewhere.

...

In any event, we point out that we see validity in arguments on both sides of the issue as to whether Congress intended to waive federal government sovereign immunity, and this, considered in favor of the sovereign, compels us to conclude that the ERA does not waive immunity because we find no unequivocal expression of intent to waive in the ERA.

On December 23, 2011, Judge Krantz dismissed the case. No appeal was taken.

The parties addressed the 2005 amendment that added the NRC as an “employee” but, in essence the ARB has determined that “person” is a missing factor. I find that this case has not been superseded and has the force of law. I note that in *Mull* the Department of Labor took the position that sovereign immunity had been waived. I note that the parties and the ARB did not address *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), where the Supreme Court established a two prong test for interpreting statutes that may be ambiguous, and did not address the “rights/remedy dichotomy.”² Where an “employee” is given a right, (s)he should be entitled to a remedy. The Complainant has the burden to overcome *Mull v.*

¹ Those statutes are the Clean Air Act, 42 U.S.C. § 7622 (2000) (CAA); the Solid Waste Disposal Act, 42 U.S.C. § 6971 (2000) (SWDA); and the Federal Water Pollution Control Act, 33 U.S.C. § 1367 (2000) (FWPCA).

² Tracy A. Thomas, “Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy under Due Process Symposium: Remedies Discussion Forum,” 41 *San Diego Law Rev.* 1633 (2004).

Salisbury Veterans Admin. Med. Clinic. He does not present legislative intent to show waiver of sovereign immunity to overcome the textual analysis applied in *Mull*. I find that he has not met his burden.

After having been fully advised in this matter, I enter the following.

1. As to jurisdiction, there are no material facts in dispute.
2. Respondent NRC is an independent regulatory agency created by Congress in 1974 to ensure the safe use of radioactive materials for beneficial civilian purposes while protecting people and the environment. The NRC regulates commercial nuclear power plants and other uses of nuclear materials through licensing, inspection, and enforcement of its requirements. Headquartered in Rockville, Maryland, the NRC employs more than 3,200 federal employees across its headquarters, 4 regional offices, and a Technical Training Center (TTC) in Chattanooga, Tennessee.
3. The Complainant is an NRC employee who brought a whistleblower action under the ERA.
4. The NRC is an instrumentality of the U.S. Government which through the laws of the United States permits certain actions under a waiver of sovereign immunity.
5. The United States has not waived sovereign immunity for ERA whistleblower actions.
6. Therefore I do not have jurisdiction in this case.
7. Therefore, Respondent NRC's Motion to Dismiss is **GRANTED**.
8. The hearing is **CANCELLED**.

**DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE**

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

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.

