



In the Matter of:

**CURTIS A. ERB,**

**ARB NO. 96-056**

**COMPLAINANT,**

**CASE NO. 95-CAA-14**

**v.**

**DATE: September 12, 1996**

**SCHOFIELD MANAGEMENT, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1/</sup>**

### **FINAL DECISION AND ORDER**

This case arises under the whistleblower protection provision of the Clean Air Act (CAA), 42 U.S.C. § 7622 (1988) and the pertinent regulations at 29 C.F.R. Part 24 (1995). On December 12, 1995, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) that the complaint be dismissed. For the reasons set forth below, the ALJ's recommended Order is accepted.

### **BACKGROUND**

The Complainant (Erb) was employed by Respondent as a maintenance worker at one of its managed properties. For approximately the first eight months of his employment, from May 1994 through early January 1995, the resident management staff considered Erb to be a very good employee. In January 1995, however, Respondent hired a new maintenance supervisor, James Fischer, whose apparent style of supervision and perceived lack of competence were a continuous source of contention for Erb. Transcript (T.) at 19, 22, 44, 50-51 and 70. Although the management staff reviewed Erb's allegations regarding Fischer's competence, they found no basis for Erb's complaints. T. at 67-68, R. D. & O. at 4.

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<sup>1/</sup> On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute and these regulations to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996)(copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Board now issues final agency decisions. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization is also attached.

Fischer was aware of Erb's complaints, and in turn complained to the management staff about Erb's attitude and lack of being a "team player." T. at 163. The resident manager initiated a number of formal and informal meetings with Erb and Fischer, but was not able to effectuate a more harmonious working situation.

The hearing record is replete with testimony of Erb's unhappiness with Fischer, and Fischer's dissatisfaction with Erb. Erb testified that on March 1, 1995, which was a month before he was terminated and three weeks prior to the incident giving rise to Erb's claim of whistleblower protection, Fischer told him he intended to fire Erb as soon as the Resident Manager went on maternity leave. T. at 22.

On March 23, 1995, Erb observed Fischer removing Freon gas, an environmentally controlled substance, from a faulty air conditioner using, apparently unknowingly, a broken gas evacuator device. Erb did not advise either Fischer or other management personnel while the gas was venting into the atmosphere, but waited until the following day to notify management of Fischer's mishandling of the recapture process. T. at 27-31. The venting of Freon was a violation of the CAA, and could have subjected Respondent to substantial penalties.

Erb advised the building management staff, and in fact, did contact the EPA with regard to the Freon venting. However, the EPA did not pursue any sanctions against Respondent for the apparently inadvertent venting. Respondent's management staff undertook an independent investigation, concluded that the venting was inadvertent and took no action against Fischer. Respondent's General Manager thanked Erb for calling the problem to their attention, and told him that he need not worry about any retaliation because it was advantageous to the company to be advised of possible problems and to deal with them before they became critical. T. at 49-50, 171.

Shortly thereafter, the maintenance staff lost personnel and Erb was given additional duties as a porter, which he felt were outside of his current job description, but which he had previously done. Erb went about his job, but was clearly unhappy. T. at 50-51, 173-76. After the first day of his newly assigned duties, Erb took two days off. When he returned to work, Fischer advised him that he was terminated for insubordination, specifically for not being "a team player." T. at 35-36, 50-51, 176.

## DISCUSSION

In order to prevail in a whistleblower protection case based upon circumstantial evidence of retaliatory intent, a complainant must prove that he was an employee of a covered employer; the complainant engaged in a protected activity; the complainant thereafter was subjected to an adverse action regarding his employment; the respondent knew of the protected activity when it took the adverse action; and the protected activity was the reason for the adverse action. *See Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389(8th Cir. 1995).

The ALJ found that Erb did establish a *prima facie* case, but did not show by a preponderance of the evidence that he was discharged, even in part, based upon discriminatory

reasons. R. D.& O. at 7. In a case such as this, in which the Respondent introduced evidence to rebut a *prima facie* case of a violation of the employee protection provision of the CAA, it is unnecessary to examine the question of whether Erb established a *prima facie* case. See *Hoffman v. Bossert*, Case No. 94-CAA-004, Dec. and Remand Order, Sept 19, 1995, slip op. at 6; *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46, Sec. Dec., Feb. 15, 1985, slip op. at 11 n.9, *aff'd sub nom. Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996).

The basic question to be examined is whether Erb carried his ultimate burden to prove by a preponderance of the evidence that he was discriminated against for engaging in protected activity. See *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993); *Darty v. Zack Co. Of Chicago*, Case No. 82-ERA-2, Sec. Dec., Apr. 23, 1983, slip op. at 7-8. To carry that burden Erb must show that Respondent's stated reasons for his discharge -- insubordination and lack of cooperation -- are pretextual. *Hoffman*, slip op. at 6.

The ALJ found that Respondent presented convincing evidence that it had legitimate, nondiscriminatory reasons for terminating Erb, with regard to his insubordination, lack of cooperation and a failure to improve his work habits. R. D.& O. at 6. The record repeatedly reveals these issues as a source of continuous contention between Erb and Fischer for the three months prior to the protected activity. Erb admitted that he was told by Fischer, prior to engaging in any protected activity, that he would be discharged as soon as the Resident Manager went on maternity leave. T. at 22, 44-45. There is no record evidence that Erb made any attempt to modify his attitude with regard to Fischer, and there is persuasive testimony by other witnesses concerning Erb's continuing negative attitude toward Fischer. DePrisco, T. at 66; Vaughan, T. at 147; Baad, T. at 160-61.

Erb proceeded in this case *pro se*, and was accorded considerable latitude by the ALJ. Although Erb presented a case setting forth his concerns regarding Fischer's competence as a supervisor, he did not meet the requisite standard of proof that the adverse action taken against him was, even in part, motivated by his protected activity. We find, after reviewing the record and, notably, Erb's own testimony at the hearing, that the ALJ's recommendation that the complaint should be dismissed is correct.

## **CONCLUSION**

The ALJ's Recommended decision of December 12, 1995, is accepted, and the complaint in this case is DISMISSED

**SO ORDERED.**

**DAVID A. O'BRIEN**

Chair

**KARL J. SANDSTROM**

Member

**JOYCE D. MILLER**

Alternate Member