In the Matter of:

ROBERT E. TYNDALL,

COMPLAINANT,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

CASE NOS. 93-CAA-6
95-CAA-5

DATE: June 14, 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

DECISION AND REMAND ORDER

These consolidated cases arise under the employee protection provision of the Clean Air Act (CAA), 42 U.S.C. § 7622 (1988). In the first case, No. 93-CAA-6, the Administrative Law Judge (ALJ) recommended dismissal of the complaint for failure to state a claim under the CAA.[2/] A different ALJ found that the second case, No. 95-CAA-5, concerns an alleged continuation of the same discriminatory acts that were the subject of the first complaint. The ALJ recommended dismissing the second complaint while the first complaint was pending before the Secretary.[3/] We disagree with the ALJs' recommendations and remand the cases for further proceedings, including a hearing.

FACTUAL BACKGROUND

[1/] These cases were filed before the Secretary of Labor pursuant to the Clean Air Act and 29 C.F.R. Part 24. On April 17, 1996, the Secretary delegated jurisdiction to issue final agency decisions under this statute and these regulations to the newly created Administrative Review Board (the Board). Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996 (copy attached).

[2/] The first ALJ's decision is referred to as "R.O. I" and the second as "R.O. II."

[3/] The Administrative Review Board had not yet been created.

Complainant, Robert E. Tyndall, was employed as a special agent in the Procurement Fraud Division of the Office of the Inspector General (OIG) of Respondent, the United States Environmental Protection Agency (EPA).[4/] Tyndall was assigned to conduct an investigation of EPA employee Rickie A. Linthurst, who awarded a contract to Kilkelly Environmental Associates (Kilkelly) to provide computer modeling for, and study, the environmental effects of acid rain ("the acid rain contract"). Tyndall discovered improprieties in the awarding and administration of the acid rain contract, including the fact that Linthurst's live-in companion was Kilkelly's project officer on the acid rain contract. Tyndall also contends that the acid rain contract was "wired" to Kilkelly, which had a long history of doing the same type of study for coal-burning utilities that opposed legislation to reduce acid rain.

Tyndall alleges that he engaged in protected activities under the CAA by reporting official misconduct and alleged wrongful interference by OIG management in the Linthurst investigation, and by filing his first CAA complaint. Tyndall further alleges that the EPA's continued retaliatory acts constitute a hostile work environment. He contends that the EPA retaliated by subjecting him to threats, intimidation, harassment, physical assaults, involuntary transfer, and the withholding of earned overtime pay and reimbursement for travel expenses. He seeks back pay, pension enhancements, compensatory damages, costs, attorney fees, and an order requiring the EPA to take affirmative action to cease discriminating against whistleblowers.

DISCUSSION

The ALJ dismissed the first complaint because the allegations "are not related to environmental safety or violations of the CAA" and afforded no basis for relief. R.O. I at 2. Such a dismissal is analogous to one under Fed. R. Civ. P. 12(6)(b) for failure to state a claim upon which relief may be granted. In considering dismissal for failure to state a claim, "all reasonable inferences are made in favor of the non-moving party . . . . *Studer v. Flowers Baking Co. of Tennessee, Inc.*, Case No. 93-CAA-00011, Dec. and Remand Ord., June 19, 1995, slip op. at 2; *Helmstetter v. Pacific Gas & Elec. Co.*, Case No. 91-TSC-1, Dec. and Rem. Ord., Jan. 13, 1993, slip op. at 4; *Estelle v. Gamble*, 429 U.S. 97 (1976). Dismissal should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980); *accord, Helmstetter*, slip op. at 4. If the alleged facts could state a *prima facie* case under the CAA's employee protection provision, dismissal is not proper. *Studer*, slip op. at 5; *Bassett v. Niagara Mohawk Power Co.*, Case No. 86-ERA-2, Sec. Remand Ord., July 9, 1986, slip op. at 8.

The CAA's employee protection provision provides in relevant part:

> 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. . .

[4/] We expressly make no findings of fact, but rather recite allegations from the complaints and supporting papers. Tyndall has now retired from the EPA, but does not contend that his retirement was coerced or discriminatory.

> (1) commenced, caused to be commenced, or is about to commence a proceeding under this chapter. . .
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> * * *
>
> (3) assisted or participate 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 chapter.

42 U.S.C. § 7622(a). To establish a *prima facie* case of a violation of the CAA's employee protection provision, a complainant must show that he engaged in protected activity of which the respondent was aware, and must raise the inference that the protected activity was the likely reason for the respondent's adverse actions against him. *Crosby* slip op. at 21*; see also Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 8 (under analogous provision of Energy Reorganization Act).

Tyndall alleges in his first complaint that his EPA superiors directed him to "disregard certain evidence" and to conduct the investigation of Linthurst in a manner that he believed "was unethical and would distort the facts, thereby denying the proper execution of justice." Mar. 3, 1993 Complaint at 2. He also complains that after he sent a memorandum to the EPA's Inspector General criticizing the interference in the investigation and recusing himself from it, the EPA disregarded his recusal and forced him to lead the investigation. *Id.* At 3.

The ALJ found that these allegations do not state a claim for relief under the CAA because they "are not related to environmental safety or violations of the CAA." R. O. I at 2. The Secretary has held that an employee's complaint must be "grounded in conditions constituting reasonably perceived violations" of environmental acts, such as the CAA. *Crosby,* slip op. at 26; *Johnson v. Old Dominion Security*, Case Nos. 86-CAA-3 et seq., Final Dec. And Order, May 29, 1991, slip op. at 15.

We find the Secretary's decision in *Jenkins v. U.S. Environmental Protection Agency*, Case No. 92-CAA-6, Sec. Dec. And Ord., May 18, 1994, instructive concerning the breadth of activities protected under the CAA. In *Jenkins*, slip op. at 12, the complainant's protected activities included, *inter alia*, complaining to Congress about conflicts of interest and contract tampering at the EPA. Jenkins also charged EPA OIG with failure to investigate and concealing evidence of contractor improprieties. *Id.*

Here, Tyndall made internal complaints to EPA managers about the same types of improprieties that Jenkins raised. It is not a valid distinction that Tyndall complained within the EPA and not to some external entity such as the Congress, because internal complaints to managers are protected under the CAA. *See Crosby*, slip op. at 24-25, and cases cited there.

The Secretary has stated that the CAA's employee protection provision "afford[s] protection for participation in activity in furtherance of the statutory objectives and traditionally [has] been construed broadly," *Jenkins*, slip op. at 10, and we find that Tyndall's allegations of protected activities meet that broad construction. At a hearing, Tyndall could establish that his managers' interference in the Linthurst investigation would lead the EPA to rely upon acid rain

studies that understate the harmful effects of acid rain. He may also show that the EPA's reliance on those studies could lead to regulate less stringent regulation of the air emissions that cause acid rain. Therefore, since it is possible that Tyndall's complaints about interference were in furtherance of the statutory objectives of the CAA, they may constitute protected activities. *See, e.g., Marcus v. U.S. Environmental Protection Agency*, Case No. 92-TSC-5, Sec. Dec. and Ord., Feb. 7, 1994, slip op. at 7 (EPA employee's memorandum criticizing a draft report concerning toxicology and carcinogenesis studies that might be used in regulating fluoride levels constituted protected activity under CAA, among other environmental statutes).

Turning to the remaining elements of a *prima facie* case, Tyndall clearly alleged that the EPA was aware of his complaints to his managers. *See* Complaint at 3: copies of Tyndall's confidential memorandum complaining about the Linthurst investigation were made available to the OIG managers about whom Tyndall complained.

Tyndall also complained that the EPA took actions that adversely affected the compensation, terms, and conditions of his employment. *See* Complaint at 4-6: alleging that the EPA directed Tyndall's reassignment to a different office, did not provide him advance money to travel to his new assignment, did not provide a properly signed performance appraisal for fiscal year 1991, subjected him to an unprecedented "quarterly performance review," and did not pay certain earned overtime pay.

Temporal proximity between a complainant's protected activities and a respondent's adverse actions may be sufficient to raise the inference that the adverse actions were taken in retaliation for the protected activities. *Couty v. Dole,* 886 F.2d 147, 148 (8th Cir. 1989). Tyndall alleged that he was assigned the Linthurst investigation in October 1991 and complained about it to the Inspector General in a December 1991 memorandum. He contends that in retaliation, the EPA gave him a punitive quarterly performance review in February 1992, directed his reassignment in August 1992, failed to provide a travel advance in November 1992, and did not pay him overtime for the fourth quarter of FY 1992 (June - August). He therefore alleged adverse actions that occurred between two and eleven months after his protected activity. We find that the temporal proximity alleged here is sufficient to raise an inference of causation and therefore to establish a *prima facie* case. *Thomas v. Arizona Public Svc. Co.*, Case No. 89-ERA-19, Sec. Final Dec. and Ord., Sept. 17, 1993, slip op. at 19 (elapse of one year between protected activities and adverse actions sufficient to infer causation) and *Goldstein v. Ebasco Constructors, Inc.,* Case No. 86-ERA-36, Sec. Dec., Dec. 7, 1992, slip op. at 1-12, *rev'd on other grounds sub nom. Ebasco Constructors Inc. v. Martin*, No. 92-4567 (5th Cir. Feb. 19, 1993) (7 or 8 months sufficient).

Tyndall also complains that the interference by his EPA managers may have violated either the civil service laws or the Inspector General Act. *See* Mar. 3, 1993 Complaint at 3 (pursuant to his rights under the Inspector General Act of 1978,
Tyndall went outside the "chain of command" by sending a complaint letter to the Inspector General, but was subjected to retribution for doing so). The allegation of a violation of other statutes does not defeat the claim under the employee protection provision. The Board has

authority to rule only upon the CAA claim; it will express no opinion as to violations of the other statutes.

Tyndall's second complaint alleges that the EPA continued retaliating against him because of the first CAA complaint.
Dec. 1, 1994 Complaint at 2-4. He further alleged that after the ALJ recommended dismissing his first complaint, EPA officials intimidated and assaulted him and also failed to investigate his internal complaint about the intimidation and assault. *Id.* at 3.

The filing of his first CAA complaint clearly constituted protected activity. *Bassett v. Niagara Mohawk Power Co.,* Sec. Final Dec. and Ord., Sept. 28, 1993, slip op. at 7 (filing a complaint under ERA employee protection provision is a protected activity). Further, the EPA obviously was aware of Tyndall's first complaint, which named the EPA as respondent. Tyndall also alleged adverse actions in his enumeration of a series of adverse acts that he contends constituted an ongoing hostile work environment. Dec. 1, 1994 Complaint at 2-4. We find that Tyndall's second complaint states a *prima facie* case of a CAA violation and that he is entitled to a hearing on that complainant.

In a letter dated March 14, 1996, Tyndall requested that, if remanded, 93-CAA-6 and 95-CAA-5 complaints should be consolidated with a third complaint that was scheduled for hearing on May 1, 1996. We find that 95-CAA-6 and 95-CAA-5 should be consolidated because of the common questions of law and fact. The request to consolidate these two cases with a third case may be moot if the hearing on the third complaint has already taken place. Even if that hearing has not yet occurred, however, since we have no knowledge of the substance of that complaint, we express no opinion on whether these complaints should be consolidated with that third complaint.

CONCLUSION

The complaints in Nos. 93-CAA-6 and 95-CAA-5 are consolidated remanded to the Chief ALJ for a hearing.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member