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Nuclear Whistleblowers: The Cases that Made a Difference in 2015

January 29, 2016

Several nuclear whistleblowers found their cases before the Department of Labor's Administrative Review Board (ARB or "the Board") in 2015. Whistleblowers who report or oppose violations of nuclear safety regulations perform a crucial service for the health and safety of surrounding communities, and the Energy Reorganization Act of 1978 (ERA) protects those whistleblowers from retaliation by their employers. Whistleblowers who believe they have been illegally retaliated against may file a complaint with the Occupational Safety and Health Administration (OSHA). Regardless of the outcome of that complaint, the whistleblower may eventually find his or her case in front of the ARB, the home of the final appellate review within the Labor Department.

This article will dive into the key ERA decisions issued by the ARB in 2015, reviewing the takeaways for nuclear whistleblowers and looking forward to what we can expect in 2016.

Protected Activity Cannot Erase Performance Issues

Smith v. Duke Energy Carolinas, LLC involves a claim brought by William Smith, a security guard with Duke Energy Carolinas LLC and DZ Atlantic. Mr. Smith alleged that Duke Energy violated the ERA whistleblower provision by subjecting him to adverse employment actions, including eventual termination, after he reported fire safety concerns. Mr. Smith performed firewatcher functions for Duke Energy, and he noticed and reported discrepancies in the fire safety inspection log. A DOL administrative law judge (ALJ) determined that, because Mr. Smith delayed in reporting the alleged falsification of the log and was thus acting in an untrustworthy manner, Duke Energy terminated him lawfully. As the ARB noted, "protected activity will not shield an under-performing worker from discipline." The Board affirmed the ALJ's remanded ruling that the Duke Energy proved that it would have terminated him had no whistleblowing occurred. As is evident here, protected activity cannot erase performance issues, and it should not be expected to do so.

Retaining Qualified Counsel Counts

Fleming v. The Shaw Group involves a claim brought by Anthony Fleming, a night-shift electrician with The Shaw Group. Mr. Fleming alleged that the company laid him off and denied him a foreman position in retaliation for his submission of a whistleblower complaint against a former employer. The ALJ dismissed, and the ARB affirmed due to the fact that Mr. Fleming's appeal did not "identify issues for this Board to review on appeal" or "substantiate those issues with supported legal argument." While this is a very short decision with little substance, we've included it in this wrap-up because it illustrates the importance of experienced counsel. Mr. Fleming was a "pro se" litigant, meaning that he was not represented by counsel. While we can draw no conclusions about the merits of Mr. Fleming's claim, it is axiomatic that aggrieved employees cannot prevail against large businesses employing expensive attorneys on the strength of their claim alone.

Recording Conversations Constitutes ERA Protected Activity

In *Franchini v. Argonne National Laboratory*, Felipe Franchini, an employee in the High Energy Physics Division of Argonne National Laboratory, alleged that the company violated the ERA when it terminated him after he reported nuclear safety concerns. Argonne maintained that it terminated him for surreptitiously recording conversations and refusing to turn them over completely, which constituted insubordination. Importantly, the ARB held that Mr. Franchini engaged in protected activity when making the recordings, as well as when taking surreptitious photographs, to the extent that the recordings involved the workplace safety concerns he reported and were taken in anticipation of his having to report his safety concerns externally. The Board further noted that even if an employee agrees to perform an action under the threat of termination—in this case, agreeing to turn over the tapes—and later fails to do so, an employer does not automatically have the right to terminate the employee on the basis of the employee's inaction. For a more in-depth discussion of the *Franchini* decision, read our blog on the topic.

Misrepresentation Does Not Constitute Protected Activity

Nelson v. Energy Northwest involves a claim brought by Richard Nelson, a subcontractor for Energy Northwest, alleging that the company revoked his unescorted access authorization badge for engaging in protected activity. Mr. Nelson asserted that his comments during the investigation into improper per diem payments for another employee, Mr. Hayes, constituted protected activity under the ERA. The ALJ dismissed the case, finding that Mr. Nelson had not engaged in protected activity neither through his statements in the investigation of Mr. Hayes nor with respect to Mr. Nelson's claim that whistleblower protection extends to "friends of a whistleblower." The ALJ further found that Energy Northwest's adverse personnel action against Mr. Nelson was based on its belief that Mr. Nelson had "shown a lack of honesty" about Mr. Hayes' permanent location and thus the amount of per diem expenses to which Mr. Hayes was entitled.

The ARB affirmed, noting that "Nelson's participation in the interview was not in furtherance of the ERA or AEA" and that he therefore could not prove that he had engaged in protected activity. The ARB also held that, even if his actions did constitute protected activity, Energy Northwest revoked his privileges because "Nelson admitted that when he submitted Hayes' employment information to [the company]" Mr. Nelson knew that Mr. Hayes was living locally, a fact that Mr. Hayes did not disclose and which would impact the amount of his per diem compensation. In short, Mr. Nelson's misrepresentation of where Mr. Hayes was living, seemingly to allow Mr. Hayes to collect a higher per diem compensation, and his disclosure of this during an investigation into the matter did not constitute protected activity.

Looking Forward

Although most of these whistleblower cases were decided in favor of the employers, nuclear whistleblowers have plenty to be optimistic about in 2016. The ARB's holding in *Franchini* that surreptitiously recording conversations in anticipation of reporting wrongdoing constituted protected activity was a big win for whistleblowers and could help many whistleblowers gather the facts they need to prove what they know to be true. More broadly, the ARB has consistently interpreted the whistleblower protection statutes enforced by the Labor Department, including the ERA, in such a way that they are actually able to provide the broad protections for which they were intended. Those protections are critical because they allow courageous nuclear employees and the public at large to rest a little easier, thus fostering a nuclear safety culture.