

April 29, 1999

FOR: The Commission
 FROM: John F. Cordes, Jr. /s/ Solicitor
 SUBJECT: LITIGATION REPORT - 1999 - 2

National Whistleblower Center v. NRC, No. 98-1581 (D.C. Cir., decided March 31, 1999)

This was the first of three lawsuits filed by the National Whistleblower Center (NWC) challenging its dismissal, for failure to file timely contentions, from the Calvert Cliffs license renewal proceeding. We moved to dismiss this lawsuit as premature, on the ground that it was filed at the same time as NWC was pursuing an administrative appeal to the Commission. The court of appeals (Edwards, Ginsburg & Sentelle, JJ.) agreed with our position and issued an order dismissing the suit.

Remaining before the court of appeals are two additional suits, filed after the final Commission decision in the Calvert Cliffs case. The court of appeals has consolidated the two remaining suits for briefing and argument, but has not yet established a briefing schedule.

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Dienethal v. NRC, No. 99-1001 (D.C. Cir., decided March 31, 1999)

This lawsuit challenged a Licensing Board decision dismissing petitioner's challenge, for lack of standing, to license amendments at Commonwealth Edison Company's Zion nuclear power plant. We filed a motion to dismiss the suit, on the ground that it had been filed prematurely. At the time petitioner filed suit, he also was pursuing an administrative appeal of the Board decision to the Commission. The Commission ultimately affirmed the Board decision (CLI-99-04).

The court of appeals (Edward, Ginsburg & Sentelle, JJ.) agreed with our prematurity argument and issued a one-page order granting our motion to dismiss.

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Dienethal v. NRC, No. 99-1122 (D.C. Cir., filed April 2, 1999)

Upon the court of appeals' dismissal of petitioner's premature lawsuit (see description immediately above), petitioner refiled his suit and styled it as a challenge to the Commission's final order affirming the Licensing Board decision. Petitioner's latest lawsuit is timely. He again will assert that he has standing to intervene in a Zion license amendment proceeding. The Board and the Commission ruled that petitioner had failed to specify how he might be harmed by the challenged amendments -- which facilitated certain staffing and management changes at Zion to account for its defueled and shut-down status.

The court of appeals has not yet established a briefing schedule.

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Dolford v. United International Investigative Services, Inc., No. AW-98-3984 (D. Md., decided February 26, 1999)

Plaintiffs in this lawsuit were former security guards at the NRC who lost their jobs when they could not meet weight requirements contained in their employer's contract with the NRC. They sued their employer, former NRC contractor United International Investigative Services (UIIS), and claimed unlawful discrimination under the Americans With Disabilities Act (ADA). UIIS, in turn, brought a "third-party action" against the NRC on the theory that UIIS's decision to fire plaintiffs rested entirely on NRC-imposed weight requirements for security guards. UIIS demanded that the NRC provide indemnification for any damages assessed against UIIS.

The district court (Williams, J.) issued an order terminating the lawsuit. The court ruled that neither the ADA itself nor federal common law gave contractors a right to seek indemnification from the government in ADA suits. The court also ruled that plaintiffs' obesity was not a proper basis for an ADA suit, both because obesity is not generally regarded as a "disability" under the ADA and because UIIS did not regard plaintiffs as disabled or take action against them on that ground.

We worked with the U.S. Attorney's office in Maryland in defending this lawsuit. There apparently will be no appeal.

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Timbers v. United States, No. MJG 99 CV 501 (D. Md., filed March 3, 1999)

This is a Federal Tort Claims Act suit for damages against the United States arising out of a slip and fall in an NRC building (OWFN). The fall allegedly occurred because of a wet floor. Plaintiff has sued not only the government but also an NRC contractor, Tecom. OGC is working with the United States Attorney's office in defending the suit.

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