U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

IRA H. KEMP, **ARB CASE NO. 00-069**

COMPLAINANT, **ALJ CASE NO. 2000-CAA-6**

v. **DATE: December 18, 2000**

VOLUNTEERS OF AMERICA OF PENNSYLVANIA, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Ira H. Kemp, *Pro se, Harrisburg, Pennsylvania*

For the Respondent:
James C. Oschal, Esq., Andrew D. Bigda, Esq., *Rosenn, Jenkins & Greenwald, L.L.P., Wilkes-Barre, Pennsylvania*

DECISION AND ORDER

Complainant Ira Kemp filed this case under the employee protection ("whistleblower") provisions of the Clean Air Act ("CAA"), 42 U.S.C. §7622 (1994). Kemp alleges that he was unlawfully terminated by his employer, Respondent Volunteers of America of Pennsylvania, Inc.

The relevant facts of this case are, for the most part, undisputed. Prior to January 1998, the Volunteers of America ("VOA") organization in Pennsylvania was divided into three separate corporations: VOA Northeastern Pennsylvania, VOA Central Pennsylvania, and VOA of the Lehigh Valley and Allentown (Tr. 85). On January 1, 1998, the VOA corporations of Northeastern Pennsylvania, Central Pennsylvania, and Lehigh Valley and Allentown merged into VOA of Pennsylvania, Inc. (Tr. 86).

Prior to the merger, VOA of Central Pennsylvania operated a store located in Harrisburg. Although several clerks worked in the store, it was actually managed by an off-site regional manager. Kemp was employed as a part-time clerk in the store and worked approximately 35-37 hours a week (Tr. 119). VOA of Central Pennsylvania believed this arrangement to be inefficient, but did not attempt to change it until after the merger (Tr. 118).

Also, prior to the merger, VOA of Northeastern Pennsylvania operated a 401(k) pension plan. VOA of Central Pennsylvania did not have a 401(k) plan and the Northeastern plan was unavailable to Kemp and the other employees of the Central Pennsylvania corporation (Tr. 109). However, after the merger, employees of Central Pennsylvania became eligible for the Northeastern plan. Once Kemp realized that the 401(k) plan was available to him, he wrote to Respondent inquiring as to his eligibility (Tr. 109-110).

Meanwhile, Respondent was effecting a reorganization of the Harrisburg store. Respondent created a new position for an on-site store manager and determined that Kemp's position was superfluous (Tr. 88, 118). Although Kemp had been an employee with Respondent for approximately 15 years, his supervisor terminated him immediately and without notice on or about June 21, 1999 (Tr. 46). Shortly thereafter, the supervisor also fell victim to the reorganization and was terminated as well (Tr. 116).

Given the abruptness of his termination, Kemp concluded that it had to be in retaliation for something he had done. Initially, Kemp thought that it was in retaliation for his inquiry concerning his eligibility under the 401(k) plan, but he later came to believe that it was because he had expressed concern over asbestos in the basement of his workplace resulting from torn insulation on utility pipes (Tr. 46-47). Therefore, Kemp filed a complaint with the Labor Department's Occupational Safety and Health Administration ("OSHA") alleging that his termination was in violation of the whistleblower provisions of the Clean Air Act.[1/] Respondent flatly denied Kemp's allegation. After an investigation, OSHA found no grounds for Kemp's complaint. Kemp objected to OSHA's determination and the matter was referred to an Administrative Law Judge ("ALJ").

On July 10, 2000, the ALJ issued a Recommended Decision and Order (RD&O) in which he found: 1) that Kemp engaged in a protected activity by informing Respondent that there was asbestos in the basement of his workplace; and 2) that Respondent's decision to terminate Kemp was motivated, at least in part, by his protected activity.[2/] Based on those findings, the ALJ recommended that the Board order Respondent, among other things, to

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[1/] Within the Labor Department, OSHA is responsible for receiving and investigating whistleblower claims under various whistleblower statutes. *See* 29 C.F.R. §§24.3, 24.4 (2000).

[2/] The ALJ also found that Kemp's termination was motivated in part by his demand that he be included in VOA's 401(k) pension plan. RD&O at 12. Accepting this as true, we see no legal basis for concluding that the ALJ or this Board would have jurisdiction over Kemp's complaint that he was retaliated against for asserting his rights to a pension.

reinstate Kemp to his former position and award him $1,000 in compensatory damages. This appeal followed.

We have jurisdiction pursuant to the Clean Air Act, 42 U.S.C. §7622, and 29 C.F.R. §24.8 (2000).

STANDARD OF REVIEW

Under the Administrative Procedure Act, we have plenary review over an ALJ's factual and legal conclusions. See 5 U.S.C. §557(b). As a result, the Board is not bound by the conclusions of the ALJ, but retains complete freedom to review factual and legal findings *de novo*. *See Masek v. Cadle Co*., ARB Case No. 97-069, ALJ Case No. 95-WPC-1 (ARB Apr. 28, 2000), slip op. at 7.

DISCUSSION

The employee protection provision of the CAA states:

> 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 . . .
>
> 1) commenced, caused to be commenced, or is about to commence a proceeding under this chapter . . . [, or]
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> * * *
>
> 3) assisted or participated or is about to assist or participate in any manner in such proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C. §7622 (1994).

Assuming for the sake of argument that Kemp complained about asbestos in the basement of his workplace, as found by the ALJ, the central issue in this case is whether such a complaint would be protected activity under the CAA. The ALJ found that Kemp raised such complaints and that they were protected, observing that Kemp's "[c]onversations relative to the asbestos were sufficient to invoke the provisions of the Clean Air Act." RD&O at 11. We disagree.

The dangers of asbestos exposure are widely recognized, and asbestos materials are regulated under several federal statutes. Generally, occupational exposure to asbestos is governed by regulations issued under the Occupational Safety and Health Act, 29 U.S.C. §651 *et seq*. (1994) (the "OSH Act"). *See also* 29 C.F.R. §§1910.1001 (general industry standard), 1915.1001 (ship repairing, shipbuilding and ship breaking standard), 1926.1101 (construction standard). Asbestos in schools is regulated under Subchapter II of the Toxic Substances Control Act, 15 U.S.C. §2641 *et seq*. (1994)(TSCA). In addition, the Environmental Protection Agency has issued regulations under the Clean Air Act governing asbestos emissions in certain specific contexts, including manufacturing, demolition and renovation, spraying, fabrication, and waste disposal. *See generally* 40 C.F.R. §61.140 *et seq*. (National Emission Standard for Asbestos).

Each of these three statutes – the OSH Act, TSCA and CAA – prohibits employers from discriminating against employees who engage in protected activity. *See* 29 U.S.C. §660(c); 15 U.S.C. §2622; 42 U.S.C. §7622. However, only the latter two statutes (TSCA, CAA) authorize the Secretary of Labor to order remedial relief for an aggrieved employee following an administrative hearing and subsequent administrative appeal. The Secretary has delegated final decision making authority in whistleblower actions under the TSCA and the CAA to this Board, but this Board has no comparable authority under the OSH Act, under which the sole whistleblower enforcement mechanism is an action brought by the Secretary in a United States district court. 29 U.S.C. §660(c)(2). *See also* Secretary's Order 2-96, 61 Fed. Reg. 19978 (May 3, 1996) (delimiting jurisdiction of the Administrative Review Board). Thus if Kemp has engaged in protected activity under the CAA, this Board has jurisdiction; if his complaint falls solely under the OSH Act, we do not.[3/]

The CAA is a comprehensive scheme for reducing atmospheric air pollution. Under the statute, an "air pollutant" is defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters *the ambient air*." 42 U.S.C. §7602(g) (emphasis added). 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)(2000). Thus a key threshold question in determining whether Kemp's concerns about asbestos materials in the basement of the VOA thrift store were protected under the CAA is whether he reasonably believed that the alleged asbestos hazard violated EPA regulations or posed a risk to the general public outside the building. Alternatively, it may be that Kemp instead articulated concerns only about an occupational hazard, which would be beyond this Board's jurisdiction.

This Board and the Secretary previously have addressed this issue (*i.e.*, whether a complaint has articulated a cognizable environmental concern or only an occupational

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[3/] The TSCA is not applicable to this case because the asbestos of which Kemp allegedly complained was not located in a school. *See* 15 U.S.C. §§2641-2656 (1994).

concern), both with specific regard to asbestos and also other potentially hazardous materials. For example, in a recent case considering whether the potential release of ethylene oxide into the space shuttle might constitute a CAA violation, we observed that:

> To be protected under the whistleblower provision of an environmental statute such as the CAA, an employee's complaints must be "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Minard v. Nerco Delamar Co*., Case No. 92-SWD-1, Sec. Dec. and Rem. Ord., Jan. 25, 1994, slip op. at 5; *Crosby v. Hughes Aircraft Co*., Case No. 85-TSC-2, Sec. Dec. and Ord., Aug. 17, 1993, slip op. at 26, *aff'd*, 1995 U.S. LEXIS 9164 (9th Cir. Apr. 25, 1995) . . . . The purpose of the CAA is to protect the public health by preventing pollutants from fouling the ambient air. ["Ambient air" is the statute's term for the outdoor air used by the general public. *See Train v. Natural Resources Defense Counsel, Inc.*, 421 U.S. 60, 65 (1975).] Employee complaints about purely **occupational hazards** are not protected under the CAA's employee protection provision. *Minard*, slip op. at 5-6. *See also, Tucker v. Morrison & Knudson*, Case No. 94-CER-1, ARB Final Dec. and Ord., Feb. 28, 1997, slip op. at 5 (under environmental acts, complaint about violations that related only to occupational safety and not environmental safety were not protected). For example, in the case of asbestos, even though "the Environmental Protection Agency has regulated the manner in which asbestos is handled within workplaces during, among other things, renovation, to prevent emissions of asbestos to the outside air . . . ," if the complainant is concerned only with "airborne asbestos as an occupational hazard, the employee protection provisions of the CAA would not be triggered." *Aurich v. Consolidated Edison Co. of New York, Inc.*, Case No. 86-CAA-2, Sec. Rem. Ord., Apr. 23, 1987, slip op. at 3-4. *Id* at 15.

Stephenson v. NASA, ARB Case No. 98-025, ALJ Case No. 94-TSC-5, Dec. and Ord., slip op. at 15 (ARB July 18, 2000) (emphasis in original; footnote omitted); *cf. Fabricius v. Town of Braintree/Park Dep't*, ARB Case No. 97-144, ALJ Case No. 97-CAA-14 (ARB Feb. 9, 1999) (complaint concerning improper demolition of building with asbestos-containing materials found to be protected activity under CAA); *Jones v. EG&G Defense Materials, Inc.*, ARB Case No. 97-129, ALJ Case No. 95-CAA-3 (ARB Sept. 29, 1998) (rejecting argument that internal complaints about irregularities in testing a chemical weapons incinerator raised only occupational safety concerns). "The substance of the complaint determines whether activity is protected under the particular statute at issue." *Johnson v. Old Dominion Security*, Case Nos. 86-CAA-3, 86-ERA-4, 5 (Sec'y May 29, 1991).

In order for us to conclude that Kemp's activity would be protected under the CAA, we must determine whether Kemp has demonstrated that his complaint was based upon a reasonable belief that the asbestos would be emitted into the ambient air. After reviewing the record in this case, there is evidence to show that Kemp believed that the asbestos posed a threat to him, his son (who sometimes accompanied him to work), his co-workers, and any member of the public who went into the basement of his workplace. However, there is nothing in the record to suggest that he thought the asbestos in the basement posed any threat to the air outside the building. In the absence of such evidence, we see no basis upon which to conclude that Kemp engaged in an activity protected by the CAA. Therefore, we decline to adopt the ALJ's recommendation in this case and conclude, instead, that the complaint shall be **DISMISSED**.

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member