No. _____

In The
Supreme Court of the United States

MICHAEL S. PECK, PH.D,
Petitioner,

V.

U.S. DEPARTMENT OF LABOR,
ADMINISTRATIVE REVIEW BOARD; AND
MARTY WALSH, U.S. SECRETARY OF LABOR,
Respondents.

LAWRENCE CRISCIONE,
Petitioner,

V.

U.S. NUCLEAR REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1154

MICHAEL S. PECK, Ph.D.,
Petitioner,
v.

UNITED STATES DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD; MARTY WALSH, U.S. Secretary of Labor,
Respondents.

On Petition for Review of an Order from the United States Department of Labor, Administrative Review Board. (2017-0062)

Submitted: March 12, 2021
Decided: April 30, 2021
Amended: June 21, 2021

Before WILKINSON, AGEE, and FLOYD, Circuit Judges.

Petition denied by published opinion. Judge Wilkinson wrote the opinion, in which Judge Agee and Judge Floyd joined.

John M. Clifford, Billie P. Garde, CLIFFORD & GARDE, LLP, Washington, D.C.; John A. Kolar, GOVERNMENT ACCOUNTABILITY PROJECT, Washington, D.C.; Ned Miltenberg, Managing

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WILKINSON, Circuit Judge:

Petitioner Dr. Michael Peck is a Nuclear Regulatory Commission (NRC) employee who made disclosures to Congress and the NRC's Inspector General regarding health and safety risks at a nuclear power plant. After the NRC rejected his applications for promotions, he brought a whistleblower-retaliation complaint under 42 U.S.C. § 5851. The Administrative Law Judge (ALJ) dismissed the case because the United States had not waived sovereign immunity for such whistleblower actions against the NRC. The Administrative Review Board (ARB) affirmed, and Peck petitioned for review before this court. Because we agree with the ARB that Congress has not waived sovereign immunity for complaints against the NRC, we deny the petition for review.

I.

Dr. Peck has worked for the NRC as a nuclear engineer since 2000. From 2007 to 2012, he served as the Senior Resident Inspector at the Diablo Canyon Nuclear Power Plant. After he left the plant,

he took three protected actions regarding concerns he had with the safety conditions there. First, in 2013 and 2014, he filed a formal Differing Professional Opinion with the NRC. Second, in January 2015, Peck sent a letter to the Senate Committee on Environment and Public Works, which oversees the NRC. Third, in 2015 and 2016, he provided testimony to the NRC Inspector General.

Since leaving the Diablo Canyon plant, Peck has served as a Senior Reactor Technology Instructor at the NRC's Chattanooga, Tennessee, office. In 2016 and 2017, he applied for two promotions at the NRC. Peck submitted an application in October 2016 for a Senior Resident Inspector (SRI) position at the Callaway Nuclear Plant in Missouri. In March 2017, he applied for the same position at a plant in Arkansas. He was passed over in both cases.

In 2017, Peck filed a complaint with the Department of Labor pursuant to the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801 *et seq.*, *as amended by* Act of Nov. 6, 1978, Pub. L. No. 95-601, 92 Stat. 2947, *and* the Energy Policy Act of 2005 (EPA), Pub. L. No. 109-58, 119 Stat. 594. He alleged that his non-selection for promotion was in retaliation for his protected disclosures about insufficient safety conditions at Diablo Canyon. In support of this claim, Peck argued that the supervisors in charge of selection knew of his protected activity and retaliated against him by choosing engineers with inferior qualifications and less experience for the two SRI positions.

On July 13, 2017, the ALJ granted the NRC's motion to dismiss on the grounds that the 2005 amendments to the ERA did not waive the federal government's sovereign immunity for suits against

the NRC. Peck appealed this decision to the ARB. Due to the significance of the issue, the ARB heard the case *en banc* and affirmed the ALJ over one dissent. *See* J.A. 329–52. Peck timely filed a petition for review of the ARB's order in this court pursuant to 42 U.S.C. § 5851(c).

II.

The parties have not questioned our power to decide the case. However, federal courts "have an independent obligation to verify the existence of" their own jurisdiction. *Williamson v. Stirling*, 912 F.3d 154, 168 (4th Cir. 2018) (quoting *Porter v. Zook*, 803 F.3d 694, 696 (4th Cir. 2015)). As such, we identified our concerns *sua sponte* and requested the parties to submit supplemental briefing on whether this court has jurisdiction over this petition.

The statute authorizing Article III review of ARB decisions provides that aggrieved employees can seek review "in the United States court of appeals for the circuit in which the violation . . . allegedly occurred." 42 U.S.C. § 5851(c). Based on the facts alleged by the petitioner, it is unclear that any of the allegedly illegal actions took place within the states of the Fourth Circuit.

We need not parse the location of the actions of Peck's supervisors because we conclude that § 5851(c) speaks not to jurisdiction but to venue. In *Davlan Eng'g, Inc. v. NLRB*, 718 F.2d 102 (4th Cir. 1983), this court considered a nearly identical statute that governs review of orders by the National Labor Relations Board. That statute provides that "any person aggrieved by a Board order may obtain review 'in any United States court of appeals in the

circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business.'" *Id.* at 103 (quoting 29 U.S.C. § 160(f)). We treated that language as a "venue requirement[]." *Id.* The same is true for the statute providing review of immigration judges' decisions. *See Sorcia v. Holder*, 643 F.3d 117, 121 (4th Cir. 2011) (stating "that a 'petition for review [of an order of removal] shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings'" (quoting 8 U.S.C. § 1252(b)(2))). Since there are no meaningful distinctions between the language of those statutes and § 5851(c), the latter statute is also a venue provision and poses no jurisdictional problems for this court.

Assured that we are seized of jurisdiction over this petition, we briefly note that it is a long-held rule that venue is a "personal privilege" that a party may waive. *Senitha v. Robertson*, 45 F.2d 51, 53 (4th Cir. 1930). In its supplemental brief, the Department of Labor has done just that and both parties request that we resolve the question presented. *See* Resp't Suppl. Br. at 6; Pet'r Suppl. Br. at 5. This court has also placed another case raising an identical sovereign immunity issue in abeyance pending the outcome of this case. *See* Order, *Criscione v. Nuclear Regulatory Comm'n*, No. 20-2320 (4th Cir. Dec. 11, 2020). Because this case is already fully briefed, and the parties have requested that we resolve it, and another case in our circuit turns on its outcome, we find that judicial economy warrants our resolution of the petition.

III.

We review the ARB's decision pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2). *See* 42 U.S.C. § 5851(c)(1). Under that framework, "we may only disturb the ARB's decision if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Welch v. Chao*, 536 F.3d 269, 275–76 (4th Cir. 2008). This case presents a pure question of law, which we review *de novo*. *Id.* at 276.

A.

It is axiomatic that "the United States [is] not suable of common right" but that "the party who institutes such a suit must bring his case within the authority of some act of [C]ongress." *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834) (Marshall, C.J.). This is because "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." The Federalist No. 81, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted). This was a principle so obvious to the Founding generation that it needed no mention—its presence was assumed. *See* Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813, 1868–75 (2012).

It is also well-settled that "the terms of its consent to be sued" are jurisdictional. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). And the Supreme Court has made crystal clear "that a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text." *FAA v. Cooper*, 566 U.S. 284, 290 (2012) (quoting *Lane v.*

Peña, 518 U.S. 187, 192 (1996)); *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 33–34 (1992). All ambiguities in the statutory text must be construed "in favor of immunity." *United States v. Williams*, 514 U.S. 527, 531 (1995).

Here we deal with the sovereign's immunity from suits for money damages. This immunity is of paramount importance in a democratic republic. In any pluralistic society, the people have many interests competing for the expenditure of the government's limited funds. The Framers saw fit to assign the power to balance those interests to the most representative branch—the legislature. *See* U.S. Const. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). Allowing a private litigant to bring a claim against the U.S. Treasury without statutory authorization would violate this most important of principles. *See Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1851) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned."). This "is to assure that public funds will be spent according to the letter of difficult judgments reached by Congress as to the common good and not according to . . . the individual pleas of litigants." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990).

Congress, however, may express the people's will in many forms. At the beginning of the Republic, Congress passed private bills in response to individual petitions. *See* Richard H. Fallon, Jr., et al., Hart & Wechsler's The Federal Courts and the Federal System 89 (7th ed. 2015). That has since given way to broader schemes of congressional

consent via statutory waiver. *See, e.g.*, Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (1946); Tucker Act, ch. 359, 24 Stat. 505 (1897). These acts served to simplify resolution and relieve the burden on Congress that an expanding number of petitions would otherwise have imposed. *See Brownback v. King*, 141 S. Ct. 740, 745–46 (2021); Fallon, *supra*, at 89.

Despite the existence of both private bills and broad schemes of statutory waiver, there nonetheless exist statutes between these two poles. Such statutes deal with more than a single person's case yet are not solely concerned with governmental liability. The Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1127 (1970), is one such statute. *See Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799 (2019). And the ERA is another such statute. Not only must these statutes regulate governmental behavior, their "waiver of sovereign immunity must extend unambiguously to . . . monetary claims." *Lane*, 518 U.S. at 192. This requirement exists, in part, to prevent a scheme encompassing certain private entities from extending inadvertently to the federal government.

B.

Considering this framework, we turn to the purported wavier of sovereign immunity. "We start, of course, with the statutory text." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). When a statute does not define a word, we turn first to its "ordinary meaning." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011); *see also United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994)

("Generally, in examining statutory language, words are given their common usage."). The Dictionary Act, 1 U.S.C. § 1, often aids courts in determining that ordinary meaning. *See, e.g.*, *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012) (determining whether organizations are suable as "individuals" under the Torture Victims Protection Act); *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993) (determining whether artificial entities are "persons" allowed to appear *in forma pauperis* under 28 U.S.C. § 1915).

The relevant statutory language here comes from the NRC's 1978 appropriations. Congress amended the ERA to "encourage[] employees to report safety violations and provide[] a mechanism for protecting them against retaliation for doing so." *English v. Gen. Elec. Co.*, 496 U.S. 72, 82 (1990) (discussing Act of Nov. 6, 1978, Pub. L. No. 95-601, 92 Stat. 2947, 2951 § 210 (codified as amended at 42 U.S.C. § 5851)). The statute prohibits employers from discharging or discriminating against employees who engage in certain protected behaviors such as testifying before Congress or notifying their employers of alleged violations of federal law. 42 U.S.C. § 5851(a)(1). The statute also explicitly defines "employer" for the purposes of the section to include the NRC. *Id.* § 5851(a)(2)(F). As such, it is clear that the prohibitions against retaliation apply to Peck's employer, the NRC.

However, this is not the end of the inquiry. As we have noted, the inclusion of a government agency as a regulated entity is not sufficient to find that Congress has waived sovereign immunity for the purposes of enforcement. *See Robinson*, 917 F.3d at 806 (analyzing the substantive and remedial

provisions of the FCRA independently). As such, we must look closely at the remainder of § 5851. First, we look at the terms used in subsection (b), which provides the complaint, filing, and notification procedures for an employee seeking to bring action under § 5851.

From the outset, it is clear that the statute does not contemplate the government as a possible respondent in such an action because the statute uses "person" rather than "employer" in the pertinent subsections. The employee must claim to "ha[ve] been discharged or otherwise discriminated against by any *person*." 42 U.S.C. § 5851(b)(1) (emphasis added). The Secretary of Labor must "notify the *person* named in the complaint" and conduct an investigation of "the *person* alleged to have committed [a] violation." *Id.* § 5851(b)(1), (2)(A) (emphasis added). If the Secretary finds a violation, he is to "order the *person* who committed such violation to" take remedial action. *Id.* § 5851(b)(2)(B) (emphasis added). Unlike subsection (a) which addresses "employers," most of the remedial subsection addresses "persons."

In contrast, even part of subsection (b) does address employers. The use of the two different words—"employer" and "person"—in close proximity indicates that Congress was conscious of the difference. There is a provision for "the employer [to] demonstrate[] . . . that it would have taken the same unfavorable personnel action" for a variety of legitimate reasons. *Id.* § 5851(b)(3)(B). And another provision prohibits relief for the employee if "the employer" makes that showing. *Id.* § 5851(b)(3)(D).

Subsections (c) and (d) support this distinction by utilizing person. The review provision allows

"[a]ny *person* adversely affected or aggrieved by an order issued under subsection (b)" to seek review in the appropriate court of appeals. *Id.* § 5851(c)(1) (emphasis added). The jurisdiction provision allows the Secretary to file an enforcement action in district court "[w]henever a *person* has failed to comply with an order." *Id.* § 5851(d) (emphasis added). In sum, § 5851 distinguishes between employers and persons.

We reject petitioner's contention that these terms should be given the same meaning. *See* Pet'r Br. at 21. It is well-established that "[w]here Congress has utilized distinct terms within the same statute, the applicable canons of statutory construction require that we endeavor to give different meanings to those different terms." *Soliman v. Gonzales*, 419 F.3d 276, 283 (4th Cir. 2005) (citing *Nordic Village*, 503 U.S. at 36); *see also Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 509 (4th Cir. 2011) (applying the canon to motor regulations). This different-terms canon is grounded in the understanding that Congress acts deliberately—"where Congress includes particular language in one section of a statute but omits it in another provision of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Soliman*, 419 F.3d at 283 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)). If that is true in different sections of the same act, it is undisputable that this canon would apply within a single section of an act. We thus conclude that the inclusion of the NRC as an "employer" in the substantive subsection cannot alone justify the treatment of the NRC as a "person" in the remedial subsection.

Our inquiry thus turns on whether the NRC is a person independent of its status as an employer. There is a general presumption that the word "'person' does not include the sovereign." *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1861–62 (2019) (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780–81 (2000)). This is no sapling of an interpretive rule—rather, it is a storied redwood of nineteenth-century origin. *See United States v. Fox*, 94 U.S. (4 Otto) 315, 321 (1876) ("The term 'person' as here used applies to natural persons, and also to artificial persons, . . . but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended."). We thus do not deviate from the general presumption lightly.

The presumption is based, first and foremost, on the word's "common usage," which "does not include the sovereign." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 275 (1947); *see also Va. Office for Protection & Advocacy v. Reinhard*, 405 F.3d 185, 189 (4th Cir. 2005) (holding that, as sovereign, Virginia agency is not a "person" capable of bringing suit under § 1983). Dictionaries support this contention. *See, e.g.*, *Person*, Black's Law Dictionary (10th ed. 2014). Finally, Congress has expressed its intention in the Dictionary Act by providing a default definition for "person" in federal law. *See Return Mail*, 139 S. Ct. at 1862. "[T]he words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Notably absent is any mention of sovereigns.

An application of the *expressio unius est exclusio alterius* canon thus informs us that sovereigns are not covered by the term "person." *See Mine Workers*, 330 U.S. at 275 ("The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them."); *see also Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861, 865 (4th Cir. 2001) (applying favorably the *expression unius* canon); *In re Wood*, --- F.3d ----, 2021 WL 1287182, at *4 (4th Cir. Apr. 7, 2021) (same). All of this accords with common sense. Characterizing the government as a person gives it too much credit. Whereas a person is understood to be a unique individual or single entity, the government is impersonally composed of untold millions of persons. In sum, "the Government is not a 'person' . . . absent an affirmative showing to the contrary." *Return Mail*, 139 S. Ct. at 1863.

C.

The petitioner has failed to make the necessary affirmative showing with the required "unequivocal[] express[ion]." *Cooper*, 566 U.S. at 290. Inasmuch as the remedies and enforcement sections of the Act are directed at persons, not the government, it is hard to distill from the statute any waiver of sovereign immunity. Contrary to petitioner's suggestions, this view is in accord with Fourth Circuit and Supreme Court precedent, and it does not create absurd results. Our recent decision in *Robinson* shows why this is so.

In that case, the plaintiff sued the Department of Education for violating the FCRA. *See Robinson*, 917 F.3d at 800. The FCRA establishes "a series of requirements for handling consumer credit information" and requires investigation when a consumer believes that there is incorrect "information relating to his credit." *Id.* at 802 (discussing 15 U.S.C. § 1681s-2(b)(1)(A)). The Act also creates civil liability for "[a]ny person who is negligent in failing to comply with any requirement imposed under this subchapter." *Id.* (quoting 15 U.S.C. § 1681o). We had to determine "whether the federal government is a 'person' for purpose of FCRA's general civil liability provisions." *Id.*

Although "[t]he statute itself define[d] 'person' to include 'any . . . government or governmental subdivision or agency," *id.* (quoting 15 U.S.C. § 1681a(b)), we nonetheless held that the statute did not unequivocally waive sovereign immunity, *id.* at 803. We reached this conclusion because the ordinary meaning of "person" does not include the federal government, statutes waiving sovereign immunity are normally clear in using the words "United States," and a different provision of the FCRA includes a waiver of immunity that "spells out that 'the United States . . . is liable to the consumer.'" *Id.* at 804 (quoting 15 U.S.C. § 1681u(j)); *see id.* at 803–04. Furthermore, we noted that including the government within the meaning of "person" "would raise a host of new issues ranging from the merely befuddling to the truly bizarre" such as allowing the government to bring criminal or civil enforcement proceedings against itself, compromising treaties, undermining international comity, and ignoring limits on federal abrogation of

state sovereign immunity. *Id.* at 804; *see id.* at 804–05. Altogether, we concluded that there was "no unambiguous and unequivocal waiver of sovereign immunity." *Id.* at 806. The presumption against waiver of sovereign immunity applied even when the "person" was explicitly defined to include the government. Thus, it applies all the more so in statutes where the term is left undefined.

The lesson of *Robinson* is that the substantive and remedial provisions of a statute may not be coextensive. There is no doubt that the NRC is bound by the prohibitions of § 5851. But that fact alone is simply insufficient to form the basis of an unequivocal waiver of sovereign immunity. This is no new contention—the Supreme Court held as much over twenty years ago in *Lane v. Peña*. The *Lane* Court faced a similar statutory scheme: the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 791 *et seq.*), forbade "discrimination on the basis of disability 'under any program or activity conducted by any Executive agency.'" 518 U.S. at 189 (quoting 29 U.S.C. § 794(a)). That the substantive prohibition of the Act covered the federal government could not have been clearer. Nonetheless, the Supreme Court held that the remedial section of the Act—§ 505(a)(2)—did not contain "the 'unequivocal expression' of elimination of sovereign immunity that [the Court] insist[s] upon . . . in statutory text." *Id.* at 192 (quoting *Nordic Village*, 503 U.S. at 37). The remedial section did not make mention of "program[s] or activit[ies] conducted by any Executive agency" like the substantive section did. *Id.* (alterations in original). This was in sharp contrast to other sections of the Rehabilitation Act,

in which Congress did expressly waive immunity. *Id.* at 193 (discussing 29 U.S.C. § 505(a)(1)). The import of *Robinson* and *Lane* is clear: (1) a substantive prohibition extending to the government is not inherently a waiver of sovereign immunity; and (2) the waiver of sovereign immunity as to one provision in an act does not equate to the waiver as to all provisions.

The petitioner suggests that our reading renders the amendments to § 5851 in the EPA meaningless. *See* Pet'r Br. at 26–28; Pet'r Reply Br. at 20–22. To review, the EPA added, inter alia, the NRC as a regulated party under § 5851(a). § 629, 119 Stat. at 785. Peck argues that our finding no waiver of sovereign immunity makes the addition of the NRC to the substantive section a useless and merely symbolic amendment. As a matter of both law and logic, that is simply not the case. Alexander v. Sandoval, 532 U.S. 275 (2001), established that Congress can create a private right with no private remedy without enacting a nullity. Federal agencies may enforce the right. See id. at 289–90. The NRC has an Inspector General who could use the prohibition as a basis for internal discipline against or even termination of supervisors who violate the whistleblower protections. All told, the peitioner is incorrect to suggest that there is no remedy to accompany the statute's protection—it just is not the remedy the petitioner wants. That does not a waiver of sovereign immunity make.

IV.

Safety at nuclear facilities is of paramount importance. Violations of safety protocols there can

have catastrophic consequences. Accidents at Three Mile Island and Chernobyl are evidence enough of that. The magnitude of those accidents explains, in part, why the nuclear industry is so heavily regulated. Whistleblower protections can help prevent such tragedies by allowing engineers, scientists, and others working at facilities to report safety violations without fear of reprisal. No person should lose their job or have their career progression stalled for following the appropriate procedures for safety reporting.

We are not saying what the right thing to do is here. The remedies afforded whistleblowers are far from non-existent. But Congress can, if it wishes, add protections in the form of a private right of action against the NRC itself. Waiving sovereign immunity is a legislative, not a judicial, prerogative. And the legislature has not exercised that prerogative here. For the foregoing reasons, we must deny Peck's petition for review and affirm the ARB's order.

PETITION DENIED

FILED: April 30, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1154
(2017-0062)

MICHAEL S. PECK, Ph.D.
Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD; MARTY WALSH, U.S. Secretary of Labor
Respondents

JUDGMENT

In accordance with the decision of this court, the petition for review is denied.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: June 21, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1154

MICHAEL S. PECK, Ph.D.,
Petitioner,
v.

UNITED STATES DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD; MARTY WALSH, U.S. Secretary of Labor,
Respondents.

ORDER

The Court amends its opinion filed on April 30, 2021, as follows:

On page 16, beginning on line 8, the following two sentences are deleted:

> Finally, the aggrieved party can bring an action against the person employed by the NRC who committed the violation. *See* 42 U.S.C. § 5851(b). Such a respondent would be a "person" as contemplated by the statute.

For the Court – By Direction
/s/ Patricia S. Connor, Clerk

FILED: July 13, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1154
(2017-0062)

MICHAEL S. PECK, Ph.D.
Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD; MARTY WALSH, U.S. Secretary of Labor
Respondents

ORDER

The court grants petitioner's motion for leave to file the amended petition for rehearing and rehearing en banc. The court denies rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Agee, and Judge Floyd.

For the Court
/s/ Patricia S. Connor, Clerk

FILED: May 3, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2320
(8:19-cv-02087-PWG)

LAWRENCE CRISCIONE
Plaintiff - Appellant

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
Defendant – Appellee

ORDER

Lawrence Criscione noted this appeal from the district court's dismissal of his whistleblower-retaliation complaint filed against the Nuclear Regulatory Commission (NRC) under 42 U.S.C. § 5851 of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5801 *et seq., as amended by* Act of Nov. 6, 1978, Pub. L. No. 95-601, 92 Stat. 2947, *and* the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594. The district court held that, because the ERA does not contain a waiver of United States sovereign immunity for whistleblower actions against the NRC, the court was without jurisdiction over the complaint.

After noting this appeal, Criscione promptly moved to hold it in abeyance pending decision in a related case involving the same legal issue, and we

granted that motion. The related case has now been decided. In *Peck v. United States Department of Labor*, ___ F.3d ___, No. 20-1154, 2021 WL 1704278 (4th Cir. Apr. 30, 2021), we held that Congress did not waive sovereign immunity for whistleblower complaints against the NRC under the ERA.

In light of our rejection in *Peck* of the identical issue presented by this appeal, we summarily affirm the district court's dismissal of Criscione's whistleblower-retaliation action against the NRC.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Agee and Judge Floyd.

For the Court
/s/ Patricia S. Connor, Clerk

FILED: May 3, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2320
(8:19-cv-02087-PWG)

LAWRENCE CRISCIONE
Plaintiff - Appellant

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
Defendant - Appellee

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate inaccordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: December 11, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2320
(8:19-cv-02087-PWG)

LAWRENCE CRISCIONE
Plaintiff - Appellant

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
Defendant - Appellee

ORDER

Upon consideration of the unopposed motion to hold case in abeyance, the court grants the motion and places this case in abeyance pending a decision by this court in *Michael S. Peck v. U.S. Department of Labor*, No. 20-1154.

For the Court
/s/ Patricia S. Connor, Clerk

Case No.: PWG 19-cv-2087

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND
Southern Division

Criscione v. U.S. Nuclear Regulatory Comm'n

493 F. Supp. 3d 423 (D. Md. 2020)
Decided Oct 6, 2020

Case No.: PWG 19-cv-2087

10-06-2020

Lawrence CRISCIONE, Plaintiff, v. U.S. NUCLEAR REGULATORY COMMISSION, Defendant.

Karen Juliet Gray, John A. Kolar, Pro Hac Vice, Government Accountability Project, Washington, DC, for Plaintiff. Tarra DeShields Minnis, Office of the United States Attorney, Baltimore, MD, for Defendant.

Paul W. Grimm, United States District Judge

MEMORANDUM AND ORDER

Paul W. Grimm, United States District Judge

Plaintiff Lawrence Criscione sued his employer, the United States Nuclear Regulatory Commission ("NRC") alleging whistleblower retaliation in violation of Section 211 of the Energy Reorganization Act, as amended by the Energy Policy Act of 2005,

Pub. L. 109-58, August 8, 2005 ("ERA"), codified at 42 U.S.C. § 5851. First Am. Compl., ECF No. 29. Mr. Criscione alleges that he disclosed serious nuclear safety concerns to the NRC, the Office of the Inspector General ("OIG") of the NRC, Congress, and the public, and the NRC responded by discriminating against him with respect to his compensation and terms of employment. *Id.* The NRC filed the pending motion to dismiss, asserting that the ERA contains no waiver of United States sovereign immunity with regard to claims brought against the NRC for the complained-of retaliation, so the complaint must be dismissed for lack of subject matter jurisdiction. Mot. Mem. 11, ECF No. 22-1. The NRC also argues that certain claims in both counts of Mr. Criscione's two-count complaint are time-barred, he failed to exhaust administrative remedies, and his claims are not plausible. *Id.* at 17-20. I have reviewed all the filings, ECF Nos. 22, 30, 31, and attached exhibits,[1] and find that a hearing is unnecessary. *See* Loc. R. 105.6 (D. Md. 2018). Because I find that there is no unequivocal waiver of sovereign immunity, I shall GRANT Defendant's motion to dismiss for lack of subject matter jurisdiction and DISMISS the Complaint without prejudice. In light of this ruling, there is no need to

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[1] As discussed below, I reviewed the following exhibits attached to Defendant's motion: Ex. 2, Dep't of Labor Secretary's Findings in Nuclear Regulatory Commission/Criscione/3-0050-14-115 (ECF No. 22-4); Ex. 4, 06/13/18 Dep't of Labor Office of Administrative Law Judges Order Dismissing Complaint in *Criscione v. NRC* , OALJ Case No. 2017- ERA-00009 (ECF No. 22-6); Ex. 6, 03/22/19 Dep't of Labor Administrative Review Board Order Dismissing Complaint in *Criscione v. NRC* , OALJ Case No. 2017-ERA-00009 (ECF No. 22-8).

consider the Defendant's alternative grounds for dismissal.

BACKGROUND[2]

According to its website, the NRC was created "to ensure the safe use of radioactive materials for beneficial civilian purposes while protecting people and the environment [and it therefore] regulates commercial nuclear power plants and other uses of nuclear materials, such as in nuclear medicine, through licensing, inspection and enforcement of its requirements." First Am. Compl. ¶ 13. Mr. Criscione has worked for the NRC since October 26, 2009 as a Reliability and Risk Engineer in the Division of Risk Assessment of the Office of Nuclear Regulatory Research.[3] *Id.* at ¶ 10. Before that, he worked as a Plant Shift Engineer for Ameren Corporation at the Callaway nuclear generating station ("Callaway Plant"). *Id.* at ¶ 14.

While at the Callaway Plant, Mr. Criscione evaluated a safety-related failure that had occurred in 2003 and discovered abnormalities that called into question the competency and integrity of the NRC-licensed operators. *Id.* at ¶¶ 33-36. Mr. Criscione documented and disclosed the irregularities to Ameren managers but was dissatisfied with the lack of response. *Id.* at ¶¶ 39- 41, 47-49. Later, between 2010-2012, after moving to the NRC, he submitted

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[2] For purposes of considering a motion to dismiss, this Court accepts the facts that Plaintiff alleged in his Complaint as true. *See Aziz v. Alcolac, Inc.*, 658 F.3d 388, 390 (4th Cir. 2011).

[3] His employment grade is GS-14. First Am. Compl. ¶ 10.

citizen petitions regarding the incident, formally protested in a "Non-Concurrence form," initiated meetings with NRC officials, provided information to public news and journals, and in August 2012, he described the incident in an email to the NRC Chairman and other officials. *Id.* at ¶¶ 37-38, 50-56. Mr. Criscione alleges that Ameren's legal counsel sent a letter to NRC in January 2011 to confirm an understanding that Mr. Criscione's official duties would not involve any matters related to Callaway. *Id.* at ¶ 57. Mr. Criscione alleges that such an understanding between his prior and current employer constitutes an adverse and discriminatory employment action because it reflects a reduction of his responsibilities. *Id.* Mr. Criscione also alleges that his NRC supervisor directed him to not pursue further regulatory actions related to Callaway, and he received performance counseling for being disrespectful and nonprofessional in connection with his disclosures. *Id.* at ¶ 58.

In September 2012, Mr. Criscione also submitted a disclosure letter to the NRC Chairman—and distributed it throughout the NRC and to the Office of Special Counsel and to two dozen members of Congress—about a serious failure by NRC management to follow through on corrective action against a serious safety vulnerability at the Oconee nuclear power plant in South Carolina. *Id.* at ¶¶ 60, 69-70. Mr. Criscione alleges that he was given a written reprimand for not marking his disclosure letter "For Official Use Only," which constitutes an adverse and discriminatory employment action because it had negative effects on his promotability. *Id.* at ¶ 72. He also alleges that he was directed to

not contact Congress directly again, and he became the subject of a criminal investigation by the Office of the Inspector General. *Id.* at ¶¶ 74-77. Mr. Criscione's November 2013 performance appraisal criticized him for failing to be professional and respectful, but when he objected, the comments were removed. *Id.* at ¶ 78. However, the NRC's Deputy Division Director ordered Mr. Criscione to make no further statements, which he interpreted to be a "gag order." *Id.*

Frustrated with his experience as a GS-14 at NRC headquarters, Mr. Criscione applied for a lowerpaid (GS-13) inspector positions in late 2013, believing they would offer better job satisfaction and more opportunity for long-term career growth. *Id.* at ¶¶ 79-80. The transfers were denied, which Mr. Criscione interpreted as adverse employment actions. *Id.* In March 2014, Mr. Criscione applied for an Operations Engineer position at the regional headquarters in Illinois. *Id.* at ¶ 82. Although his application was referred to the Selecting Official, he was not interviewed, so he filed a union grievance against the agency. *Id.*

Mr. Criscione filed his complaint with the Department of Labor, Occupational Safety and Health Administration ("OSHA") on May 20, 2014. *Id.* at ¶ 16. OSHA dismissed the complaint on May 26, 2017. *Id.*[4] Mr. Criscione objected to the findings and requested a hearing, and on June 13, 2018, the Administrative Law Judge ("ALJ") dismissed Mr.

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[4] *See also* Def.'s Ex. 2, Dep't of Labor Secretary's Findings in Nuclear Regulatory Commission/Criscione/3-0050-14-115 (ECF No. 22-4).

Criscione's complaint on summary decision finding that it lacked subject matter jurisdiction. *Id.*[5] He then filed a petition for review with the Administrative Review Board ("ARB") on June 22, 2018. *Id.* Not yet having received a final decision, on March 7, 2019, Mr. Criscione filed a notice stating his intention to file this lawsuit. *Id.* The ARB dismissed his complaint on March 22, 2019 so Mr. Criscione could pursue his case in federal court. *Id.*[6]

Mr. Criscione alleges that he did not receive vindication through collective bargaining arbitration because the NRC awarded him a Priority Consideration while still refusing to admit that it had neglected to follow its hiring practices. *Id.* at ¶ 82. Since being awarded the Priority Consideration, Mr. Criscione has been offered GS-13 positions, but he now believes that if he takes the demotion, he will never get fair consideration for future promotion back to GS-14. *Id.* at ¶ 84[7]

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[5] *See also* Def.'s Ex. 4, 06/13/18 Dep't of Labor Office of Administrative Law Judges Order Dismissing Complaint in *Criscione v. NRC* , OALJ Case No. 2017- ERA-00009 (ECF No. 22-6).

[6] *See also* Def.'s Ex. 6, 03/22/19 DOL Administrative Review Board Order Dismissing Complaint in *Criscione v. NRC*, OALJ Case No. 2017-ERA-00009 (ECF No. 22-8).

[7] Mr. Criscione also alleges that the pattern of retaliation continued, and he provides examples of various applications for Operations Engineer positions. For example, Mr. Criscione applied for an Operations Engineer position at NRC Region III in February 2015, but he alleges that the posting was withdrawn when his application was received. *Id.* at ¶ 83. In 2017, he was not selected for a position as a Headquarters Emergency Response Officer even though he had more

The NRC filed the pending motion to dismiss Mr. Criscione's complaint for lack of jurisdiction, or alternately for summary judgment on both counts. Mot., ECF No. 22.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) allows a defendant to move for dismissal of a plaintiff's complaint due to lack of subject matter jurisdiction, asserting, in effect, that the plaintiff lacks any "right to be in the district court at all." *Holloway v. Pagan River Dockside Seafood, Inc.*, 669 F.3d 448, 452 (4th Cir. 2012). "Jurisdiction of the lower federal courts is ... limited to those subjects encompassed within a statutory grant of jurisdiction." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 701, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). Because subject matter jurisdiction involves the court's power to hear a case, it cannot be waived or forfeited, and courts have an independent obligation to ensure that subject matter jurisdiction exists. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). The burden of establishing subject matter jurisdiction rests with the plaintiff. *Evans v. B.F. Perkins Co.,* 166 F.3d 642, 647 (4th Cir. 1999). The district court should grant a 12(b)(1) motion "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Balfour Beatty Infrastructure, Inc. v. Mayor & City Council of Balt.,*

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experience that the candidates chosen for the position. *Id.* at ¶ 84A. Mr. Criscione believes that he was not chosen because of his history of protected disclosures. *Id.* He provides additional examples from April 2018 and March 2019. *Id.* at ¶ 84B.

855 F.3d 247, 251 (4th Cir. 2017) (quoting *Evans,* 166 F.3d at 647).

When a defendant moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, asserting a facial challenge that "a complaint simply fails to allege facts upon which subject matter jurisdiction can be based," as Defendant does here, "the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a 12(b)(6) consideration." *Adams v. Bain,* 697 F.2d 1213, 1219 (4th Cir. 1982) ; *see Lujan v. Defs. of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (noting that, on a motion to dismiss, a plaintiff's pleading of the elements of standing are "presum[ed] [to] embrace those specific facts that are necessary to support the claim" (quoting *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990))).

Pursuant to Rule 12(b)(6), a plaintiff's claims are subject to dismissal if they "fail[ ] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a) (2), and must state "a plausible claim for relief," *Ashcroft v. Iqbal,* 556 U.S. 662, 678-79, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937. Rule 12(b)(6) 's purpose "is to

test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Velencia v. Drezhlo,* No. RDB-12-237, 2012 WL 6562764, at *4 (D. Md. Dec. 13, 2012) (quoting *Presley v. City of Charlottesville,* 464 F.3d 480, 483 (4th Cir. 2006)).

Whether considering a Rule 12(b)(1) factual challenge or a Rule 12(b)(6) motion, the Court may take judicial notice of "fact[s] that [are] not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Additionally, the Court may "consider documents that are explicitly incorporated into the complaint by reference." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) ; *see also Sposato v. First Mariner Bank*, No. CCB-12-1569, 2013 WL 1308582, at *2 (D. Md. Mar. 28, 2013) ("The court may consider documents attached to the complaint, as well as documents attached to the motion to dismiss, if they are integral to the complaint and their authenticity is not disputed."); *CACI Int'l v. St. Paul Fire & Marine Ins. Co.,* 566 F.3d 150, 154 (4th Cir. 2009) ; Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."). Moreover, where the allegations in the complaint conflict with an attached written instrument, "the exhibit prevails." *Fayetteville Investors v. Commercial Builders, Inc.,* 936 F.2d 1462, 1465 (4th Cir. 1991) ; *see Azimirad v. HSBC Mortg. Corp.,* No. DKC-10-2853, 2011 WL 1375970, at *2-3 (D. Md. Apr. 12, 2011). As identified, the exhibits I have considered— Department of Labor

rulings—were attached to the Defendant's motion, are relied upon and integral to the Plaintiff's Complaint, and they are also subject to judicial notice.

DISCUSSION

The Plaintiff asserts that this Court has jurisdiction over this action pursuant to 42 U.S.C. § 5851(b) (4) and 28 U.S.C. § 1331. The NRC asserts that Plaintiff's complaint must be dismissed for lack of subject matter jurisdiction because the ERA does not contain a waiver of United States sovereign immunity with regard to claims brought against the NRC for the complained-of retaliation. Mot. Mem. 11.

"As a sovereign the United States 'is immune from suit save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *McLean v. United States,* 566 F.3d 391, 401 (4th Cir. 2009), *abrogated on other grounds by Lomax v. Ortiz-Marquez,* —— U.S. ——, 140 S. Ct. 1721, 207 L.Ed.2d 132 (2020) (quoting *United States v. Testan,* 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976)); *see also Hercules, Inc. v. United States,* 516 U.S. 417, 422, 116 S.Ct. 981, 134 L.Ed.2d 47 (1996) (noting the limits of federal jurisdiction). Sovereign immunity also applies to agencies and instrumentalities of a State, such as the NRC. *See Regents of Univ. of Cal. v. Doe,* 519 U.S. 425, 429, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997) ; *McCray v. Maryland Dept. of Transp., Maryland Transit Admin.,* 741 F.3d 480, 483 (4th Cir. 2014). The defendant bears the burden of

demonstrating sovereign immunity, which is "akin to an affirmative defense." *Hutto v. S.C. Ret. Sys.,* 773 F.3d 536, 543 (4th Cir. 2014). It "'deprives federal courts of jurisdiction to hear claims, and a court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject-matter jurisdiction.'" *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 649 (4th Cir. 2018) (quoting *Ackerson v. Bean Dredging LLC,* 589 F.3d 196, 207 (5th Cir. 2009)).

For a claim to be brought against the United States, there must be an explicit waiver of sovereign immunity. *Lehman v. Nakshian,* 453 U.S. 156, 160-61, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981); *Testan*, 424 U.S. at 399, 96 S.Ct. 948. And the waiver must be established by the statute itself. *See Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996) ("A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text: 'the "unequivocal expression" of elimination of sovereign immunity that we insist upon is an expression in statutory text.'")(quoting *United States v. Nordic Vill., Inc.,* 503 U.S. 30, 37, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992)). The Supreme Court's "clear statement" approach requires courts to strictly construe the text in favor of the sovereign in the absence of a clear statement from the United States waiving sovereign immunity. *See Sossamon v. Texas,* 563 U.S. 277, 290, 131 S.Ct. 1651, 179 L.Ed.2d 700 (2011); *McMellon v. United States,* 387 F.3d 329, 340 (4th Cir. 2004). However, Congress is not required to "make its clear statement in a single section or in statutory provisions enacted at the same time." *Kimel v. Fla.*

Bd. of Regents, 528 U.S. 62, 76, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000).

The NRC is a federal regulatory agency established by the Energy Reorganization Act of 1974, which includes protections for employees who raise nuclear safety concerns. Specifically, 42 U.S.C. § 5851 (a)(1) states:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—
>
> (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);
>
> (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
>
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;....

The term "employer" is then defined, which includes the NRC, and the text continues in subsection (b) to describe the action an employee may take:

> Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint, the Commission, and the Department of Energy....

The text continues to describe in more detail the steps that are taken to investigate and resolve a complaint, including the circumstances under which a complaint may be filed with a United States District Court. *Id.* at § 5851(b). The purpose of such a whistle-blower provision is to "to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment." *Trimmer v. United States Dep't of Labor,* 174 F.3d 1098, 1104 (19th Cir. 1999) (quoting *Passaic Valley Sewerage Comm'rs v. Dep't of Labor,* 992 F.2d 474, 478 (3d Cir. 1993)). As an example, if Mr. Criscione had gone public with his concerns while working as a Plant Shift Engineer for Ameren Corporation at the Callaway Plant, and was discriminated against by Ameren as a result of his whistle-blowing, this provision could provide a remedy.

However, Mr. Criscione is complaining about discrimination by his current employer, a federal agency, and the agency claims it has not waived sovereign immunity under this provision. I have found no federal court decision squarely ruling on whether the NRC has waived sovereign immunity. The plain language in Subsection (b) states "discriminated against by any *person,*" and the term "person" is not defined in the Act. § 5851(b) (emphasis added).

Mr. Criscione's complaint was first reviewed and dismissed by the Secretary of the Department of Labor, finding that the NRC is "not a covered employer" within the meaning of 42 U.S.C. § 5851, "as sovereign immunity applies." Mot. Ex. 2, ECF No. 22-4. Mr. Criscione then requested a hearing by an ALJ, followed by a review by the ARB. The ALJ dismissed the complaint, noting that he was bound by ARB precedent, which held "that Congress has not unequivocally waived sovereign immunity under the ERA." Mot. Ex. 4, ECF No. 22-6.[8]

ARB precedent on this question can be found in *Mull v. Salisbury Veterans Admin. Med. Ctr.*, ARB Case No. 09-107, 2011 WL 4343277 (Aug. 31, 2011). In *Mull*, the ARB specifically analyzed § 5851 to determine whether the federal government waived its sovereign immunity under the ERA. *Id.* It distinguished between the language "employer" in

[8] Because no final decision was issued within one year after the filing of the complaint, Mr. Criscione filed a notice stating his intention to file an action in federal district court, so the ARB dismissed the complaint without issuing a ruling. Mot. Ex. 6, ECF No. 22-8.

the first section providing the anti-retaliation provision from the language "person" in the second section providing the remedy. *Id.* at *5-6. The ARB stated: "After analyzing the ERA, we conclude that it does not contain any language that expresses congressional intent to waive the federal government's sovereign immunity. Certainly, it is self-evident that there is no statement that 'federal sovereign immunity' is waived." *Id.* at *7. The ARB noted that the remedy provision applied to "any person" but "person" is not defined. *Id.* at *8. In comparison, the Clean Air Act, 42 U.S.C § 7622, which also uses the term "person" but specifically "defined it to include 'any agency, department, or instrumentality of the United States,' thereby unequivocally expressing the intent to waive the federal government's sovereign immunity." *Id.* The ARB *432 concluded that there was no waiver of sovereign immunity in the ERA because the "lack of any language including the federal government as an entity against which complaints can be filed or otherwise waiving its sovereign immunity, tends to suggest that Congress did not intend the federal government's sovereign immunity to be waived." *Id.* I find the ARB's analysis persuasive. Importantly, when Congress amended the definition of employer to include the NRC, it was aware of the ARB's earlier decision similarly interpreting the absence of a definition of "person," but it did not additionally amend the definition of person to include the federal government. *Id.* at *9, n.5 (citing *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute

and to adopt that interpretation when it re-enacts a statute without change")).

Also instructive is Judge Russell's analysis of the language in the Fair Credit Reporting Act ("FCRA"), which was also centered on the meaning of the word "person." *Robinson v. Pennsylvania Higher Education Assistance Agency*, Case No.: GJH-15-0079, 2017 WL 1277429, at *2-4 (D. Md. Apr. 3, 2017). Although there was a definition of person in the Act, it was not clear whether the federal government is a "person" for purposes of the general liability provisions. *Id.* Judge Russell recognized that "Congress is well-equipped and able to construct statutory language waiving sovereign immunity, and it has done so in other instances." *Id.* at *3 (citing the Federal Tort Claims Act and the Tucker Act as examples). Judge Russell concluded that the FCRA provisions do not contain a clear and unequivocal waiver of sovereign immunity. *Id.* at *4. The Fourth Circuit affirmed, concluding that "person" does not include the federal government or its agencies, noting that "[t]here is a 'longstanding interpretive presumption that "person" does not include the sovereign.'" *Robinson v. United States Dep't of Educ.*, 917 F.3d 799, 802 (4th Cir. 2019) (quoting *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens,* 529 U.S. 765, 780, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000)).

Mr. Criscione cites *FAA v. Cooper,* 566 U.S. 284, 291, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012) to note that "the Supreme Court 'ha[s] never required that Congress use magic words' of any kind to waive sovereign immunity." Resp. 13. The Fourth Circuit also cited this language in *Robinson*, adding "[b]ut

courts are to 'presume congressional familiarity' with the need for waivers of sovereign immunity to be unambiguous and unequivocal." 917 F.3d at 804. Mr. Criscione adds that he "'need not cite to "an express contrary definition," ' of a term a defendant contends defeats waiver; instead the proponent of waiver need only 'point to some indication in the text or context of the statute that affirmatively shows Congress intended to include the Government' among the entities to which waiver applies." Resp. 13 (quoting *Return Mail, Inc. v. United States Postal Service,* 587 U.S.——, 139 S. Ct. 1853, 1863, 204 L.Ed.2d 179 (2019)). In *Return Mail*, the Supreme Court considered whether the Postal Service, a federal agency, was a "person" eligible to seek patent review, focusing on the patent-review statute's specific remedies' language. 139 S. Ct. at 1861-62. It proceeded from "a 'longstanding interpretive presumption that 'person' does not include the sovereign,' and thus excludes a federal agency," and ultimately found none of the Postal Service's arguments for displacing the presumption sufficient to overcome it. 139 S. Ct at 1861-63. The Court ultimately reinforced the general rule that the Government is presumptively *not* a "person" for purposes of federal statutes. *433 *See id.* at 1862 ("Thus, although the presumption is not a "hard and fast rule of exclusion, it may be disregarded only upon some affirmative showing of statutory intent to the contrary."" (citation omitted)).[9]

[9] I note that *Return Mail* further illustrates that Congress knows how to abrogate sovereign immunity expressly. *See* 139 S. Ct. at 1863 n.3.

Finally, Mr. Criscione argues that different immunity provisions may be tested under disparate levels of scrutiny and suggests that secondary provisions, such as a remedy provision, must be tested under a less stringent "fair interpretation"/"fair inference" standard. Resp. 14-15 (citing *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003)). In *White Mountain*, the Supreme Court allowed the White Mountain Apache Tribe's claim for breach of trust to proceed against the United States, holding that the language of the Act went "beyond a bare trust and permit[ted] *a fair inference* that the Government is subject to duties as a trustee." 537 U.S. at 468-69, 474, 123 S.Ct. 1126 (emphasis added). The case establishes guidelines by which a court determines whether a statute or regulation creates a trust relationship, but it does not refute the requirement for an express waiver of sovereign immunity. The Court explained that although the waiver of sovereign immunity must be unequivocal (and the Act at issue contained such a waiver), the language mandating a right of recovery in damages may be implied, stating that the "fair interpretation rule demands a showing *demonstrably lower* than the standard for the initial waiver of sovereign immunity." *Id.* at 472-73, 123 S.Ct. 1126. Here, the ERA does not contain an explicit waiver of sovereign immunity such as existed in *White Mountain* .

Therefore, recognizing that waivers are not to be implied, and ambiguities are to be resolved in favor of the Government, I conclude that there is no clear unequivocal waiver of sovereign immunity present in

the ERA's whistleblower provisions, and this Court does not have subject matter jurisdiction over Mr. Criscione's claims. I shall GRANT Defendant's motion to dismiss for lack of subject matter jurisdiction. Because I find in favor of the Defendant, I will not reach the alternative arguments raised in the motion.

ORDER

For the reasons stated in this Memorandum and Order, it is this 6th day of October 2020, hereby ORDERED that:

1. Defendant's Motion to Dismiss, ECF No. 22, is GRANTED;

2. Plaintiffs' claims are DISMISSED WITHOUT PREJUDICE;

FILED: July 2, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2320
(8:19-cv-02087-PWG)

LAWRENCE CRISCIONE
Plaintiff - Appellant

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
Defendant - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Agee, and Judge Floyd.

For the Court
/s/ Patricia S. Connor, Clerk

42 U.S. Code § 5851. Employee protection

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

(2) For purposes of this section, the term "employer" includes—

(A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);

(B) an applicant for a license from the Commission or such an agreement State;

(C) a contractor or subcontractor of such a licensee or applicant;

(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344;

(E) a contractor or subcontractor of the Commission;

(F) the Commission; and

(G) the Department of Energy.

(b) Complaint, filing and notification

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint, the Commission, and the Department of Energy.

(2)

(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be

made on the record after notice and opportunity for public hearing. Upon the conclusion of such hearing and the issuance of a recommended decision that the complaint has merit, the Secretary shall issue a preliminary order providing the relief prescribed in subparagraph (B), but may not order compensatory damages pending a final order. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(3)

(A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.

(C) The Secretary may determine that a violation of subsection (a) has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

(4) If the Secretary has not issued a final decision within 1 year after the filing of a complaint under paragraph (1), and there is no showing that such delay is due to the bad faith of the person seeking relief under this paragraph, such person may bring an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(c) Review

(1) Any person adversely affected or aggrieved by an order issued under subsection (b) may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

(2)

An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

(d) Jurisdiction

Whenever a person has failed to comply with an order issued under subsection (b)(2), the Secretary

may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

(e) Commencement of action

(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(f) Enforcement

Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28.

(g) Deliberate violations

Subsection (a) shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended [42 U.S.C. 2011 et seq.].

(h) Nonpreemption

This section may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee.

(i) Posting requirement

The provisions of this section shall be prominently posted in any place of employment to which this section applies.

(j) Investigation of allegations

(1) The Commission or the Department of Energy shall not delay taking appropriate action with respect to an allegation of a substantial safety hazard on the basis of—

(A) the filing of a complaint under subsection (b)(1) of this section arising from such allegation; or

(B) any investigation by the Secretary, or other action, under this section in response to such complaint.

(2) A determination by the Secretary under this section that a violation of subsection (a) has not occurred shall not be considered by the Commission or the Department of Energy in its determination of whether a substantial safety hazard exists.