

Fields v. NRC, No. 1:98CV01714 (EGS) (D.D.C., decided Feb. 7, 2000)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID A. FIELDS,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 98-1714 (EGS)
)	[27-1] FILED
UNITED STATES NUCLEAR)	
REGULATORY COMMISSION)	
)	FEB 7 2000
Defendant.)	
)	

CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION

Plaintiff David A. Fields, pro se, is a former Nuclear Shift Supervisor at Florida Power Corporation's ("FPC") Crystal River Nuclear Plant. Plaintiff alleges that the defendant, the Nuclear Regulatory Commission ("NRC"), violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), when NRC published a letter stating that plaintiff had conducted unauthorized tests of the plant's safety system. Defendant has moved to dismiss plaintiff's complaint under Fed. R. Civ. P. 12(b)(1) and (6). Upon consideration of defendant's motion to dismiss, plaintiff's response in opposition, defendant's reply in support, and for the reasons detailed below, this Court concludes that defendant's motion to dismiss should be **GRANTED**.

I. Factual Background

In 1994, plaintiff and his team of control room operators at

FPC's Crystal River 3 nuclear power plant became concerned that FPC's mandated operating curve, which set the parameters for maintaining hydrogen pressure, was unsafe.¹ To substantiate their claims about the operating curve's danger, plaintiff and his team performed tests on the plant's nuclear reactor during the September 4 and 5 midnight shifts.

Following the September 5 test, plaintiff and his team prepared a problem report that did not mention the September 4 test. In reaction to the event report, FPC transferred plaintiff to another position, and the NRC began a 22-month investigation.² On August 23, 1995, after learning of the September 4 test, FPC discharged plaintiff.

On July 10, 1996, NRC issued a letter concluding that

- the crew plaintiff supervised failed to meet the standards for operators of a nuclear power plant;
- plaintiff's unauthorized tests of the plant's safety system constituted a violation of the conditions of plaintiff's license to operate the plant; and
- instead of running unauthorized tests, plaintiff

¹ An operating curve includes a margin of error to ensure that the level of hydrogen pressure is within the design basis requirements of a nuclear power plant. Exceeding an operating curve is not a safety violation. However, when a design basis requirement is exceeded, it must be corrected immediately, reported to the NRC within one hour, and the facility must issue a problem report within 30 days.

² NRC eventually determined that plaintiff's concerns were valid and determined that the operating curve was actually a design basis curve.

should have raised his concerns about the plant's safety system higher within the FPC and the Nuclear Regulatory Commission ("NRC").

The letter also stated that "the unauthorized evolutions authorized and directed by [Fields] on September 4 and 5, 1994 constituted a violation of the conditions of [Fields'] 10 CFR Part 55 license." Compl., Ex. 2. The letter further stated that although the unauthorized evolutions were a significant violation, NRC would not undertake any formal enforcement action against Fields. See *id.*

II. Procedure

Plaintiff has since been trying to amend the record containing the NRC's conclusions. Plaintiff filed a § 211 discrimination action with the DOL, alleging that FPC terminated him for engaging in activities protected under the Energy Reorganization Act of 1974, 42 U.S.C. § 5851(1)(D) (1988). After an evidentiary hearing, the DOL granted FPC's motion for summary judgment, concluding that there was overwhelming evidence that plaintiff had acted deliberately and without authorization from FPC management when they conducted the tests.

Plaintiff appealed first to the ARB, and then to the 11th Circuit. Both affirmed the decisions below. The ARB adopted the DOL's recommendation, and concluded that FPC's decision to discharge plaintiff was based upon his and his team's reckless

disregard as to whether a nuclear safety violation would occur. The 11th Circuit upheld the AFB's determination as "reasonable and supported by substantial evidence contained in the record." See Fields v. U.S. Department of Labor Administrative Review Board, 173 F.3d 811, 813 (11th Cir. 1999).

On July 9, 1998, plaintiff filed a claim in this Court under the Privacy Act, 5 U.S.C. § 552a(d)(2), challenging the NRC's findings. Defendant moved to dismiss the complaint on the grounds that plaintiff was improperly using the Privacy Act to attack the NRC's conclusion collaterally, and, in the alternative, that plaintiff could not state a claim for a Privacy Act violation. On May 11, 1999, the Court granted defendant's motion, dismissed the plaintiff's Privacy Act claim, and, *sua sponte*, gave plaintiff leave to file an amended complaint seeking review of the NRC's decision under the APA. See 5 U.S.C. § 706(2). Plaintiff filed his amended complaint on June 11, 1999. Defendant filed the pending motion to dismiss on July 19, 1999.

III. Discussion

A. Fed. R. Civ. P. Rule 12(b)(6)

Rule 12(b)(6) allows dismissal for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A 12(b)(6) motion should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of

his claims which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957). The court must construe the complaint in favor of the complaining party. See *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

1. Administrative Procedure Act Claim

Defendant argues that plaintiff's APA claim doesn't pass Rule 12(b)(6) muster for two reasons. First, defendant claims that plaintiff has not complied with the pleading requirements of APA judicial review. Section 702 of the APA limits judicial review to "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." Here, while plaintiff argues that defendant's actions in investigating the tests and publishing its conclusions violated the APA, see 5 U.S.C. § 706(2), plaintiff has failed to cite any "relevant statute" under which he has been "aggrieved." Defendant is correct. Plaintiff's complaint is deficient under the APA.

Defendant further argues that the requisite "agency action" was not present here. "Agency action" is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof." See 5 U.S.C. § 551(13). Defendant contends that the NRC letter stating its "opinion" does not qualify as agency action under this definition. Def. Mot. to

Dismiss at 13. All the definitions of "agency action" require such action to have some sort of future effect. However, the NRC letter neither took action against plaintiff nor ordered him to do anything;³ in addition, the letter did not affect plaintiff's license, since he had already lost it before he was fired.⁴ Defendant is correct that plaintiff's claim lacks the requisite agency action to activate APA review.

2. Due Process Claim

Defendant also targeted plaintiff's due process claim for 12(b)(6) dismissal. Defendant argues that plaintiff's due process rights have not been violated because he has not been deprived of a property or a liberty interest. While loss of employment and injury to reputation may constitute a protected interest if they are combined, see Paul v. Davis, 424 U.S. 693, 701 (1976), separately, each is not enough to trigger due process protections. In Doe v. Department of Justice, 753 F.2d 1092, 1106 (D.C. Cir. 1985), our circuit elucidated the two-part stigma-plus test described in Paul. First, the government must stigmatize the litigant. Second, the resulting stigma must

³ For a thorough discussion of why the NRC letter does not fall into each definition of "agency action," see defendant's motion to dismiss at 14-16.

⁴ Defendant adds that the agency informed plaintiff that the letter "do[es] not impose any restrictions on [plaintiff's] ability to be involved in licensed activities." Compl., Ex. 2.

effect a change in status with respect to the government, like loss of employment or the right to be considered for government contracts. Here, defendant contends that plaintiff cannot satisfy either prong. It seems from plaintiff's complaint that his reputation was damaged by the issuance of the NRC letter; it is clear, however, that plaintiff's employment was not affected, because plaintiff was terminated and his license was revoked before the letter was issued, when FPC found out about the September 4 test.⁵

Accordingly, because plaintiff failed to cite a relevant statute under which he had been aggrieved under the APA, because there was no agency action in the instant case, and because plaintiff has not been deprived of a liberty or property interest, defendant's 12(b)(6) motion to dismiss is granted.

B. *Fed. R. Civ. P. 12(b)(1) and Issue Preclusion*

Defendant further argues that plaintiff's claims are outside

⁵ Defendant further argues that plaintiff received all the process that he was due, since he had an opportunity to provide a response to the NRC letter at a name-clearing hearing. Any response would have been placed with the NRC's letter in the NRC's public document room. Dft.'s Mot. to Dismiss at 12. Defendant claims plaintiff did not file any such response. However, on at least one occasion, March 25, 1998, plaintiff requested that the NRC amend the letter. Plaintiff provided a "proposed statement correcting the record" with exhibits attached. NRC denied this request on June 19, 1998, on the grounds that the documents "provide[d] no new information and would not change the decisions made in these cases." Compl. Ex. 8.

this Court's jurisdiction because of federal energy statutes,⁶ and issue precluded because plaintiff has previously raised the same issue administratively and lost before three fora.⁷ Because defendant's motion can be resolved on APA and due process grounds, the Court will not reach these arguments.

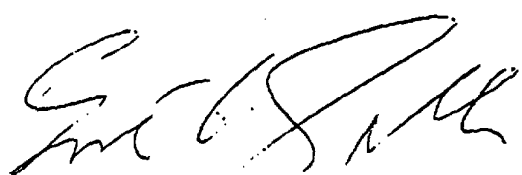
III. Conclusion

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss plaintiff's amended complaint [27-1] is **GRANTED**.

2/5/00

DATE



EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

Notice To:

David A. Fields
7347 Applewood Drive
Inverness, FL 34450

Rudolph Contreras
Assistant United States Attorney
555 4th Street, N.W., Room 10-814
Washington, D.C. 20001

⁶ Under § 189 of the Atomic Energy Act, 42 U.S.C. § 2239, and the Hobbs Act, 28 U.S.C. §§ 2341-2351, NRC licensing decisions are reviewable only in the Courts of Appeals. Defendant argues that, in as much as plaintiff's amended complaint constitutes a challenge to the NRC's exercise of its licensing function, this Court lacks jurisdiction.

⁷ As is discussed above, plaintiff's claims concerning this occurrence have been heard by the DOL, DOL's Administrative Review Board (ARB), and the 11th Circuit.

UNITED STATES DISTRICT COURT
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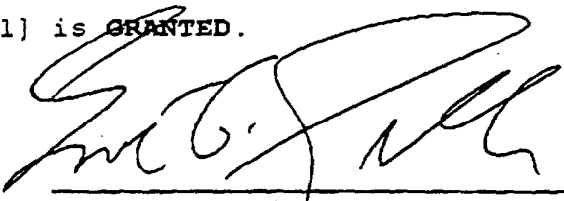
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ORDER

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