In the Matter of:

WILLIAM T. KNOX, **ARB CASE NO. 06-089**

COMPLAINANT, **ALJ CASE NO. 01-CAA-3**

v. **DATE: April 28, 2006**

UNITED STATES DEPARTMENT OF THE INTERIOR,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Daniel P. Meyer, Esq., *Public Employees for Environmental Responsibility, Washington, D.C.*, and Richard E. Condit, Esq., *Washington, D.C.*

For the Respondent:
Donald S. Harris, Esq., *United States Department of the Interior, Washington, D.C.*

FINAL DECISION AND ORDER ON REMAND

William T. Knox filed a whistleblower complaint against his employer, the United States Department of the Interior (DOI), claiming that it had violated the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 1995); the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998); and the Department of Labor's (DOL) implementing regulations set out at 29 C.F.R. Part 24 (2005). After an evidentiary hearing, a United States Department of Labor Administrative Law Judge (ALJ) concluded that DOI had violated the CAA. But on DOI's appeal, we dismissed Knox's complaint. *Knox v. United States Dep't of the Interior*, ARB No. 03-040, ALJ No. 01-CAA-3 (ARB Sept. 30, 2004). Knox then appealed to the United States Court of Appeals for the Fourth Circuit. That court

remanded the case to us for further proceedings. *Knox v. United States Dep't of the Interior*, 434 F.3d 721 (4th Cir. 2006).

BACKGROUND

We restate the relevant background facts. Knox began working as a Training Instructor at the National Park Service Job Corps Center in Harper's Ferry, West Virginia on November 21, 1999. Respondent's Exhibit (RX) 46. Part of Knox's duties included acting as the safety officer for the Center. RX 45. While accompanying a United States Department of Labor Occupational Safety and Health Administration (OSHA) officer during a regularly scheduled safety inspection of the Center's facilities in December 1999, Knox learned that some of the Center's buildings contained asbestos. RX 2. Knox also found an "Asbestos Survey Report" dated September 8, 1993, and an OSHA "Notice of Unsafe or Unhealthful Conditions," issued after a previous inspection in January 1999. *Id*. Both noted the presence of asbestos in buildings at the Center.

In January 2000 Knox told DOI management officials that the Job Corps Center had an asbestos problem. He said that employees, students, and contractors at the Center may have been exposed to hazardous asbestos in the workplace and that they should be informed of their potential exposure. Complainant's Exhibits (CX) 118-119; RX 45, 55. Knox testified that at a meeting on January 11, 2000, at which he discussed his asbestos concerns, management threatened to reduce his job duties and pay. Hearing Transcript (HT) at 1319-1320, 2133.

This threat led Knox to file the first of three whistleblower actions with the Merit Systems Protection Board (MSPB), in which he contended that he was exposed to asbestos and was working in unsafe and unhealthful conditions. RX 54-55. Knox then wrote a letter to the DOI Office of Special Counsel on February 2, 2000, again expressing his concern that employees, students, and contractors had been exposed to asbestos at the Job Corps Center. CX 120; RX 55. Knox also faxed a letter to DOI Secretary Bruce Babbitt on March 7, 2000, contending that DOI managers had harassed and discriminated against him because he had revealed the asbestos problems at the Job Corps Center. Administrative Law Judge Exhibit (ALJX) 1.

Then, on March 13, 2000, Jay Weisz, the Center's director, fired Knox. Weisz believed Knox was a probationary employee whose employment could be terminated at will. RX 31. Weisz fired Knox because he did not perform assigned duties, did not follow instructions and exhibited disruptive and inappropriate behavior. *Id.* But upon discovering that Knox was actually a permanent employee, DOI reinstated Knox on March 18, 2000, and removed all reference to his firing from his record. RX 48.

Knox filed this whistleblower action in April 2000, alleging violations of the CAA and TSCA whistleblower protections. *See* ALJX 3. As required by regulation, OSHA investigated the allegations and found them to be valid. DOI then requested a

hearing with the Office of Administrative Law Judges. *Id*. *See* 29 C. F. R. § 24.4. The ALJ conducted a hearing in February and March 2001 and issued a Recommended Decision and Order (R. D. & O.) on December 30, 2002. The ALJ concluded that DOI had violated the CAA.[1] Thus, the ALJ ordered reinstatement, back pay, and compensatory and exemplary damages. He also prohibited DOI from further retaliation and ordered it to clear Knox's record and publicly post the order. DOI appealed the ALJ's R. D. & O. and, as noted, we dismissed Knox's complaint. Knox appealed our decision to the Fourth Circuit, and that court remanded the case to us for further proceedings.

JURISDICTION AND STANDARD OF REVIEW

The environmental whistleblower statutes, such as the CAA, authorize the Secretary of Labor to hear complaints of alleged discrimination because of protected activity and, upon finding a violation, to order abatement and other remedies. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). The Secretary has delegated authority to the Administrative Review Board (ARB) to review an ALJ's initial decision. 29 C.F.R. § 24.8. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman,* 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

DISCUSSION

To prevail on his CAA complaint, Knox must establish by a preponderance of the evidence that he engaged in protected activity, that DOI was aware of the protected activity, that he suffered adverse employment action, and that the protected activity was the reason for the adverse action. S*eetharaman v. General Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21, slip op. at 5 (ARB May 28, 2004).

Under the CAA, an employee engages in protected activity when he or she expresses a concern, and reasonably believes, that the employer has either violated

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[1] The ALJ correctly held that sovereign immunity barred Knox's TSCA complaint. R. D. & O. at 20, 32, 43-44. *See Johnson v. Oak Ridge Operations Office, United States Dep't of Energy*, ARB No. 97-057, ALJ Nos. 95- CAA-20, 21, and 22, slip. op. at 9-10 (ARB Sept. 30, 1999); *Stephenson v. NASA*, 1994-TSC- 5 (Sec'y July 3, 1995).

Environmental Protection Agency (EPA) regulations implementing the CAA or has emitted or might emit, at a risk to the general public, potentially hazardous materials into the ambient air. *See Kemp v. Volunteers of America of Pa., Inc.*, ARB No. 00-069, ALJ No. 00-CAA-6, slip op. at 4-6 (ARB Dec. 18, 2000). Here, of course, the potentially hazardous material was asbestos. 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).

We dismissed Knox's complaint because we found that he had not proven by a preponderance of the evidence that he had engaged in CAA-protected activity. Specifically, we found that when he complained about the asbestos Knox "was not concerned that DOI was emitting asbestos into the ambient air." *Knox*, ARB No. 03-040, slip op. at 6. Moreover, at the hearing Knox admitted that he had not raised concerns with DOI officials about asbestos escaping from the DOI Job Corps Center buildings. Therefore, though he had expressed concern that the employees, students, and contractors at the Job Corps Center may have been exposed to asbestos, we held that Knox did not engage in CAA-protected activity.[2]

The Fourth Circuit noted that the standard for protected activity that we set out in our opinion did not include the fact that a whistleblower may engage in protected activity even if no release into the ambient air occurred.[3] *Knox*, 434 F.3d at 724 n.3. We agree that protected activity under the CAA may also consist of expressing a concern about violations of relevant EPA regulations. *See, e.g.*, 40 C.F.R. § 61.150(c) (requiring markings on vehicles used to transport asbestos-containing waste material); 40 C.F.R. § 61.150(d) (requiring that waste shipment records be maintained). *See also Kemp*, slip op. at 4-5.

More significant is the Fourth Circuit's holding "that the ARB altered its protected activity standard from an inquiry into Knox's reasonable beliefs to a *requirement* that Knox *actually conveyed* his reasonable beliefs to management." *Knox*,

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[2] Generally, regulations issued under the Occupational Safety and Health Act (OSH Act) govern exposure to asbestos in the workplace. *See* 29 U.S.C.A. § 651 *et seq.* (West 1999). *See also* 29 C.F.R. § 1910.1001 (2005). The purpose of the OSH Act is to encourage employees to come forward with complaints about safety and health hazards at their worksites so that remedial action may be taken to achieve safe and healthful working conditions. But employee concerns or complaints about purely occupational worksite hazards are not protected under the CAA's employee protection provision. *See Aurich v. Consolidated Edison Co. of N.Y.*, 86-CAA-2, slip op. at 4 (Sec'y Apr. 23, 1987).

[3] We wrote: "To establish that he engaged in CAA protected activity, Knox must prove that when he expressed his concerns about the asbestos to DOI managers, the DOI Office of Special Counsel, and Secretary Babbitt, he reasonably believed that DOI was emitting asbestos into the ambient air. *See Kemp v. Volunteers of America of Pa., Inc.*, ARB No. 00-069, ALJ No. 00-CAA-6, slip op. at 4, 6 (ARB Dec. 18, 2000)." *Knox*, ARB No. 03-040, slip op. at 4.

434 F.3d at 725. The court read our protected activity standard under the CAA as requiring only that Knox reasonably believe that asbestos was escaping from the Job Corps Center into the outside, ambient air. And since Knox testified that he observed asbestos escaping into the outside air via an exhaust fan, it follows that Knox reasonably believed the same. *Id*., *citing Knox*, ARB No. 03-040, slip op. at 6.[4] When we concluded that Knox had not engaged in protected activity because he never told DOI officials about the exhaust fan emissions, the court held that we had applied a "different [CAA protected activity] standard than formally announced." Therefore, our decision was unreasonable and remand was necessary. *Knox*, 434 F.3d at 725 n.4.

The ARB's protected activity standard for the CAA is, as stated above, that an employee engages in protected activity under the CAA when he or she expresses a concern, and reasonably believes, that the employer has either violated an Environmental Protection Agency (EPA) regulation implementing the CAA or has emitted or might emit, at a risk to the general public, potentially hazardous materials into the ambient air.[5] If the Fourth Circuit's standard for CAA-protected activity, however, requires only that the whistleblower reasonably believe that an employer is violating EPA regulations or is emitting, or is about to emit, potentially hazardous materials into the ambient air, Knox engaged in CAA-protected activity. [6]

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[4] Knox testified at the hearing which occurred in February and March, 2001, nearly a year after DOI fired him and he filed his whistleblower complaint. When our opinion acknowledged that Knox testified about observing the exhaust fan, we sought to emphasize that this was the first time that he had expressed a concern about asbestos escaping into the outside air. *See* HT at 1273, 1276, 1354, 1454, 1507-1508, 1970, 2041-2042, 2069, 2102, 2160-2161, 2420, 2550, 2574, 2581, 2590, 2592, 2596, 2598, 2600, 2603.

[5] Knox neither argues nor does the record contain any evidence that DOI was violating any EPA regulations implementing the CAA.

[6] We read the CAA's definition of protected activity as requiring the whistleblower to take some action.

> 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 (or any person acting pursuant to a request of the employee) –
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> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan . . . [or,]

Nevertheless, Knox still does not prevail here. This is because Knox admitted in his March 2001 testimony that he did not express a concern to DOI management officials about asbestos escaping from the Job Corps Center. HT at 2597, 2605. *See also* HT 204, 231, 2749; 4194, 4419.[7] Therefore, since DOI was not aware of Knox's protected activity, it could not have retaliated against him because of his protected activity.

CONCLUSION

To succeed on his whistleblower claim, Knox must demonstrate by a preponderance of the evidence that DOI retaliated against him because of his CAA-protected activity. Because DOI was not aware of Knox's CAA-protected activity, it could not have retaliated against him because of it. Therefore, we **DISMISS** Knox's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

> (3) assisted or participated 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.A. § 7622(a)(1), (3). *See also* 29 C.F.R. § 24.2(a), (b), (c).

[7] Because of this admission, we gave no weight to Knox's self-serving, contradictory statement, contained in an affidavit dated May 14, 2001 (CX 100), that he "articulated concern [to management] about the general public being endangered by emissions of asbestos fibers." *Knox*, ARB No. 03-040, slip op. at 6-7.