U.S. DEPARTMENT OF LABOR

DEPUTY SECRETARY OF LABOR

WASHINGTON, D.C.

20210

DATE: July 30, 1987

CASE NO. 84-ERA-27

IN THE MATTER OF

HOWARD SAMUEL NUNN, JR.,

COMPLAINANT,

v.

DUKE POWER COMPANY,

RESPONDENT.

BEFORE: THE DEPUTY SECRETARY OF LABOR[1]

DECISION AND ORDER OF REMAND

This proceeding arises under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1982), which prohibits an employer from discriminating against an employee because the employee has engaged in a protected activity.

Complainant Nunn alleges that, in October of 1983, he was discharged from his position as a welder at Duke Power Company's Catawba Nuclear Power Station because he engaged in the protected activity of complaining about safety and quality control problems at the plant. Complainant also alleges that he was discriminated against in the conditions and terms of his employment. Respondent Duke Power Company denies these allegations, and contends that it discharged Complainant because of excessive absenteeism.

Prior to a hearing on Complainant's allegations of discrimination, Duke Power moved to dismiss Complainant's complaint with prejudice and, in the alternative, for summary decision. The basis for the request for dismissal with prejudice was that the complaint in this case had not been timely filed in accordance with section 5851(b)(1) of the ERA. The grounds for the summary decision request were that there was no genuine issue of material fact as to the basis for Complainant's termination, and that Complainant could not, as a matter of law, prevail on his claim of discrimination because (1) Complainant had not engaged in a protected activity under *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), and (2) Complainant could not make out a prima facie case of disparate treatment. On January 25, 1985, Administrative Law Judge (ALJ) Eric Feirtag issued a decision recommending that summary decision be

granted in favor of Duke Power because Complainant had not engaged in protected activity. The ALJ made no recommendation as to any other issues. *See* Recommended Decision and Order on Motion For Summary Judgment (R.D. and O.).

After a review of the record in this case, I have concluded that I cannot accept the ALJ's recommendation that I grant Duke Power's motion for summary decision. Accordingly, for the reasons set forth below, I remand this case to the ALJ for further proceedings.

It appears from the facts set forth in the pleadings that, during his employment, Complainant made several safety related complaints to Catawba's supervisory personnel about the welding and construction of the Catawba plant. Later, on October 3, 1983, Complainant contacted the Palmetto Alliance, which was a legal intervenor in Catawba's ongoing licensing proceeding under the Atomic Energy Act, and discussed with that organization his safety complaints regarding the Catawba facility. Complainant states that he also offered to become a witness at the licensing hearing. Complainant also states that he later testified at this licensing proceeding. *See* Complainant's Appeal to the Secretary of Labor of the Recommended Decision and Order on Motion for Summary Judgment (Complainant's Appeal) at 2, 12-13. On the same day that he contacted Palmetto, Complainant contacted the Government Accountability Project (GAP), which is representing Complainant in this proceeding, and solicited its assistance in relating his complaints to the proper authorities. Subsequently, Complainant told fellow employees that he had spoken with GAP and that he was going to take his complaints to the Nuclear Regulatory Commission (NRC). On October 14, 1983, Complainant was informed by Respondent that, in accordance with Duke Power's policy of terminating employees who had an excess of eighteen absences within a twelve-month period, Complainant was "removed from service." Complainant's eighteenth absence had, it appears, occurred on October 13th, the previous day. Complainant contacted the NRC on October 14th but not until after he was informed that he was "removed from service." Subsequent to this removal, Duke Power conducted an investigation of Complainant's absences, and, on October 19, 1983, officially terminated Complainant.

The ALJ's basis for recommending that summary decision be granted in Duke Power's favor is that Complainant did not engage in any activity protected by section 5851 of the ERA. In reaching this conclusion, the ALJ relied on the decision of the United States Court of Appeals for the Fifth Circuit in *Brown & Root*, which held that employee conduct, which consists merely of the filing of internal quality control reports and does not involve "contact or involvement with a competent organ of government", 749 F.2d at 1036, is not protected under section 5851, and on the decision of the United States Court of Appeals for the Sixth Circuit in *De Ford v. Secretary of Labor*, 700 P.2d 28 (6th, 1983), which recognized that employee participation in an NRC proceeding was protected under section 5851. The ALJ recognized that both the Ninth Circuit and the Secretary had taken the position in *Mackowiak v. University Nuclear Systems, Inc.*, Case No. 82-ERA-8,

(April 29, 1983), slip op. at 8-11, *remanded on other grounds*, 735 F.2d 1159 (9th Cir. 1984), that the filing of purely internal quality control reports constitutes a protected activity under section 5851. *Accord Wells v. Kansas Gas and Electric Co.*, 83-ERA-12 (June 14, 1984), *aff'd Kansas Gas and Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 106 S.Ct 3311 (1986). The ALJ, however, reasoned that, since *Mackowiak* and *Brown & Root* involved retaliation against quality control inspectors, neither the Secretary's opinion nor the Ninth Circuit's opinion in *Mackowiak* were contrary to *Brown & Root* when applied to the filing of internal reports by other types of employees, such as Complainant who is a welder. The ALJ, thereupon, adopted *Brown & Root* as the applicable precedent. R.D. and O. at 2-4. The ALJ then went on to find that any safety complaints, which Complainant may have made to Duke Power management, as well as any contact with Palmetto Alliance and with GAP, did not constitute protected activity because neither the internal complaints nor the contact with Palmetto or GAP had been with a competent organ of government. The ALJ further found that, while Complainant's contact with NRC was with a competent organ of government, Duke Power did not retaliate against Complainant because of this contact since, by Complainant's own admission, he made no attempt to contact NRC prior to Duke Power's decision to remove him from service. R.D. and O. at 4.

Complainant has filed with me exceptions to the ALJ's recommended decision in which he argues that the applicable precedent is *Mackowiak*. Complainant also argues that he engaged in a protected activity even under *Brown and Root* because he contacted the legal intervenor in the Catawba licensing proceeding and agreed to become a witness on behalf of Palmetto, because he contacted GAP which agreed to take his allegations to the NRC, and because he contacted the NRC before he was formally terminated. In addition, Complainant argues that he suffered disparate treatment in the determination of his absences after he contacted the NRC. *See* Complainant's Appeal at 19-22. Finally, Complainant alleges that Respondent's policy of insisting that workers first take their safety complaints to their supervisors constituted a misrepresentation of a material fact to an adverse party and, consequently, Respondent is estopped from asserting the protection of *Brown and Root*. *See* Complainant's Appeal at 42-51.

In response to Complainant's exceptions, Duke Power again argues that the complaint was untimely filed, that Complainant did not engage in a protected activity prior to his discharge, and that Complainant cannot establish a prima facie case of disparate treatment. In addition, Duke Power argues that Complainant's estoppel argument is untimely raised and has no merit. *See* Respondent Duke Power Company's Brief In Support of the Recommended Decision and order of the Administrative Law Judge.

In reply to Duke Power's arguments, Complainant has filed two requests for Partial Remand to the ALJ requesting that I remand to the ALJ the issues raised in Duke Power's brief but not resolved in the ALJ's recommended decision. Complainant argues that these issues, which include whether the complaint was

timely filed and whether there was disparate treatment, are not ripe for review by me since there has been no hearing in this case and since discovery has not yet been completed. In the alternative, Complainant requests leave to brief these issues. *See* Motion For Partial Remand; Complainant's Second Motion For Partial Remand or in the Alternative to File a Response Brief. Duke Power opposes any remand which would permit reopening and expansion of the record, arguing that there has been adequate discovery and that the timeliness and disparate treatment issues have been extensively briefed by both parties and are ripe for decision. *See* Respondent Duke Power Company's Response to Complainant's Motion For Partial Remand; Respondent Duke Power Company's Opposition to Complainant's (Second) Motion For Partial Remand, Etc.

Pending before me are also additional motions filed by Complainant while this case has been before me for review.[2] Complainant has filed a Motion to Amend the Record seeking to reopen the evidentiary record to admit a recent decision of NRC's Office of Inspection and Enforcement in which Duke Power was found to have violated NRC regulations. See Motion to Amend the Record. Duke Power opposes reopening of the record on the grounds that the factual findings in the NRC decision were available prior to the closing of the record in the case before me and that the NRC decision is irrelevant to this case. see Respondent Duke Power Company's Opposition to Complainant's Motion to Amend the Record.

Complainant has also filed requests for sanctions against Duke Power and its counsel. *See* Complainant's Motion For Sanctions Based Upon Respondent's Prejudicial Misstatement of Facts In Respondent Duke Power Company's Brief In Support of the Recommended Decision and Order of the Administrative Law Judge (Respondent's Brief In Support); Complainant's Response Brief to Respondent's Opposition to Complainant's Second Request For Remand and Sanctions. Duke Power has responded to Complainant's requests for sanctions. See Respondent Duke Power Company's Opposition to Complainant's Motion For Sanctions; Respondent Duke Power Company's Opposition to Complainant's Second Motion For Sanctions.

Whether Summary Decision Should be granted.

The standard for awarding summary decision is that there be no genuine issue as to any material fact and that the party in whose favor summary decision is granted be entitled to prevail as a matter of law. 29 CFR 18.40(d) (1986). Neither element of that standard, however, has been met in this case.

First, there is a disputed issue of fact as to the date of Complainant's termination which affects the determination of whether Duke Power discriminated against Complainant because he complained to NRC. Complainant asserts that he was not terminated any earlier than October 19th when he was officially terminated by the Project Manager, and Duke Power contends that Complainant was terminated on October 14th when he was "removed from service." If Complainant's termination occurred on October 14th, his

subsequent contact with NRC could not be the basis for a finding that this contact, a protected activity, led to his termination. The date of termination, consequently, is crucial to the ultimate issue of whether Duke Power violated section 5851.

The ALJ found that "the decision to terminate Complainant occurred, for all practical purposes on October 14, 1983." R.D. and O. at 5. The documents constituting the record before the ALJ, however, do not explicitly resolve the issue of whether the "removal from service" constituted the actual termination. On the one hand, Duke Power written management procedures require that, after the removal from service of an employee with 18 occurrences, "[a] review shall then be conducted and if warranted the employee discharged for 'excessive and repeated attendance deficiencies'." *See* Exhibit 25 at 4, item F, of Exhibits For Complainant's Pre-Trial Brief and Memorandum in Opposition to Respondent's Motion to Dismiss (Complainant's Exhibits). Moreover, these procedures permit the discharge of an employee "only after a thorough investigation of the facts shows just cause for termination", and furthermore, describe "removal from service" as the initial step in the investigative process" and as allowing "time for all the facts to be gathered, documented and considered before a final decision is made." Exhibit 27, at 1, item STATEMENT. *Id*. Furthermore, Complainant's supervisor testified by deposition that "removal from service' is a suspension pending a decision on whether or not the employee will be terminated. On the other hand, Duke Power argues that: "discharge inexorably follows a verified eighteenth absence," *see* Respondent's Brief In Support at 44; that Complainant himself was aware that termination would follow his eighteenth absence; and that the investigation required by management procedures was completed by October 14th. See Memorandum In Support of Respondent Duke Power Company's Motion to Dismiss With Prejudice and Motion For Summary Decision at 31-35. Thus, there is a genuine issue of material fact which should not have been resolved by the ALJ but should have been decided only after the parties had an opportunity to present all relevant evidence. *See* 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice*, § 56.15 (2d ed. 1981). Since discovery has not been completed and a hearing has not been held, the parties have not been afforded this opportunity.

Morever, even if Complainant's contact with NRC cannot be a basis for a finding that Duke Power violated section 5851, Duke Power is not entitled to prevail as a matter of law since Complainant's internal safety complaints are protected under section 5851. The ALJ erred in applying *Brown & Root* in this case, and thus finding that Complainant's safety related complaints to his supervisors did not constitute an activity protected by the ERA. The applicable precedents are *Mackowiak* and *Kansas Gas* and not *Brown & Root*.

I do not agree with the ALJ's conclusion that *Mackowiak* and *Brown & Root* are inconsistent only when applied to employees who are quality control inspectors. Although both of these cases, as well as *Kansas Gas*, involved quality control personnel, it is my view that *Mackowiak* and *Kansas Gas* are applicable to other

employees as well. It is not only quality control personnel who play a part in NRC's regulatory scheme. All employees of NRC licensess are advised in Form NRC-3, a "Notice to Employees", which NRC requires each licensee to post at the workplace, that violations of NRC rules should be reported immediately to the employee's supervisor and, if adequate corrective action is not taken, then to N.R.C. *See* 10 C.F.R. S 19.11(c). Moreover, Section 5851 already has been applied where internal safety complaints were made by a mechanic who, although a member of the union's Nuclear Safety Committee, is not reported as having any quality control functions. *Consolidated Edison Co. of N.Y., Inc. v. Donovan*, 673 F.2d 61 2d Cir. (1982). *See also Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, issued April 27, 1987, amended May 6, 1987, and *Willy v. Coastal Corp.*, Case 85-CAA-1, issued June 4, 1987, where internal complaints were made by employees who were not quality control personnel. Furthermore, like the Tenth Circuit in *Kansas Gas*, 780 F.2d at 1513, and unlike the ALJ, I am more persuaded by the rationale of *Mackowiak* than that of *Brown & Root*. if, therefore, Complainant were to establish that he reported numerous safety related problems to Duke Power supervisory personnel, he would have established that he had engaged in an activity protected by section 5851 regardless of when he contacted the NRC.

Additionally, if Complainant establishes that he was going to testify at the NRC's Atomic Safety Licensing Board hearing on the Catawba plant, he would have engaged in an activity protected under section 5851. Section 5851(a)(2) specifically protects an employee who "testified or is about to testify" in a proceeding for the administration or enforcement of any requirement imposed by the ERA or the Atomic Energy Act of 1954 (AEC), and section 5851(a)(3) protects an employee who has "assisted or participated or is about to assist or participate in any manner in such a proceeding . . . That Complainant was to be a witness or was to otherwise assist or participate in the licensing hearing was apparently not raised before the ALJ.[3] The ALJ, therefore, simply ruled that Complainant's contact with Palmetto and GAP was not a protected activity because *Brown & Root* required contact with a government agency. Neither section 5851(a)(2) nor the above quoted language of section 5851(a)(3), however, were at issue in *Brown and Root*. There the Fifth Circuit interpreted only that part of section 5851(a)(3) that extends protection to an employee who "assisted or participated or is about to assist or participate in any manner . . . *in any other action* to carry out the purposes" of the ERA or the Atomic Energy Act. (emphasis supplied) *Brown and Root*, 747 F.2d at 1031. Since on remand Complainant may be able to establish that he was about to testify or that he assisted or participated or was about to assist or participate in the licensing hearing, I reject the recommendation of the ALJ that Complainant's contact with Palmetto and GAP did not constitute a protected activity.[4]

Inasmuch as there exists genuine issues of material fact and inasmuch as Duke Power is not entitled to prevail on the law, I reject the ALJ's recommendation, and I deny Duke Power's motion for summary decision.

Whether the Complaint was Timely Filed.

As noted earlier, Duke Power's motion for summary decision was alternative to its motion to dismiss for untimeliness of the complaint. The ALJ should have decided the motion to dismiss before deciding Duke Power's motion for summary decision. Only if the ALJ had found the complaint timely was it necessary to determine whether Complainant had engaged in an activity protected by section 5851 of the ERA.

Section 5851(b)(1) requires that a complaint be filed within thirty days after the violation has occurred. Complainant was removed from service on October 14, 1983 and was officially terminated on October 19, 1983. The complaint was in the form of a letter from Complainant to the Wage and Hour Division, U.S. Department of Labor. *See* Exhibit A to Respondent's Motion For Summary Decision. This letter was dated November 18, 1983 and is stamped as having been received on November 22, 1983. Section 24.3 of the regulations implementing section 5851 of the ERA, 29 C.F.R. § 24.3, provides that "a complaint filed by mail shall be deemed filed as of the date of mailing." Thus, if the complaint in this case was mailed after November 18th, it is without question untimely. Complainant alleges that he mailed the complaint on November 18th. Duke Power contends that there is no evidentiary support for this contention. The record sheds no light on this question.

Duke Power further argues that, even assuming that the complaint was mailed on November 18th, the complaint is untimely because the violation of section 5851 occurred on October 14th when, as found by the ALJ, the decision to terminate occurred and Complainant recognized that he would be terminated. In support of this argument, Duke Power cites to Supreme Court and Fourth Circuit decisions in termination cases arising under other discrimination statutes. *Chardon v. Fernandez*, 454 U.S. 6 (1981) (termination in violation of 42 U.S.C. § 1983); *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (denial of tenure in violation of Title VII, Civil Rights Act of 1964 and of 42 U.S.C. S 1981); and *Price v. Litton Business Systems, Inc.*, 694 F.2d 963 (4th Cir. 1982) (termination in violation of the Age Discrimination in Employment Act of 1967). These cases stand for the proposition that the applicable limitation period begins to run not from the date on which the termination is implemented but from the date on which the operative decision to terminate or to deny tenure is made and communicated to the employee. In each case, the court focused on the time of the allegedly discriminatory action and communication of that action to the employee, regardless of when the effects of the action were felt. Thus, where a decision to deny tenure or to terminate was made, the limitation period ran from that date the employee was given notice of that decision rather than from a subsequent date on which the employment actually ceased.

I find these cases persuasive, and, therefore, find their holdings applicable to determining when the thirty-day limitation period in section 5851(b)(1) of ERA begins to run. Nevertheless, as I have already pointed out,

there is a dispute between the parties as to when the operative decision to terminate was actually made and communicated to Complainant, and this dispute cannot be resolved at this juncture. It is not enough, as contended by Duke Power, that Complainant knew that he would be "removed from service" after his eighteenth occurrence; not if the decision to terminate had not yet been made.[5] As noted by the Court, in *Ricks* "the application of the general principles discussed herein necessarily must be made on a case-by-case basis." 449 U.S. at 258 n.9. The general principle of the *Ricks* case, and the cases cited above, is that the limitations period commences when the decision complained of is made and communicated to the employee. When the decision to terminate was made and communicated to Complainant Nunn must yet be determined.

Furthermore, in each of the above cited cases it was made clear that there was no "continuing violation" - i.e., no unlawful acts following the decision to deny tenure or to terminate, but simply the continuance of the employment until the date established for termination was reached. Here Complainant not only argues that his "removal from service" did not constitute a termination but also argues that "the core of the discrimination" occurred between October 14th and 19th when Duke Power allegedly misused the required investigation process and miscounted his occurrences. *See* Complainant's Appeal to the Secretary of Labor of the Recommended Decision and Order on Motion For Summary Judgment at 19-23. Although the ALJ concluded that any discrimination in the counting of occurrences took place during the twelve month period before October 14th, he reached this conclusion on an incomplete record. Complainant should have the opportunity to establish that his occurrences were reviewed during the investigative period and that in this review he was discriminated against by being treated differently than other employees, and that such disparate treatment was par, of a continuing course of retaliation for his safety complaints. *See Egenrieder v. metropolitan Edison Company/GPU*, Case No. 85-ERA-23 (April 20, 1987).

Accordingly, I remand the case to the ALJ for a determination as to whether the complaint in this case was timely filed. To this end, the ALJ is to permit the presentation by the parties of such relevant evidence as will enable him to reach a decision. If the ALJ determines that the complaint was timely filed, the ALJ should proceed to a hearing on all issues relevant to whether Complainant was discharged in violation of section 5851.[6]

Rulings on Motions

It is necessary that I rule on Complainant's outstanding motions. By virtue of my remand, I have, in effect, granted Complainant's motion for partial remand. I, however, deny Complainant's motions to amend the record. Those motions seek to reopen the evidentiary record in this case in order to admit the June 4, 1985 decision of NRC's Office of Inspection and Enforcement, which decision apparently proposed

enforcement action and a fine against Duke Power. Complainant contends that the evidence and findings set forth in that decision are relevant to establishing Duke Power's animus toward Complainant, and were not available when the record in this case was made. Duke Power opposes Complainant's request, arguing that the factual findings were previously available to and known by the parties, and, moreover, that they are not material to Complainant's case. In view of my remand of this case for further proceedings, Complainant will have an opportunity, if a hearing is held, to introduce his evidence and to, at that time, establish its relevancy.

I also deny, at this time, both of Complainant's motions for imposition of sanctions against Duke Power and its counsel.[7] These motions are based upon alleged prejudicial mistatements in Duke Power's response brief and appendix thereto, and on the alleged fraudulent notarization of an affidavit. Duke Power disputes these allegations. I deny these motions without prejudice to renewal of the motions before the ALJ and for a ruling by him in accordance with Rule 11 of the Federal Rules of Civil Procedure, Fed.R. Civ. P. 11.

Therefore, this case is remanded to the ALJ for reconsideration in accordance with the decision.

SO ORDERED.

DENNIS E. WHITFLIELD

Deputy Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The Secretary delegated his authority to adjudicate this case to the Deputy Secretary, formerly called the Under Secretary. Order of Recusal, March 31, 1986.

[2] Complainant also filed, on September 10, 1986, Complainant's Motion For Leave to File the Attached Brief to Respondent's Memorandum to Dismiss Nunn's Complaint on the Basis of Statute of Limitations. Duke Power opposed this motion. *See* Respondent Duke Power Company's Opposition to Complainant's Motion For Leave to File His Seventh Brief. By Order of October 10, 1986, I accepted Complainant's brief. On November 5, 1986, Duke Power filed Respondent Duke Power Company's Reply to Complainant's Opposition to the Dismissal of His Complaint on Timeliness Grounds.

[3] I reject Duke Power's argument that this issue is not timely raised because it was not mentioned in the complaint filed by Complainant with the Department of Labor. *See* Respondent's brief in support of ALJ decision at 27-28. The failure to allege in the complaint the elements which establish a violation of section 5851 is not a valid basis for granting summary decision. *Richter v. Baldwin Associates*, Case No. 84-ERA-9 through 12, (March 12, 1986) slip op. at 9-11.

[4] In so ruling, I do not hold that mere contact with the Palmetto Alliance or with GAP constitutes protected activity.

[5] I do not agree with Duke Power that the statement by the Supreme Court in *Ricks*, 449 U.S. at 261, that "the existence of careful procedures to assure fairness in the . . decision should not obscure the principle that limitations periods normally commence when the employer's decision is made", compels a finding that the Complainant's 'removal from service" constituted the termination. It is clear that plaintiff Ricks had been "abundantly forewarned" that he was being denied tenure, but the Supreme Court did not suggest that the limitations period would begin to run from any date earlier than when the Board of Trustees formally voted to deny tenure to Ricks. *See*, 449 U.S. at 262 n. 16 and 17.

[6] In this connection, the ALJ should permit such additional discovery as is necessary and appropriate.

[7] I also reject Complainant's contention that Duke Power is estopped from asserting the protection of *Brown and Root*. Whether internal complaints are a protected activity under section 5851 is not dependent on the information imparted by an employer to his employees.