ISSUES IN EMPLOYMENT DISCRIMINATION

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ISSUES

- ISSUE 1: RECENT RASH OF ENFORCEMENT ACTIONS HAS RESULTED IN LICENSEE MANAGERS BEING FEARFUL OF TAKING APPROPRIATE MANAGEMENT ACTIONS

- ISSUE 2: NRC HAS CHANGED THE STANDARDS IN EMPLOYMENT DISCRIMINATION CASES BY ADDING AN "IN PART" TEST

- ISSUE 3: NRC HAS ELIMINATED THE ELEMENT OF INTENT IN ACTIONS UNDER 10 C.F.R. 50.7

- ISSUE 4: NRC HAS ELIMINATED THE ADVERSE ACTION REQUIREMENT IN CASES ARISING UNDER 10 C.F.R. 50.7

- ISSUE 5: NRC FINDS LICENSEE'S GUILTY OF DISCRIMINATION BUT FINDS NO MANAGER RESPONSIBLE FOR THE DISCRIMINATION

ISSUE 1: MANAGEMENT FEARS

- THE SKY IS NOT FALLING!! THE PERCENTAGE AND ABSOLUTE NUMBER OF SUBSTANTIATED CASES HAS REMAINED STEADY.
- OVER 95% OF ALL ALLEGATIONS OF DISCRIMINATION ARE RESOLVED IN FAVOR OF THE LICENSEE
- IN THE PAST FIVE YEARS ONLY ONE LICENSEE MANAGEMENT OFFICIAL HAS RECEIVED AN ORDER BANNING HIM FROM LICENSED ACTIVITIES DUE TO DISCRIMINATION
- ODDS OF A LICENSEE MANAGER WINNING THE LOTTERY ARE GREATER THAN THE ODDS OF RECEIVING AN ORDER WITH ONE SIGNIFICANT DIFFERENCE -- YOU CAN WIN AN ORDER!

ISSUE 2: THE "IN PART" TEST

- NRC AND DOL USE THE SAME CAUSATION STANDARD FOR FINDING VIOLATIONS
- ERA SECTION 211(b)(3)(C) PROVIDES THAT IT IS A VIOLATION OF THE ACT IF PROTECTED ACTIVITY WAS A "CONTRIBUTING FACTOR" IN THE UNFAVORABLE PERSONNEL ACTION
- ERA SECTION 211(b)(3)(D) PROVIDES THAT NO REMEDY MAY BE ORDERED IF THE EMPLOYER DEMONSTRATES BY CLEAR AND CONVINCING EVIDENCE THAT SAME ACTION WOULD HAVE BEEN TAKEN ABSENT PROTECTED ACTIVITY
- DOL CASE LAW USES THE TERMS CONTRIBUTING FACTOR AND RESPONSIBLE IN PART INTERCHANGEABLY
- DIFFERENCE IN ULTIMATE APPLICATION ARISES FROM DIFFERENCE IN DOL AND NRC INTERESTS -- DOL IS RESPONSIBLE FOR PROVIDING A PERSONAL REMEDY TO EMPLOYEES WHO HAVE BEEN DISCRIMINATED AGAINST AND NRC IS INTERESTED IN ASSURING AN ENVIRONMENT IN WHICH EMPLOYEES FEEL FREE TO RAISE SAFETY CONCERNS

ISSUE 3: INTENT

- ONLY INTENT NECESSARY IS THAT ACTION IS BASED ON PROTECTED ACTIVITY
- SPECIFIC INTENT TO VIOLATE 10 C.F.R. 50.7 IS NOT NECESSARY
- AS IN OTHER DISCRIMINATION STATUTES -- IGNORANCE IS NOT AN EXCUSE FOR THE LICENSEE

ISSUE 4: ADVERSE ACTION

- NEITHER SECTION 211 NOR 10 C.F.R. 50.7 ARE CONFINED TO ADVERSE PERSONNEL ACTIONS -- BOTH COVER ANY NEGATIVE IMPACT ON TERMS AND CONDITIONS OF EMPLOYMENT
- THREATS ARE CONSIDERED BY THE STAFF TO BE A PER SE VIOLATION
- IT MAKES NO SENSE FROM A SCWE PERSPECTIVE TO ONLY CONSIDER INEFFECTIVE THREATS AS DISCRIMINATION
- 10 C.F.R. 50.7(f) SPECIFICALLY PROHIBITS ANY TERM OR CONDITION OF EMPLOYMENT THAT WOULD PREVENT OR DISCOURAGE AN EMPLOYEE FROM ENGAGING IN PROTECTED ACTIVITY
- STAFF CONSIDERS EVERY EMPLOYMENT CONTRACT IN THE INDUSTRY TO HAVE IN IT A TERM THAT GUARANTEES THE RIGHT TO ENGAGE IN PROTECTED ACTIVITY

ISSUE 5: 50.5 VS 50.7

- DIFFERENT RESULTS ARE THE RESULT OF DIFFERENT STANDARDS
- AS PREVIOUSLY DISCUSSED SPECIFIC INTENT IS NOT A REQUIREMENT UNDER 10 C.F.R. 50.7 FOR LICENSEES
- LICENSEE EMPLOYEES ARE NOT COVERED BY 10 C.F.R. 50.7 AND THEREFORE ENFORCEMENT ACTIONS AGAINST INDIVIDUALS MUST BE TAKEN UNDER THE WRONGDOER RULE -- 10 C.F.R. 50.5
- 10 C.F.R. 50.5 CARRIES A SIGNIFICANTLY DIFFERENT STANDARD -- NAMELY THAT THE INDIVIDUAL "DELIBERATELY" DISCRIMINATED. SPECIFIC INTENT WOULD HAVE TO BE ESTABLISHED.