



In the Matter of:

JUDY K. STEPHENSON,

ARB CASE NO. 96-080

COMPLAINANT,

ALJ CASE NO. 94-TSC-5

v.

DATE: February 13, 1997

**NATIONAL AERONAUTICS & SPACE
ADMINISTRATION,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

DECISION AND ORDER OF REMAND

This case arises under the employee protection provision of the Clean Air Act (CAA), 42 U.S.C. § 7622 (1994), and regulations implementing the environmental whistleblower laws which appear at 29 C.F.R. Part 24 (1996).^{2/} On July 3, 1995, the Secretary of Labor remanded the case to the Administrative Law Judge (ALJ) for a hearing on the CAA complaint of unlawful discrimination filed by Complainant Judy K. Stephenson against the National Aeronautics & Space Administration (NASA). NASA is subject to suit under the CAA. *See Jenkins v. U.S. Environmental Protection Agency*, Case No. 92-CAA-6, Sec. Dec., May 18, 1994, slip op. at 4-8 (sovereign immunity waived

^{1/} On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under, *inter alia*, the Clean Air Act and implementing regulations, to the Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19,978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Administrative Review Board now issues final agency decisions. *See* 61 Fed. Reg. 19,982 for the final procedural revisions to the regulations implementing this reorganization.

^{2/} These regulations implement the whistleblower provisions of the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (1994); Federal Water Pollution Control Act, 33 U.S.C. § 1367 (1994); Toxic Substances Control Act, 15 U.S.C. § 2622 (1994); Solid Waste Disposal Act, 42 U.S.C. § 6971 (1994); Clean Air Act; Energy Reorganization Act, 42 U.S.C. § 5851 (1994); and Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610 (1994). 29 C.F.R. § 24.1(a).

under CAA); 42 U.S.C. § 7418(a) (Federal facilities provision); 42 U.S.C. § 7602(e) (“any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof” included). Stephenson alleges that NASA ordered her immediate employer, a government contractor, to prohibit her from communicating with NASA personnel, to bar her from the Johnson Space Center and to revoke her unescorted access clearance because she engaged in activity protected under the CAA. In particular, she complained about astronauts being exposed, within the space capsule, to ethylene oxide and Freon. Following the Secretary’s remand of the case, NASA filed a motion for summary decision, which the ALJ granted. Recommended Order Dismissing Complaint on Summary Decision (R. O.), Feb. 26, 1996. The Administrator of the Wage and Hour Division has filed a brief as *amicus curiae* in support of Stephenson’s position that the ALJ erred in dismissing the complaint.

In reaching a decision, the ALJ found the following: Stephenson never had been employed directly by NASA. Because of the absence of an employment relationship, NASA was not an “employer” and Stephenson was not an “employee” for purposes of coverage under CAA section 7622. Stephenson thus could not maintain the discrimination complaint against NASA. Rather, Stephenson had been employed by Martin Marietta Services, Inc., a NASA contractor, and she had settled the discrimination complaint filed against that employer. In finding that Stephenson was not an “employee,” the ALJ applied the standard adopted in *Reid v. Methodist Medical Center of Oak Ridge*, Case No. 93-CAA-4, Sec. Dec., Apr. 3, 1995, slip op. at 12-13, *aff’d*, No. 95-3648 (6th Cir. Dec. 20, 1996), which in turn applied the “common-law” employment test articulated in *Nationwide Mutual Ins. Co. v. Darden*, 112 S.Ct. 1344, 1348 (1992) and *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989). The ALJ applied the *Darden* test with minimal discussion of the reasons for doing so. The ALJ noted that in *Reid* the Secretary “announced that he would apply the test adopted [in *Darden*]” and that under the test “the term ‘employee’ is to be construed in accordance with common law principles” R. O. at 2. The ALJ then stated: “This construction is accepted and *it is found that the prohibitions contained in the employee protection provision of CAA applies [sic] only to Complainant’s employer* and the remaining question is whether NASA is Complainant’s employer under common law principles” *Id.* (emphasis added).

In *Reid v. Methodist Medical Center*, the issue was whether Dr. Reid, a physician^{3/} recruited by a medical center and medical management company to set up a local medical practice, was an “employee” or an “independent contractor” for purposes of the environmental whistleblower laws. In *Darden*, the court stated that the key element of the common-law definition of employee was the hiring party’s right to control the manner and means by which the product is accomplished. The issue, then, was the degree of control possessed by the Respondents over Dr. Reid’s delivery of medical services. Factors relevant to determining the degree of control include the level of skill required, the source of instrumentalities and tools, work location, the hiring party’s right to assign additional projects, the hired party’s discretion in scheduling work, the hired party’s role in hiring and paying assistants, provision of employee benefits, and tax treatment. While noting that the case did not fall clearly at either end of the “employee” -- “non-employee” spectrum, the Secretary found that Respondents were not shown to possess sufficient control over the delivery of services for Dr.

^{3/} Dr. Reid was a board certified internist and board eligible oncologist and hematologist.

Reid to be considered an employee. Rather than an “employee” in the common-law sense of the term, Dr. Reid more closely resembled a self-employed individual or an independent professional contractor.

As the Administrator points out, *Reid* is distinguishable. Admin. Br. at 1-2. No question exists but that Stephenson is an employee in the common-law sense of the term. The question, rather, is whether she is protected under the CAA against retaliation by an entity which, albeit not her direct or immediate employer, is nonetheless a covered employer. See *Coupar v. United States Department of Labor*, No. 95-70400 (9th Cir. Jan. 30, 1997), slip op. at 11 (in determining employer-employee relationship, *Reid* and *Darden* “are of limited usefulness . . . because they deal with the distinction between the status of employee and that of independent contractor”).

CAA section 7622(a) states that “[n]o employer may discharge any employee or otherwise discriminate against any employee” because the employee has engaged in protected activity. 42 U.S.C. § 7622(a). Further, a complaint may be filed by “any employee who believes he has been discriminated against by any person^{4/} in violation of subsection (a).” 42 U.S.C. § 7622(b)(1). The terms “employer” and “employee” are not defined in the Act. Without deciding the exact breadth appropriately accorded these terms, we do conclude that, in a hierarchical employment context, an employer that *acts* in the capacity of employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that that employer does not directly compensate or immediately supervise the employee. A parent company or contracting agency acts in the capacity of an employer by establishing, modifying or otherwise interfering with an employee of a subordinate company regarding the employee’s compensation, terms, conditions or privileges of employment. For example, the president of a parent company who hires, fires or disciplines an employee of one of its subsidiaries may be deemed an “employer” for purposes of the whistleblower provisions. A contracting agency which exercises similar control over the employees of its contractors or subcontractors may be a covered employer. See, e.g., *Hill v. TVA and Ottney v. TVA (Hill and Ottney)*, Case Nos. 87-ERA-23/24, Sec. Rem. Dec., May 24, 1989. The issue of employment relationship necessarily depends on “the specific facts and circumstances” of the particular case, however. *Id.*

Owing, in part, to certain procedural confusion engendered during case development, the record does not permit us to decide this issue. In furtherance of the Secretary’s September 28, 1995, Order of Remand which directs that the parties be given an opportunity for reasonable discovery and the submission of evidence, we remand the case for the creation of a complete factual record for use in deciding the issues of coverage and liability.

Attached to Complainant’s opening brief on review of the ALJ’s decision is the Declaration of David R. Proctor, a former NASA employee, which NASA now moves to strike. Complainant asserts that she would have filed the declaration in response to Respondent’s October 17, 1995, Motion for Summary Decision had she received service of the Secretary’s December 13, 1995, Order

^{4/} A “person” is “an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department or instrumentality of the United States and any officer, agency, or employees thereof.” 42 U.S.C. § 7602(e).

Denying [Interlocutory] Motions. NASA's motion to strike is denied. The declaration is accepted for filing and may be considered on remand. We do not reach the issue of the former ALJ's recusal since it is moot. *See* Complainant's letter of December 13, 1996.

Accordingly, the ALJ's R. O. is rejected. This case **IS REMANDED** to the Office of Administrative Law Judges for a hearing.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member