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Issue Date: 16 December 2005

Case No.: 2006-CAA-0001

In the matter of:

STEPHEN P. DURHAM,
Complainant,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

On November 14, 2005, Tennessee Valley Authority (Respondent) filed a Motion for Summary Decision, pursuant to 29 C.F.R. §§ 18.40 and 18.41(a). Respondent argues that Stephen P. Durham's (Complainant) complaint was untimely and that he cannot make a prima facie showing that he engaged in protected activity or was subject to discrimination within the meaning of the Clean Air Act (CAA or the Act), 42 U.S.C. § 7622, et seq. On November 28, 2005 Complainant filed a Motion for Summary Decision. The record was held open until December 13, 2005 for the submission of responsive pleadings, however, neither party responded.[1]

FACTS

The following facts are not disputed:

1. Complainant was employed by Respondent as an Assistant Unit Operator in Respondent's Widows Creek Fossil Plant.

2. Respondent is an entity covered by the provisions of CAA.

3. Complainant's position was subject to Respondent's Random Alcohol and Drug (A&D) Testing Program for Non-Nuclear Power Organizations. Under this policy, Complainant is subject to random alcohol and drug testing. Employees who fail or refuse to cooperate in a timely testing are subject to termination and a permanent hiring restriction. On

[1] On November 16, 2005 Complainant filed a Motion to Amend Complaint to include violations under the Energy Reorganization Act. I denied this Motion by Order dated December 15, 2005.

November 21, 2001 Complainant received a notice, which he signed, that he was subject to Respondent's policy.

4. According to Respondent's Fitness for Duty program (FFD), employees who test positive for drugs or alcohol are subject to the procedure set out in Respondent's A&D program. Employees who have a first-time positive test result are normally placed in non-work, non-pay status for 14 days and are referred first to FFD and then Respondent's Employee Assistance Program (EAP) for possible rehabilitation. An employee who has a positive A&D result may not return to work without rehabilitation and approval from FFD, and an employee who cannot return to work is terminated. Under Respondent's employee discipline policy, the failure to comply with Respondent's FFD requirements is a specific basis for termination of employment.

5. On December 6, 2004 Complainant provided an alcohol/urine specimen as required by Respondent's A&D testing program.

6. On December 9, 2004, Complainant was sent a memorandum from his supervisor, informing him that he tested positive for marijuana and that he was required to comply with the recommendations made by EAP in order to return to work.

7. EAP scheduled Complainant for an assessment on December 23, 2004 at a drug and alcohol rehabilitation center. He was also scheduled for an appointment on January 3, 2005 with a psychologist for further assessment. Complainant, however, failed to attend either appointment.

8. Complainant's supervisor sent him a letter on January 13, 2005 informing him that his continued failure to demonstrate progress in meeting the recommendations of EAP would result in disciplinary action including termination.

9. Following receipt of the January 13, 2005 letter, Complainant replied to his supervisor with a copy to Senator Lamar Alexander.

10. Complainant's appointments were rescheduled for February 4 and 8, 2005. On January 26, 2005 Respondent's non-nuclear FFD manager sent a letter to Complainant that his failure to keep those appointments would result in a final notification that he was not in compliance with Respondent's A&D program.

11. Complainant failed to keep the February, 2005 appointments and did not attempt to reschedule. Accordingly, FFD sent a final notification to management that Complainant had not complied with Respondent's A&D program.

12. On February 22, 2005 Respondent sent a letter to Complainant notifying him that his employment would be terminated no earlier than 30 days from the date of his receipt of the notice because of his non-compliance with Respondent's alcohol and drug policy.

13. On March 27, 2005 Complainant was terminated from employment.

14. In a July 30, 2005 letter to OSHA, Complainant alleges that in January, 2005 he informed Senator Alexander of serious safety and environmental issues at Widows Creek Fossil Plant.

15. In an August 5, 2005 e-mail to OSHA, Complainant states his belief that he was terminated because of the letter sent to Senator Alexander, in which he alleges he raised safety, environmental and administrative issues.

DISCUSSION OF LAW AND FACTS

Any party may move with or without supporting affidavits for summary decision on all or part of the proceeding. 29 C.F.R. § 18.40(a) (2004). Summary judgment is granted for either party if the administrative law judge finds "the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Id. Thus, in order for a motion for summary decision to be granted, there must be no disputed material facts and the moving party must be entitled to prevail as a matter of law.

In deciding a motion for summary decision, the court must consider all the material submitted by both parties, drawing all reasonable inferences in a manner most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. Once the moving party has met its burden of production, the non-moving party must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. Lincoln v. Reksten Mgmt., 354 F.3d 262 (4th Cir. 2003). However, granting a summary decision is not appropriate where the information submitted is insufficient to determine if material facts are at issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).[2]

Timeliness of Complainant

Under the environmental whistleblower statutes, including the Clean Air Act, a complainant must file a complaint within thirty days of the alleged violation. 42 U.S.C. § 7622(b)(1); see also 33 U.S.C. § 1367(b); 42 U.S.C. § 300j-9(i)(2)(a)(1); 42 U.S.C. 6871(b); 15 U.S.C. 2622(b)(1); 42 U.S.C. § 9610(b). The Administrative Review Board (ARB or the Board) has clarified that the thirty-day limitations period begins to run on the date that a complainant receives "final, definitive and unequivocal notice of a discrete adverse employment action."

[2] Complainant has not demonstrated that he is entitled to prevail as a matter of law. Accordingly, his Motion for Summary Decision is denied.

Schlagel v. Dow Corning Corp., ARB No. 02-092, ALJ No. 01-CER-1 (ARB Apr. 30, 2004). The Board has also applied the "discovery rule" and has held that "statutes of limitations in whistleblower cases begin to run on the date when facts which would support a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his rights." Kaufman v. United States Envtl. Prot. Agency, 02-CAA-22 (ALJ Sept. 30, 2002) (citing Whitaker v. CTI-Alaska, Inc., ARB No. 98-036, ALJ No. 97-CAA-15 (ARB May 28, 1999)). The date an employer communicates its decision to implement an adverse employment action, rather than the date the consequences are felt, marks the occurrence of the violations. Id. The Board explained that "discrete acts of discrimination are easy to identify. Examples are failure to promote, denial of transfer, termination and refusal to hire." Id. (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002)); see e.g., Delaware State College v. Ricks, 449 U.S. 250 (1980) (finding the limitations period began to run when the employee was denied tenure rather than on the date his employment terminated).

The undisputed facts establish that Complainant's claim was filed outside the statutory thirty-day time period. Under the CAA, the time period began to run on the day Complainant received notice of his termination. On February 22, 2005 Respondent issued a letter notifying Complainant that he was terminated from his position no earlier than thirty days from his receipt of that notice. (RX 9).[3] The letter concludes by stating that due to Complainant's refusal to comply with Respondent's alcohol and drug testing, his employment is terminated, and he is given non-work, non-pay status during the notice period. This letter is clearly within the definition of a "final, definitive, and unequivocal notice" of an adverse employment decision under the whistleblower statutes. See Swenk v. Exelon Generation Co., ARB No. 4-028, ALJ No. 03-ERA-30 (ARB Apr. 28, 2005). Complainant received this letter no later than February 25, 2005. Accordingly, Complainant had thirty days from receipt of this letter to bring his complaint. However, this proceeding was not initiated until Complainant notified OSHA in July, 2005. Consequently, Complainant's claim is time barred.

Even if Respondent's February, 2005 notification of Complainant's termination is not sufficient to commence the statute of limitations, Complainant's actual termination date is applicable. The undisputed facts establish that Complainant was terminated on March 27, 2005. In his statement to OSHA raising his complaint, Complainant states he was terminated from Respondent's employment on March 27, 2005. Accordingly, Complainant had thirty days from this date to bring his complainant. However, as previously stated, Complainant did not notify OSHA until July, 2005 well after the statutory time period had expired.

The limitations period is subject to equitable modification and "may be extended when fairness requires." Hill v. U.S. Dep't of Labor, 65 F.3d 1331, 1335 (6th Cir. 1995); School District of the City of Allentown v. Marshall, 657 F.2d 16, 19-21 (3d Cir. 1981). Complainant asserts he is entitled to equitable tolling because he was unaware of Respondent's unlawful motivation for his termination until after the limitations period. This argument, however, is not a justification for the application of equitable tolling. Equitable tolling is not warranted where a complainant is aware of all the essential facts constituting discriminatory treatment but lacks

[3] Respondent submitted factual citations with its Motion for Summary Decision. These documents will be referenced as (RX). Complainant also submitted factual citations, which will be referenced as (CX).

direct knowledge or evidence of the defendant's subjective discriminatory motive. See Hill v. United States Dep't of Labor, 65 F.3d 1331 (6th Cir. 1995). The Board has specifically determined that a complainant's failure to acquire evidence of a respondent's motivation for his suspension or firing does not affect his rights or responsibilities for initiating a complaint. Halpern v. XL Capital, Ltd., ARB No. 04-120, ALJ No. 04-SOX-54 (ARB Aug. 31, 2005) (citing Wastak v. Lehigh Valley Health Network, 333 F.3d 120, 126 (3d Cir. 2003)). Therefore, there is nothing to support a finding of an extraordinary circumstance warranting the tolling of the limitations period.

Protected Activity

Even if Complainant filed his complaint within the statutory time period, I find Respondent's motion for summary decision should be granted because the undisputed facts demonstrate that Complainant is unable to prove all the necessary elements under the Act. To receive protection under the Act, a complainant must establish by a preponderance of the evidence that: (1) he engaged in protected activity under the Act; (2) his employer was aware of the protected activity; (3) he suffered an adverse employment action; and (4) circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. See Jenkins v. United States Envtl. Prot. Agency, ARB No. 98-146, ALJ No. 88-SWD-2 (ARB Feb. 28, 2003); 29 C.F.R. § 1980.104(b).

In order to prevail on its motion for summary decision, Respondent has the initial burden of showing that undisputed facts establish that one or more of the aforementioned elements is not established. If Respondent succeeds, Complainant may rebut this showing by setting forth specific facts establishing that there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In its motion for summary decision, Respondent asserts that Complainant's claim fails because he has not established that he engaged in protected activity.

While interpreting the "protected activity" provisions in the whistleblower statutes, the Secretary of Labor has broadly defined the term as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it does not matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations" of environmental laws. Johnson v. Old Dominion Security, 86-CAA-3, 4 & 5 (Sec'y May 29, 1991); Minard v. Nerco Delamar Co., 92-SWD-2 (Sec'y Jan. 25, 1995). In other words, the complainant's concern must at least "touch on" the subject matter of the related statute. Nathaniel v. Westinghouse Hanford Co., 91-SWD-2 (Sec'y Sept. 22, 1994). Furthermore, the standard involves an objective assessment of reasonableness. The subjective belief of the complainant is not sufficient. Kesterton v. Y-12 Nuclear Weapons Plant, 95-CAA-12 (ARB Apr. 8, 1997).

Following this line of precedent, the Board has stated that to determine whether the complainant has engaged in protected activity, the court must look at whether the complainant's alleged activities furthered the purpose of the environmental acts or related to their administration and enforcement. Culligan v. American Heavy Lifting Shipping Co., ARB No. 03-046, ALJ Nos. 00-CAA-20, 01-CAA-09, 01-CAA-11 (ARB June 30, 2004). The purpose of the CAA "is to protect and enhance the quality of the nation's air resources so as to promote the

public health and welfare." 42 U.S.C. § 7622; see also Crosby v Hughes Aircraft Co., 85-TSC-2 (Sec'y Aug 17, 2003). Complainant has not engaged in protected activity as his concerns do not touch on the subject matter of the CAA.

Complainant alleges he was terminated because of a letter he sent to Senator Alexander, which raised concerns about Respondent. Complainant's concerns were in regards to workplace safety, payment and leave balances, and sexual harassment. The Secretary has stated that complaints which only relate to workplace safety do not touch upon general public safety and health. See Sawyers v. Baldwin Union Free School District, 85-TSC-1 (Sec'y Oct. 24, 1994); Aurich v. Consolidated Edison Co. of New York, Inc., 86-CAA-2 (Sec'y April 23, 1097). Complaints about safety in the workplace fall under the jurisdiction of the OSHA and not the CAA. Devers v. Kaiser-Hill Co., ARB No. 03-113, ALJ No. 01-SWD-3 (ARB Mar. 31, 2005); Post v. Hensel Phelps Constr. Co., 94-CAA-13 (Sec'y Aug. 9, 1995) (stating that environmental whistleblower statutes generally do not protect complaints restricted solely to occupational safety and health, unless the complaints also encompass public safety and health or the environment). Furthermore, complaints about poor management, or poor recordkeeping, do not relate to environmental statutes under the jurisdiction of the Secretary of Labor. Deveraux v. Wyoming Association of Rural Water, 93-ERA-18 (Sec'y Oct. 1, 1993); Jenkins v. United States Envtl. Prot. Agency, ARB No. 98-146, ALJ No. 88-SWD-2 (ARB Feb. 28, 2003). Allegations of official misconduct or alleged wrongful interference by management have no basis for CAA relief. Tyndall v. United States Envtl. Prot. Agency, 93-CAA-6 (ALJ Oct. 12, 1994).

Therefore, Respondent has established that there exists no genuine issue of material fact as to whether Complainant engaged in protected activity. Although Complainant submitted memoranda, he has failed to put forth specific facts that would show an issue of fact exists as to the reasonableness of his perception regarding Respondent's alleged activity. Complainant's allegations are too tangential and remote to merit protection under the CAA. This act exists to protect and promote the public health and welfare, yet Complainant has failed to allege activities which further those purposes. Instead, Complainant's allegations concern personnel issues and misconduct, and violations of occupational safety regulations.

Conclusion

Based on the foregoing discussion, construing all facts in the light most favorable to Complainant, the Court finds that the complaint is time barred and in the alternative that Complainant did not engage in activities protected under the Act. Respondent is thus entitled to summary decision as a matter of law.

RECOMMENDED DECISION AND ORDER

It is RECOMMENDED that Respondent's Motion for Summary Decision be GRANTED.

A

LARRY W. PRICE
Administrative Law Judge

LWP/TEH
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).