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Issue Date: 11 March 2008

CASE NO. 2008-CAA-0003

In the Matter of:

DOUGLAS EVANS,
Complainant,

vs.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This case arises under the employee protection provisions of the laws enforced through 29 C.F.R. Part 24. These laws, listed at 29 C.F.R. 24.1(a), include the Energy Reorganization Act of 1974, 42 U.S.C. 5851; Toxic Substances Control Act, 15 U.S.C. 2622; Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Clean Air Act, 42 U.S.C. 7622; and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or "Superfund Law"), 42 U.S.C. § 9610 (hereinafter referred to collectively as the "Environmental Acts").

On January 25, 2008, Respondent filed a Motion to Dismiss, in which it argued Complainant's complaint should be dismissed, or in the alternative, discovery should be restricted to matters occurring post-May 2006. Respondent based its Motion to Dismiss on its contention that Complainant's alleged whistleblowing does not constitute protected activity under the Environmental Acts enumerated in the Complaint. Respondent alternatively argued that Complainant's discovery request is burdensome and should be stayed and/or limited pending consideration of the Motion to Dismiss.

On February 11, 2008, Complainant submitted his Memorandum in Opposition to the Motion to Dismiss, in which he argued his Complaint should not be dismissed because the enumerated environmental statutes provide him with protection against retaliation. Complainant alleged that Respondent subjected him to a hostile work environment and ultimately terminated his employment in retaliation for alerting management regarding the environmental risks of requiring employees to participate in Respondent's emergency response plan without sufficient training, and filing a whistleblower retaliation complaint with OSHA.

On February 19, 2008, Respondent filed a Reply to Complainant's Memorandum in Opposition to Motion to Dismiss. Respondent again argued that Complainant failed to show he engaged in protected activity. Thus, Respondent urges dismissal, and not leave to amend, is proper as the whistleblower protection of the Environmental Acts is not implicated here.

ISSUE

Did Complainant fail to engage in protected activity within the purview of the Environmental Acts such that his complaint should be dismissed for failure to state a claim?

SUMMARY OF DECISION

Complainant is unable to show that he engaged in protected activity entitling him to relief under the employee protection provisions of the Environmental Acts. Therefore, the complaint fails to state a claim upon which relief can be granted and must be dismissed with prejudice.

FACTUAL BACKGROUND

Complainant filed a complaint ("OSHA Complaint") against EPA in May 2006, alleging violations of the employee protection provisions of the above enumerated environmental statutes. In the OSHA Complaint, Complainant claimed to have engaged in activity protected by the statutes for which he was retaliated against, referring to "raising compliance issues with management about the environmental risks of having employees participate in emergency response work without sufficient training," and contacting "appropriate enforcement authorities to report violations." Complainant identified one specific instance of activity which he alleged constituted protected activity – a letter he wrote to the EPA administrator in 2004 which he claims provoked a "spiral of harassment and animosity."

On November 21, 2007, OSHA issued the Secretary's findings concerning Complainant's OSHA Complaint, finding that: (1) with respect to his 2004 letter to the EPA administrator, Complainant failed to engage in protected activity under the environmental statutes because his letter failed to address any public safety or environmental concerns; and (2) with respect to his OSHA Complaint and subsequent amendments, Complainant did engage in protected activity under the environmental statutes but a preponderance of the evidence demonstrated that Respondent was not motivated by Complainant's protected activity when it took adverse employment actions against him. Complainant subsequently filed an appeal, and the matter was assigned to this Tribunal.

ANALYSIS

Legal Standard for Granting Motion to Dismiss

Under the Environmental Acts upon which Complainant relies, the proper standard for determining whether a whistleblower complaint states a claim is that set out in Federal Rule of Civil Procedure 12(b)(6). Because "[n]either the rules governing hearings in whistleblower cases, 29 C.F.R. Part 24, nor the rules governing hearings before ALJs, 29 C.F.R. Part 18,

provide for dismissal of a complaint for failure to state a claim upon which relief can be granted," the Secretary has held that an ALJ in determining whether to dismiss a complaint for failure to state a claim must apply Federal Rule of Civil Procedure 12(b)(6)). *Helmstetter v. Pacific Gas & Electric Co.*, Case No. 91-TSC-1, at *2 (Sec'y Jan. 13, 1993) citing 29 C.F.R. § 18.1(a) (requiring ALJs to turn to Federal Rules of Civil Procedure when ALJ procedural rules are silent); *see also Studer v. Flowers Baking Co.*, Case No. 93-CAA-11, at *1 (Sec'y June 19, 1995) (analyzing CAA complaint under standards in Federal Rule of Civil Procedure 12(b)(6)); *Chase v. Buncombe County*, Case No. 85-SWD-4, at *1 (Sec'y Nov. 3, 1986) (same).

Under this standard, as recently clarified by the U.S. Supreme Court, although a complaint "does not need *detailed* factual allegations" it still must provide "factual allegations" that indicate the "grounds" for the complaint. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1959 (2007) (emphasis added) (clarifying *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002)). While the standard remains "very charitable," under *Bell Atlantic* dismissal is no longer "reserved for those cases in which the allegations of the complaint itself demonstrate that the plaintiff does not have a valid claim." *Powers v. Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union (Pace)*, Case No. 04-111, at *6, (Aug. 31, 2007) citing *Helmstetter*, at *5. Rather, the complaint itself must contain "enough factual matter (taken as true) to suggest that" the alleged violation is "plausible." *Powers*, at *6.

Accepting as true Complainant's allegations, Complainant nonetheless fails to show Respondent violated the whistleblower protection laws. As discussed in more detail below, Complainant's actions do not rise to the level of protected activity. Complainant argues that leave to amend is appropriate instead of dismissal. However, it is not a defect in the Complaint that warrants dismissal, but the absence of Complainant's participation in any protected activity under the Environmental Acts. Complainant is in the best position to know what that protected activity might be, and he has had ample opportunity to allege such activity. As discussed below, Complainant has failed to provide sufficient factual allegations in his Complaint to suggest that he engaged in protected activity within the purview of the Environmental Acts. Accordingly, dismissal of the Complaint is the appropriate remedy.[1]

Protected Activity

The environmental whistleblower protection provisions prohibit employers from discharging or otherwise discriminating against any employee "with respect to the employee's compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activities such as initiating, reporting, or testifying in any proceeding regarding environmental safety or health concerns. *See* 29 C.F.R. § 24.2. To prevail on his Complaint, Complainant must establish by a preponderance of the evidence that: (1) he engaged in protected activity, (2) Respondent was aware of the protected activity, (3) he suffered an adverse employment action, and (4) Respondent took the adverse action because of his protected activity. *In the Matter of: Milorad Stojicevic v. Arizona-American Water*, Case No. 05-081, at *3 (Oct.

[1] Complainant also argues that Respondent's motion is founded on factual allegations, thus discovery is required before this Court can make a decision on summary judgment. However, since dismissal is proper here without resort to any factual allegations, summary decision standards are irrelevant. Instead, dismissal is based on the purely legal argument that Complainant's actions do not constitute protected activity under the Environmental Acts.

30, 2007). Complainant's failure to establish that he engaged in a protected activity, defeats his Complaint.

To engage in protected activity, a complainant must report an act which he or she reasonably believes is a violation of a federal whistleblower statute, here the Environmental Acts. *See, e.g., Saporito v. Central Locating Services, Ltd.,* Case No. 05-004, at 5 (Feb. 28, 2006); *Devers v. Kaiser-Hill Co.,* Case No. 03-113, at 11 (Mar. 31, 2005). To be protected, safety and health complaints must be related to the requirements of the environmental laws or regulations implementing those laws; the employee protection provisions protect employees from retaliation only if they have reported safety and health concerns that the statutes address. *Mourfield v. Frederick Plass & Plass, Inc.,* Case Nos. 00-055, 00-056, at 8 (Dec. 6, 2002). But employees need not prove that the hazards they perceived actually violated the environmental acts. *Saporito,* at 6.

Complainant alleges the following such instances of protected activity: (1) his assertion that he raised "compliance issues with management about the environmental risks of having employees participate in emergency response work without sufficient training"; (2) his assertion that he "contacted appropriate enforcement authorities to report violations"; and (3) a letter he wrote to the EPA administrator in 2004.

As to his first two allegations of protected activity, Complainant does not specify to whom he raised compliance issues, what environmental risks were involved, or the nature of the alleged violations. Complainant has had sufficient time to identify such information. To survive a 12(b)(6) motion to dismiss, factual allegations must be enough to raise a right to relief above the speculative level. *Bell Atlantic Corp.*, 127 S. Ct. at 1959. Based on such vague allegations, I cannot find that Complainant has engaged in protected activity to warrant federal whistleblower protection without any evidence of this activity. A more detailed account of this activity is necessary to form a basis beyond mere speculation upon which to designate it as protected activity to warrant whistleblower protection.

Nor does the remaining allegation of protected activity, the 2004 letter to the EPA administrator, constitute protected activity. In order to be protected, Complainant's letter must have reported safety and health concerns that the Environmental Acts address. *Mourfield,* at 8. At no point in his letter does Complainant report any public safety or environmental concerns. Rather, Complainant's letter addresses his concerns with EPA management's treatment of its employees, in particular allegations of age discrimination. While such allegations may have merit, they are not concerns that the Environmental Acts address, thus this is not the appropriate forum in which Complainant should seek a remedy.

Nor does Complainant's act of filing the OSHA Complaint itself constitute protected activity. The mere fact that a complainant contacts OSHA does not protect that employee under an environmental whistleblower act, if the complaint is restricted solely to occupational safety and health. *Post v. Hensel Phelps Construction Company,* Case No. 94-CAA-13 (Sec'y Aug. 9, 1995); *Tucker v. Morrison & Knudson,* Case No. 96-043 (Feb. 28, 1997). The distinction between complaints about violations of environmental requirements and complaints about violations of occupational safety and health requirements is not a frivolous one. *Tucker,* at *3.

Worker protection for whistleblowing activities related to occupational safety and health issues is governed by Section 11 of the Occupational and Safety and Health Act, 29 U.S.C. §§ 651-678 (1988), and enforced in federal district courts, not within the Department of Labor's administrative adjudicatory process. *Id.* at *3. This point has been emphasized in previous environmental whistleblower cases. *Id.*; *see e.g. Aurich v. Consolidated Edison Co. of New York, Inc.*, Case No. 86-CAA-2, at 3-4 (Apr. 23, 1987) ("If Complainant has complained that one or more provisions of [EPA regulations dealing with emissions of asbestos to the outside air] had been violated by Respondent, such complaint would appear to be protected . . . on the other hand, if complainant's complaints were limited to airborne asbestos as an occupational hazard, the employee protection provision of the CAA would not be triggered.") As set forth in these decisions, the environmental whistleblower provisions are intended to apply to environmental and not other types of concerns. *Tucker*, at *4.

Thus, a key threshold question in determining whether Complainant's OSHA Complaint is protected under the Environmental Acts is whether he reasonably believed that the allegations upon which he based his Complaint violated environmental regulations or posed a risk to the general public. *See Kemp v. Volunteers of America*, Case No. 2000-CAA-6, at *3 (Dec. 18, 2000). After reviewing the record in this case, most significantly the 2004 letter referenced in the OSHA Complaint and discussed above, there is no evidence to show that Complainant reasonably believed the EPA's actions posed any threat to the environment or the general public. As discussed, the 2004 letter makes no mention of any such threats and I decline to infer that the OSHA Complaint was based upon such beliefs. In the absence of such evidence, there is no basis upon which to conclude that Complainant engaged in an activity protected by the Environmental Acts. Accordingly, Complainant's Complaint is hereby dismissed.

CONCLUSION

Complainant is unable to show that he engaged in protected activity entitling him to relief under the employee protection provisions of the Environmental Acts. Therefore, the complaint fails to state a claim upon which relief can be granted and must be dismissed with prejudice.

ORDER

For the reasons stated above, Complainant's complaint is hereby DISMISSED with prejudice.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge