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COURT REPORTS

UNITED STATES COURT OF APPEALS

Knox v. U.S. Dep't of Labor, 434 F.3d 721 (4th Cir. 2006).

William Knox was employed by the United States Department of the Interior ("DOI") as a Training Instructor at the National Park Service Job Corps Center ("the Center") in Harper's Ferry, West Virginia. In December 1999, Knox, during a safety inspection with an officer from the Occupational Safety and Health Administration ("OSHA"), discovered that some of the Center's buildings contained asbestos. Additionally, Knox found an asbestos report from 1993 and an OSHA notice from January 1999 that both identified asbestos in the buildings. Between January and March 2000, Knox made several reports to management that there was an asbestos problem. During this time, management threatened Knox with a reduction in duties and pay. In response, Knox filed three whistle-blower actions under the Clean Air Act ("CAA") with the Merit Systems Board claiming that the threats were actually retaliation for his reports about the asbestos problem. The whistle-blower provisions of the CAA, found in 42 U.S.C. § 7622, prohibit "an employer from discharging or discriminating against an employee for instituting proceedings for enforcement of the Act or carrying out the purposes of the Act."

An Administrative Law Judge ("ALJ") first heard Knox's case and held that the DOI had violated the whistle-blower provisions of the CAA. The ALJ stated Knox had engaged in protected activities, the DOI knew of the activities, and Knox "experienced adverse personnel actions solely because of such activities." On appeal, the Administrative Review Board ("ARB") reversed the ALJ's decision. The ARB concluded the CAA is concerned with pollution of the ambient air (external pollution) and Knox reported concerns about internal pollution. Further, the ARB stated that there was a requirement that Knox communicate to management that he "reasonably believed that DOI was emitting asbestos into the ambient air" and Knox had only expressed concerns about internal pollution. Based on these facts, the ARB held that Knox had not engaged in a protected activity under the CAA.

The Fourth Circuit held that the ARB improperly applied the

"reasonable belief of a release into the ambient air" standard. The court stated that, granting deference under *Chevron*, the ARB was permitted to interpret the construction of the CAA. However, the Fourth Circuit found that the ARB's standard is not always the proper standard because the CAA can be violated without pollution being released into the ambient air. Further, Knox's complaints were sufficient evidence that he reasonably believed there was asbestos pollution and he didn't have to actually state to management he reasonably believed it. Therefore, the Fourth Circuit held that Knox "ha[d] engaged in a protected activity under the CAA as interpreted by the ARB."

ERIN C. BARTLEY

Am. Canoe Ass'n v. Murphy Farms Inc., 412 F.3d 536 (4th Cir. 2005).

The American Canoe Association ("ACA") brought suit under the Clean Water Act ("CWA") alleging that Murphy Farms was in violation of the standards of the CWA. The district court determined that as a citizen group the ACA needed to satisfy the requirements of section 505(a) of the CWA. The district court found that the ACA met all the requirements of section 505(a) and thus was eligible to bring a citizen suit against Murphy Farms.

Murphy Farms appealed the district court's finding. The appellate court upheld the district court's holding. In reaching its decision the court relied on various facts regarding Murphy Farm's previous violations of the CWA. Murphy Farms had previously discharged swine wastewater into a nearby creek on five separate occasions. Two of the spills had occurred prior to the filing of this suit in 1998. These two incidents occurred because of Murphy Farms' negligent operation of spraying equipment. The equipment was used to spray swine slop on the fields; the slop acted as a fertilizer. The last three instances also occurred because of negligent operation of the same spraying equipment. The last instance occurred February 5, 2000. For each of these instances, the district court held that "there were fewer responsible *and* competent land techs employed and/or on duty than were required to operate the hog waste management system in compliance with the Clean Water Act." Thus, it was highly likely that

Murphy Farms would continue to violate the CWA.

Section 505(a) of the CWA states that, "any citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of the standards of the Act." In interpreting this phrase, the appeals court relied on a previous United States Supreme Court decision that stated a citizen suit under the CWA may not be premised solely on past violations of the Act. In order to bring a citizen suit, the group must show a continuous or intermittent violation that shows the violator will continue to pollute in the future. The group must prove either (1) that the violations will continue after the date on which the complaint is filed, or (2) by showing evidence from which a reasonable trier of fact could conclude a continuing likelihood of recurring violations. There is a continuing likelihood of recurring violations until the there is no real likelihood of repetition.

The court found that the ACA had properly shown that Murphy Farms had not eliminated the likelihood of recurring violations. In order to correct this deficiency, Murphy Farms need not show that it has eliminated any possibility of a violation. It only needs to show that it has taken steps that eliminate the "real likelihood of repetition." Once Murphy Farms proves there is no real likelihood of repetition, the federal court will not have jurisdiction to hear a citizen suit against them.

AMY L. OHNEMUS

United States v. John Chamness, 435 F.3d 724 (7th Cir. 2006).

Congress poignantly noted that illicit methamphetamine production "poses serious dangers to both human life and the environment." As a result the Methamphetamine Anti-Proliferation Act of 2000 called for more rigid sentencing if a methamphetamine offense created a substantial risk of harm to human life.

John Chamness was found producing methamphetamine in an Illinois trailer park during the summer of 2003. Chamness pled guilty on two counts of knowingly attempting to manufacture a mixture or substance containing methamphetamine in violation of 21 U.S.C §§ 841(a)(1) and 846. In accordance with the November 1, 2004 United

States Sentencing Guidelines the district court found Chamness' offense warranted a three-level increase for creating a substantial risk of harm to human life or the environment.

The first police officer that entered the mobile home discovered a clandestine methamphetamine lab. The lab was complete with glass jars of methamphetamine, muriatic acid, Coleman stove fuel, peeled lithium batteries, an air pump, salt, and a toxic, white ether fog that engulfed the living room/kitchen area. In conformity with Drug Enforcement Administration guidelines the police arranged for a hazardous waste disposal team to secure the trailer.

The substantial risk of harm is weighed according to the following criteria: the quantity of hazardous/toxic substances found at the laboratory, the likelihood of release into the environment, the extent and duration of the manufacturing operation, and the location of the laboratory. The Court of Appeals reasoned that the need for a hazardous waste disposal team to disassemble and the quantity of toxic substances warranted sentence enhancement. Chamness' argument that he was involved in the less dangerous second gassing phase, as opposed to the initial process involving anhydrous ammonia, was unpersuasive. The government did not introduce evidence as to how Chamness intended to dispose of the toxic chemicals. Therefore, the likelihood of release into the environment factor was indeterminate. Expert testimony that only 30 percent of methamphetamine producers are sophisticated enough to perform the second stage showed the operation's extent was considerable. The trailer's location within a residential area placed several people at risk of serious injuries from explosion or fire.

After examining the first, third, and fourth factors together the Court of Appeals found that Chamness placed numerous persons at substantial risk of harm. The concurrent 168 months of imprisonment sentence for each count was upheld.

SETH D. OKSANEN

United States v. Gurley, 434 F.3d 1064 (8th Cir. 2006).

Gurley owned and operated a hazardous waste site in Edmondson,

Arkansas and a site in West Memphis, Arkansas. The Environmental Protection Agency brought action against Gurley's refining company and Gurley as an individual pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act. The EPA sought to recover the clean-up costs associated with oil waste pits and filed for declaratory judgment for liability at the Edmondson site for future response costs. In March 1992, judgment was entered against Gurley and his company for $1.7 million as well as an estimated $6 million in pre-judgment interest and future response costs. In July 1995, he filed for bankruptcy in Florida. The government later filed a proof of claim in bankruptcy court and for the response costs and interest at the Edmondson site based on the existing judgment and declaratory judgment. The government also sought response costs for the West Memphis site. Gurley filed an objection to the proof of claim and then filed a motion in the Middle District of Florida to withdraw the reference of the contested matter from the bankruptcy court to the district court. The district court granted the motion and subsequently transferred venue to the United States District Court for the Eastern District of Arkansas. The district court entered judgment against Gurley and denied his motion to alter or amend the judgment on the claim that the interest calculation start date was incorrect.

Gurley then appealed to the Eighth Circuit Court of Appeals. Gurley appealed on two grounds. First, he claimed that the court had no subject matter jurisdiction. Second, Gurley claimed that the action was never commenced because the government had failed to serve him with a complaint and therefore any properly filed complaint would be time-barred.

The Eighth Circuit Court of Appeals held that the district court had subject matter jurisdiction to adjudicate Gurley's objection to the government's proof of claim. District courts may reference bankruptcy cases to bankruptcy courts and when a resolution of the case requires consideration of title 11 and other laws of the United States affecting regulation of interstate commerce, the district court may withdraw reference of the proceedings to the bankruptcy court in the case of a timely motion. However, withdrawing the reference and returning adjudication of a proof of claim to the district court does not affect the district court's subject matter jurisdiction.

The Court also found that the district court had personal

jurisdiction over Gurley. Because the government participated in the bankruptcy proceeding via the filing of its proof of claim, and the proceeding was *in rem*, there was no need to establish personal jurisdiction over Gurley.

Additionally, the government's filing of proof of claim was not barred based on the amount of time elapsed because the government filed the proof of claim, which constituted the requirement that the government act in order to recover costs under CERCLA.

Finally, the district court properly declined to address the pre-judgment interest issue since Gurley failed to raise this argument before he filed his motion to alter or amend the judgment. Thus the district court did not abuse its discretion by not addressing those arguments Gurley presented.

The Eighth Circuit Court of Appeals affirmed the district court's judgment entered against Gurley as well as the district court's denial of Gurley's motion for reconsideration.

TRAVIS A. ELLIOTT

Sierra Club v. Johnson, No. 03-10262, 2006 WL 146230 (11th Cir. 2006).

The Sierra Club and Georgia Forestwatch, collectively "Sierra Club," petitioned for review of the Environmental Protection Agency's ("EPA") decision to deny their request that the EPA object to the granting of four Clean Air Act ("CAA") Title V permits. The four permits were issued by the Georgia Environmental Protection Division ("GEPD"). In order to ensure compliance with the CAA's quality-control standards, Title V requires stationary sources of air pollution to obtain permits from state permitting authorities, which include emission limitations and other conditions.

State permitting authorities must provide the public at least 30 days to comment on the permits and must give notice by newspaper publication of any public hearing or in a state publication, to individuals on a mailing list developed by the permitting authority, and by other means if necessary to ensure adequate notice. GEPD, exercising its permit authority, published a notice in a local newspaper announcing a 30-day comment

period on the draft Title V permit for an area manufacturer that chemically processes and prints cotton and synthetic fabrics. GEPD failed to create a mailing list until after the time for public comment on the draft permit had expired. Thus, it failed to comply with the mailing list requirement provided in 40 C.F.R. § 70.7(h)(1).

The Sierra Club brought the lack of mailing list notice to the attention of GEPD. Due to the failure to provide mailing list notice, the Sierra Club requested that the manufacturer's permit go through the notification process again. GEPD refused, asserting that "its implementation of a mailing list after it had issued [the manufacturer's] permit sufficiently addressed the Sierra Club's concerns." The Sierra Club subsequently requested that the EPA object to the permit because of the lack of the mailing list notice. The EPA denied the request, asserting that the mailing list would not have "significantly" increased public participation. The Sierra Club then filed a petition with the U.S. Court of Appeals for the Eleventh Circuit, contending that the EPA's failure to object was in direct opposition to the unambiguous language of Title V.

As a threshold matter, the Eleventh Circuit found that the Sierra Club had standing to assert the present claim. The court then tackled the case's main issue and agreed with the Sierra Club, determining that the EPA was in error to assert that "it can avoid its own unambiguous mailing list requirement in the Title V permitting process" and "ignore obvious violations of [the] permit program." Furthermore, the court was unconvinced by the EPA's implicit assertion that the burden should be placed on the Sierra Club to show that statutory non-adherence led to "less meaningful public participation." The court vacated the EPA's order concerning the permit process and remanded the case to the EPA for further consideration.

ERIC S. OELRICH

UNITED STATES DISTRICT COURT

City of Moses Lake v. United States, No. CV-04-03760AAM, 2005 WL 3724919 (E.D. Wash. Dec. 30, 2005).

Beginning in 1999, the EPA began the planning process to address contamination at the former Larson Air Force Base, currently owned by the City of Moses Lake ("the City"). Under 42 U.S.C. § 9620, the EPA was required to provide the City with all relevant information concerning the proposed plan and to allow the City to participate in the planning and selection of a remedy at the site. The City filed suit in the Eastern District of Washington, seeking damages, declaratory relief, and injunctive relief against the EPA, Lockheed Martin, Boeing, and other governmental agencies for failure to include the City as required by the statute.

The court first had to address whether the City's claim was jurisdictionally barred. At issue was the application of the text of 42 U.S.C. § 9613 to § 9620. The text of section 9613 presents a jurisdictional bar to civil suits if the proposed plan is a CERCLA removal action on federal property. However, if the proposed action was remedial, the jurisdiction bar would be inapplicable. The statutory language, the court found, required a distinction between removal and remedial actions in regard to the jurisdictional bar issue.

After careful review of the statutory language, the definitions of removal and remedial in the statute, and relevant case law on the difference between the two, the court determined that "the removal/remedial distinction boils down to whether the . . . EPA did not have time to undertake the procedural steps required for a remedial action, and, in responding to a time-sensitive threat, the EPA sought to minimize and stabilize imminent harms to human health and the environment." The court found in this case the proposed plan was a remedial action, so the statutory bar did not apply. The City was free to pursue its claims and relief.

The court next found the proposed plan by the EPA constituted a "planning" and/or an "action plan." The EPA intended to issue the proposed plan to the public at large, without first notifying the city, and argued this gave the City the required notice and participation under the statute. However, the court found that once the proposed plan is issued to the public at large, the "planning" stage is over and the remedy selection phase begins. The City argued that it, along with the rest of the public, was already entitled to notice of formal issuance of the proposed plan and that it had the right to tender comment regarding the plan. The court held that without reviewing the proposed plan and its alternative remedies

(including the EPA's preferred remedy) *before issuance to the public*, there was simply no way for the City of Moses Lake to meaningfully and intelligently "participate in the planning and selection of the remedial action . . . and the development of . . . action plans." Once the plan had been publicly issued, the planning stage was over, and the City had been denied its rights.

If the EPA were permitted to follow its intended course of action and only disseminate the plan to the City after it was complete, the court found that the City would be irreparably harmed and fully denied its rights under § 9620. Therefore, the court issued a preliminary injunction against the EPA and other named defendants, ordering the dissemination of the proposed plan to the City within 10 days of the order, and outlined timetables for consultation between the two. The court noted that while the City may participate, the final decision on the course of action rests with the federal government.

NATALEE M. BINKHOLDER

STATE COURTS

Price *ex. rel.* Massey v. Hickory Point Bank & Trust, 841 N.E.2d 1084 (Ill. App. Ct. 2006).

In November 2001, a physician identified elevated levels of lead in the blood of one-year-old twins, Mikal and Mikala Price. The physician notified the Macon County Health Department, which conducted an investigation at the children's residence in Decatur, Illinois. The health department found lead hazards on windows, baseboards, and doorjambs in the house where the children lived. The health department informed the twin's parents' landlords about its findings and gave the defendant landlords one month to take care of the lead issues in the house.

David Massey, as guardian of the twin's estate, brought suit against defendants, alleging negligent violations of the Decatur Municipal Code and certain EPA regulations that apply provisions of the federal Residential Lead-based Paint Hazard Reduction Act of 1992.

In June 2005, the trial court entered an order granting summary

judgment to defendants. The trial court reasoned that defendants could not be held liable for lead-based paint contamination because they had no knowledge that the house contained lead-based paint before being notified of its existence by the Macon County Health Department. Plaintiffs appealed the grant of summary judgment, and the Illinois Appellate Court reversed. The appellate court held that Massey did not have to show that the landlords knew they had violated the city code and EPA regulations in order to establish a prima facie case of negligence.

In ruling that plaintiffs did not have to show that defendants had knowledge of lead in the house, or that they knew about their duty to provide the twin's parents with a lead warning statement or an information pamphlet, the court referred to case law regarding common-law negligence claims based on a violation of a statute or ordinance. The court cited several cases, each holding that a violation of a statute which is designed to protect human life, without more, is prima facie evidence of negligence. In order to establish this prima facie case, a plaintiff must make out three elements. First, a plaintiff must show that he is a member of the class of persons the statute is designed to protect. Second, he must show that his injury is of the type the statute is designed to protect against. Third, the defendant's violation of the statute must have been the proximate cause of the plaintiff's injury. The plaintiff need not allege that the defendant was aware of his duty under the statute as the violation itself is prima facie evidence of negligence.

The appellate court also looked to the language of section 745.118 of the EPA, which provides, "[f]ailure to comply with § 745.107 (disclosure requirements for sellers and lessors), § 745.110 (opportunity to conduct an evaluation), § 745.113 (certification and acknowledgment of disclosure), or § 745.115 (agent responsibilities) is a violation of 42 U.S.C. § 4852d(b)(5) and of the Toxic Substance Control Act § 409." The appellate court noted that the EPA regulations defendants were charged with violating did not include knowledge requirements.

For these reasons, the Illinois Appellate Court held that the landlords' failure to provide the lessees with a lead warning statement and an information pamphlet was sufficient for plaintiffs to make their prima facie case, regardless of defendants' lack of knowledge about the lead in the house or their statutory duties. Therefore, the trial court's grant of summary judgment to defendants was in error. The case was reversed and

remanded.

This opinion also explained why the trial court violated the Supreme Court Rule on citation of unpublished orders. That explanation was not material to the disposition of the current case.

LEAH M. CLUBB

F.W. Disposal South, LLC v. St. Louis County, 168 S.W.3d 607 (Mo. Ct. App. 2005).

In what was alleged to be an effort to protect the environment and maintain public health, St. Louis County enacted an ordinance targeted to prevent F.W. Disposal South ("FWDS") from constructing a solid waste facility within one thousand feet of a church. FWDS, originally under the name of a parent company, sought declaratory judgment to prevent the county from enforcing the ordinance. The trial court held that the ordinance was invalid and granted summary judgment to FWDS. On appeal, the Court of Appeals for the Eastern District of Missouri affirmed the trial court's ruling and held that the ordinance was enacted primarily for zoning purposes. The Court of Appeals found the county failed to follow its own procedure, which required notice and comment, for the creation of zoning ordinances, thus rendering the ordinance at issue invalid.

Initially, FWDS filed an application to operate a solid waste transfer facility within one thousand feet of a church. In response, St. Louis County drafted Ordinance ("SLCRO") Section 607.805 prohibiting the construction of any transfer station or waste processing facility within one thousand feet of a church, residential area, school, nursery school, child care center, or nursing home and subsequently denied the application.

At issue is whether the ordinance was for public safety, which falls under the "police powers" of the county, or for land use regulation, requiring much stricter ordinance implementation procedure. On appeal, the county argued the ordinance was for public safety purposes, which includes environmental and health concerns. The court disagreed finding that the ordinance restricted the use of land according to location. The

court noted that the ordinance did not describe the environmental or health impacts of such facilities, nor was the stated purpose of the ordinance to protect public safety. Instead, the court found that this was an example of "not in my backyard" complaints resulting in the ordinance being crafted to promote the development of real estate and not to protect the health of those near the site.

The court also noted that before St. Louis County enacted the ordinance, the land could be used for waste transfer purposes, but now the ordinance prohibited this use. Such an action is consistent with zoning regulation, which in St. Louis County requires notice and comment. The court held that because there was no notice and comment prior to enacting the ordinance, it was therefore invalid and not a sufficient reason for denying FWDS's application.

This decision limits the ability of counties, municipalities and other divisions to write health ordinances under their "police powers," forcing them instead to follow the rules of zoning ordinance construction. Apparently, under this ruling, a county must include an environmental or health analysis when writing an ordinance that could be construed as zoning if the purpose is public safety. Lastly, the court noted that had this ordinance been enacted simultaneously with other provisions that directly regulate solid waste, perhaps the court's ruling would be different. Such a suggestion indicates that if a county wishes to regulate the location of potential health or environmental offenders, it must do so in a way that includes ordinances written strictly for such purposes that do not include zoning language.

G. MICHAEL BROWN

Nixon v. Alternate Fuels, Inc. 181 S.W.3d 177 (Mo. Ct. App. 2005).

The State of Missouri brought a collection action against Alternate Fuels, Inc. ("AFI"), a Kansas corporation, for penalties, interest, and fees on assessments made after AFI's Missouri land reclamation permits had expired. AFI obtained permits from the Missouri Land Reclamation Commission ("MLRC"), under the Department of Natural Resources, beginning in 1990 for the operation of the Blue Mound Mine. AFI

operated the Blue Mound facility until 1996 when the facility was turned over to Cimarron Energy LLC; AFI, however, continued to hold the permits.

During the time in which AFI maintained control of the Blue Mound Mine, a DNR inspector conducted several inspections on the permitted area and found that the land did not comply with the reclamation laws, regulations, or rules. These violations included failure to backfill and grade the land within time frames provided by regulation to control soil erosion, the absence of a plan to address the acidity and toxicity of exposed soils, and failure to report on the quality of the water in the affected area. The inspectors issued several notices indicating the specified deadlines for compliance. AFI did not renew the permits, and the only activity that has occurred at Blue Mound since the end of 2001 is reclamation, which the federal government has inspected and enforced.

MLRC issued orders of assessment against AFI, and neither AFI nor Cimarron paid any of the penalties due. The MLRC then requested that the Attorney General seek collection of the penalties with interest and attorney's fees. The present action followed, naming AFT as defendant; Cimarron was not made a party to the action.

At the trial court level, the Circuit Court of Cole County, Missouri ruled in favor of AFI holding that the MLRC lacked jurisdiction to lay assessments against AFI after the permit expiration. On appeal the Missouri Court of Appeals for the Western District held that the MLRC is a state program that is approved by the federal government as it complies with the federal Surface Coal Mining Control and Reclamation Act of 1977 ("SMCRA"). The court additionally held that MLRC "must be no less effective than the federal program." The court also noted the Missouri Legislature's intent to mirror the federal act and its intent to, "protect the environment from the adverse effects of surface coal mining while ensuring an adequate supple of coal to meet the nation's energy requirements." The court then examined the federal regulation and held that it "does not expressly prohibit or grant the MLRC authority to assess penalties against a non-renewed permittee." The court further held that AFI was correctly treated as a permittee since it was an expired permittee and reclamation was occurring on its permitted land. The court held that the orders issued against AFI were proper as long as reclamation activity was occurring on the permitted land. The court accordingly found that the

trial judge's ruling and statement of the law was erroneous. The case was reversed and remanded for further proceedings.

ERIK G. HOLLAND

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