

IN THE SUPREME COURT OF THE UNITED STATES

No. 05-9739

DIANA R. WILLIAMS, PETITIONER,

v.

UNITED STATES DEPARTMENT OF LABOR,
BALTIMORE CITY PUBLIC SCHOOL SYSTEM, RESPONDENTS

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

PETITION FOR REHEARING

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for the Fourth Circuit.

Petition for Rehearing

Petitioner, Diana R. Williams respectfully prays for a rehearing and reversal of the order entered on the 2nd day of October, 2006, denying its petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, on the following grounds:

1. The majority from the United States Court of Appeals for the Fourth Circuit (hereinafter "Fourth Circuit") fails to properly apply the "Substantial Evidence Standard" in determining whether the Administrative Review Board (hereinafter "ARB") and the Administrative Law Judge (hereinafter "ALJ") erred in finding that the petitioner's whistle-blowing actions were unprotected activity and, thus, the Baltimore City Public School System (hereinafter "BCPSS") had legitimate grounds to dismiss her as a Mathematics teacher. In applying the substantial evidence standard, the Fourth Circuit, the reviewing court, set aside agencies' decisions where they are "unsupported by substantial evidence or are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. & 706(2)(A), (B). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Blackburn v. Martin, 982 F.2d 125, 128 (4th Cir. 1992) (internal quotations and citations omitted). In applying this standard, the Fourth Circuit should examine the entirety of the record, including the ARB's decision, ALJ's decision, and any contrary evidence. Id. (internal citations omitted). Still too, the substantial evidence standard requires the Fourth Circuit to "weigh whatever in the record fairly detracts from the Board's fact-finding as well as evidence that support it." Dorsey Trailers,

Federal whistleblower provisions are "intended 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..." *Passaic Valley Sewerage Commissioners v. United States Dept. of Labor*, 992 F.2d 474, 478 (3rd Cir. 1993). This Fourth Circuit has already noted that federal safety legislation, including whistleblower statutes, should be "broadly construed" so as not to diminish their congressional purpose. *Rayner v. Smith*, 873 F.2d 60, 63 (4th Cir. 1989) (interpreting Federal Railroad Safety Authorization Act to protect whistleblowers in making intra-corporate complaints even though the act itself did not explicitly provide such protection). In the instant case, the Fourth Circuit adopted the findings made by the ARB who agreed with the ALJ's determination that (1) the petitioner was not participating in protected activity under the Federal whistleblower provisions by circulating a letter dated February 24, 1999 which erroneously stated that there is lead in the drinking water at Southeast Middle School (hereinafter "SEMS"); (2) and, the BCPSS' proffered reasons for the petitioner's suspension without pay, namely, for her "unauthorized use of names and addresses of persons to whom she sent the letters and the disruption caused by the circulating the unfounded allegations were legitimate and nondiscriminatory."

Contrary to the ARB's and ALJ's determination that the BCPSS legitimately fired the petitioner, there are four (4) other independent Finders of Fact whose fact-findings and conclusions agree with the fact-findings and conclusion from the opinion of the dissenting judge from the Fourth Circuit, that is, the Honorable Judge Gregory.

The Hearing Examiner, the Regional Investigator for the Federal Occupational Safety and Health Administration (hereinafter "OSHA"), the Regional Supervisory

Investigator for OSHA, and the Regional Administrator for OSHA concluded that the petitioner was wrongfully and unlawfully terminated by the BCPSS and her employer, the Baltimore City Board of School Commissioners (hereinafter "School Board"). Along with the Honorable Judge Gregory, all four independent Finders of Fact found that the petitioner participated in state and/or federal protected activity when she circulated her fliers publicly alleging lead poisoning from lead-tainted drinking water and/or lead poisoning from lead dust created from lead-based paint hazards at four of BCPSS.

The federal OSHA commenced their investigation of the petitioner's discrimination complaint against her employer in December of 1999. Also, the federal OSHA initiated another investigation of a discrimination complaint on behalf of the petitioner against a state agency, which is significantly related to the petitioner's federal discrimination complaint against BCPSS. This federal discrimination complaint was filed against the Maryland Occupational Safety and Health (hereinafter "MOSH") and was filed on September 1, 2000. MOSH's responsibility as a state agency includes investigating employee's discrimination complaints and investigating complaints of environmental hazards in the workplace. As evidenced in the record, the federal OSHA filed the petitioner's discrimination complaint against MOSH under the Complaint Against State Plan Administration (hereinafter "CASPAs complaint"). In essence, the petitioner's CASPA complaint alleges that MOSH did not properly or thoroughly investigate her state discrimination complaint against her employer for wrongfully and unlawfully terminating her employment due to her participation in state and/or federal protected activity. Also, the petitioner alleged that MOSH appeared to be biased, unresponsive or slow to respond at times to her complaints of lead-contaminated drinking water at SEMS and/or lead-based paint hazards at Fairmount-Harford High School (hereinafter "FHHS"), James Mosher Elementary School (hereinafter "JMES"),

and Highlandtown Middle School (hereinafter "HMS").

On October 19, 2001, the federal OSHA investigator wrote a seven page findings of fact and conclusion of law relevant to the CASPA complaint. The OSHA investigator merited the petitioner's CASPA complaint and made numerous recommendations to MOSH on how they should have investigated the petitioner's discrimination complaint against her employer, mentioned that there is an "appearance of a bias" on the part of MOSH relevant to their investigation of the petitioner's complaint of discrimination, and recommended that MOSH re-open the petitioner's complaint of discrimination against her employer. On July 10, 2002, the federal administrator for OSHA issued his factual findings and conclusions which, also, merited the petitioner's CASPA complaint against MOSH, found that MOSH improperly investigated the petitioner's discrimination complaint against her employer, made recommendations to MOSH on how they should investigate future discrimination complaints of employees, and recommended that MOSH re-open the petitioner's complaint of discrimination against her employer. In both instances, MOSH completely ignored the recommendations and never re-opened the petitioner's discrimination complaint against the BCPSS or her employer. The federal administrator informed the petitioner that OSHA could do nothing to MOSH in order to coerce MOSH to re-open her discrimination complaint.

Contrary to the findings of the ARB and ALJ which found that, among other things, the School Board terminated the petitioner because of her "unauthorized access to and use of the names and addresses" of parents of students at SEMS, the petitioner's March 1, 1999 letter of suspension without pay, the petitioner's May 8, 1999 letter which had attached to it the statement of charges document, and the 11-page fact-findings dated October 12, 1999 by the Hearing Examiner, the original Finder of Fact (hereinafter "Findings"), cite that the petitioner is

alleged to have committed: (1) misconduct in office as a result of circulating erroneous information to parents, students, and staff relevant to lead poisoning from lead-contaminated drinking water at SBMS and/or from lead dust created by deteriorated lead-based paint from three of BCPS, namely, FHHS, HMS, and JMS; (2) misconduct in office by failing to follow the chain of command by disseminating the information directly to the public and the media; (3) and, misconduct in office due to the petitioner's inability to perform her duties as a Mathematics teacher. Thus, the petitioner's letter of suspension without pay, statement of charges document, or the issues of the case as cited by the Hearing Examiner never remotely allege or allude to the petitioner being charged with misconduct in office for "unauthorized access to and use of students' names and addresses" as cited in the fact-findings of the ARB and ALJ. Further, the petitioner did state in her 52-page Brief to the ARB that the Respondents cleverly, illegally, and unlawfully amended the original Statement of charges and that Maryland law prohibits the amending of the statement of charges document, especially after there has been a complete hearing on the matter, as was the case with the petitioner's de novo dismissal hearing before the original Finder of Fact.

2. The majority's opinion from the Fourth Circuit fails to properly apply the "Substantial Evidence Standard" to determine whether the Fourth Circuit, the reviewing court, should set aside decisions of the ARB and the ALJ because they "failed to give proper consideration to certain evidence.... and didn't 'consider all the evidence and explain.... the reason for rejecting relevant evidence in support of the claim.'" King v. Califano, 615 F.2d 1018, 1019-20 (4th Cir. 1980) (applying substantial evidence standard and setting aside decision "because the Secretary failed to give proper consideration to certain evidence.... The Secretary must consider all the evidence and explain.... the reason for rejecting relevant evidence in support of the claim"). It is not enough that evidence can be found in the record which, viewed in isolation,

substantiates the Secretary's decision but rather "the
whenever in the record fairly detracts from its weight.
"Universal Camera v. N.L.R.B., 340 U.S. 487-488
(1951).

In the instant case, the ALJ was not the original Finder of
Fact. The Hearing Examiner who was hired by the
School Board to be the original Finder of Fact, presided
over the matter of the petitioner's dismissal hearing
which was held on August 26th and 27th of 1999. The
dismissal hearing was in response to the CEO's March 1,
1999 letter of suspension without pay and the May 8,
1999 letter which included the Statement of Charges.
document against the petitioner. In these two documents,
the CEO of BCPSS recommended suspension without
pay and dismissal of the petitioner as a Mathematics
teacher in the
BCPSS primarily based on their
allegations that the petitioner circulated erroneous files
alleging lead in the drinking water and/or lead-based
paint hazards at four of BCPSS.

In his Findings, the Hearing Examiner concluded that the
petitioner has received substantial training in the field of
lead paint assessment and abatement. Secondly, the
original Finder of Fact concluded that the petitioner
presented sufficient documentation to support her
statements in the circulated letter dated February 24,
1999 to parents of students at SEMS about their being
lead in the drinking water. Also, contrary to the ARB's
and the ALJ's fact-findings, the Findings by the Hearing
Examiner and the Honorable Judge Gregory from the
Fourth Circuit gives a more detailed chronology of facts
which supports the petitioner claim that there was lead in
the water at SEMS when the letter was circulated, that
BCPSS and her employer knew since 1993 that SEMS as
well as thirty-one other BCPSS had lead-contaminated
drinking water, that the BCPSS did not fully disclose to
the parents that there was an issue with the lead content
of water at SEMS before the petitioner circulated her
letter dated February 24, 1999, and that BCPSS may

three OSHA Finders of Fact concluded that the petitioner's circulated letter was covered under federal protected activity. And contrary to the ARB's and ALJ's fact-findings, the Hearing Examiner concluded the weight of the evidence supports the petitioner's claim of lead paint hazards at FHHS and JMES. Moreover, the ALJ cited in her opinion that the petitioner's tier relevant to JMES and HMS were circulated in April of 1998, and MOSH did not investigate her complaints about the health hazards until July of 1998. Thus, it is contradictory for the ALJ to conclude that the environmental hazards at JMES and HMS were addressed and resolved by MOSH when the petitioner's tier was circulated. Furthermore, it is illegal and unlawful for the ALJ not to give proper consideration to the Findings of the Hearing Examiner and the three OSHA Finders of Fact, not to state her reason for rejecting such critical and relevant fact-findings and conclusions of law that supports the petitioner's claim that she was wrongfully and unlawfully terminated by her employer. Consequently, the majority Fourth Circuit and the ARB should set aside the decision of the ALJ since she failed to give proper consideration to such critical and relevant evidence and failed to explain her reason for rejecting the fact-findings by four other independent Finders of Fact that supports the petitioner's claim that she was wrongfully and unlawfully terminated by her employer.

Furthermore, since August of 1996, the petitioner has been participating in state and/or federal protected activity. Since 1997, the petitioner has been accredited by the state agency whose responsibility includes issuing accreditation certificates in lead hazard control and assessment, issuing documentation to lead abatement contractors for proof of reduction and/or abatement of lead hazards, and enforcing regulations relevant to lead-based paint hazard control. This state agency is called the Maryland Department of the Environment (hereinafter "MDE"). Among other certifications,

the petitioner has been accredited by MDE as an Inspector Technician and Lead Abatement Contractor. As an Inspector Technician, the petitioner is required by MDE to adhere to her written protocol submitted to MDE relevant to inspecting properties in order to determine the presence and location of lead-based paint, to perform dust wipe sampling to detect for lead dust above EPA's standard, and to collect samplings of water according to a specific protocol approved by MDE and submit the samples to an EPA certified laboratory in order to determine the lead content of the water. As a lead abatement contractor, MDE's

regulations recognizes the petitioner as a "Lead Expert", contrary to the ARB's and ALJ's findings that the petitioner called herself a "lead expert". And, as a lead abatement contractor, the petitioner can expertly identify what MDE recognizes as a lead-based paint hazard, the various means for reducing and/or eliminating the lead-based paint hazards, what protection protocols need to be in place prior to initiating any lead hazard reduction or abatement so as not to expose workers, employees, Headstart children, pregnant females, or others to lead poisoning, and what necessary procedures and documentation are required by MDE in order to pass a "clearance testing" which permit re-occupancy of a facility once a lead-based paint hazard has been identified, reduced and/or abated. Thus, again, it is wrong and unlawful for the ARB and the ALJ not to give proper consideration to such relevant evidence in the record which substantiates why the petitioner can expertly detect lead hazards which cause lead poisoning to thousands of unsuspecting lives. Thus, the majority Fourth Circuit should have set aside the decisions of the ARB and ALJ because they did not give consideration to crucial, relevant evidence nor did they give a reason for rejecting the relevant evidence that support the petitioner's claim.

The Court should set aside the decisions of the ARB and ALJ because of their failure to give proper consideration to the federal OSHA's extensive record, which includes

the February 29, 2000 and the June 12, 2000 fact-finding and conclusions of law of the federal OSHA's Investigator and the Supervisory Investigator, both of whom merited the petitioner's discrimination complaint against the BCPSS and her employer. Also, the Court should set aside the ARB's decisions because the ARB failed to give proper consideration to the October 19, 2001 and July 10, 2002 findings of fact and conclusions by the federal OSHA's Regional Investigator and Supervisor, whom, also, merited the petitioner's CASPA complaint against MOSH and detailed how MOSH improperly investigated the petitioner's complaint against the BCPSS, revealed how "appearance of a biased investigation" on the part of MOSH, made recommendations for future investigations by MOSH, and recommended that MOSH re-open the petitioner's discrimination complaint against her employer. Moreover, the majority Fourth Circuit should set aside the decisions of the ARB and ALJ to all the critical and relevant evidence in the record by these four independent Finders of Fact, but failed to give any reason for rejecting the critically relevant evidence of these four Finders of fact which support the petitioner's claim of being wrongfully and unlawfully discriminated against by her employer.

Dated October 20, 2006

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