

ILLINOIS POLLUTION CONTROL BOARD
June 5, 1997

BERNICE LOSCHEN,)	
)	
Complainant,)	
)	PCB 97-174
v.)	(Enforcement - Citizens)
)	
GRIST MILL CONFECTIONS, INC.,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J. Yi):

This matter is before the Board on a complaint filed on April 3, 1997 by Ms. Bernice Loschen. The complaint alleges that the respondent, Grist Mill Confections, Inc. (respondent or Grist) has violated Sections 3.02, 3.03, 8, 9(a) and (b), and 9.5(a)(1) and (a)(2) of the Environmental Protection Act (Act) (415 ILCS 5/3.02, 3.03, 8, 9(a) and (b), and 9.5(a)(1) and (a)(2) (1994)) as a result of odor being emitted by respondent's facility.

On April 11, 1997, the respondent filed a motion to dismiss the complaint.¹ The respondent argues that the complaint is frivolous because it requests relief beyond that which the Board has the statutory authority to provide and that respondent has not violated the Act. On April 21, 1997, complainant filed a response to the motion to dismiss.² Additionally, the Board notes that complainant filed a motion for an extension of time on April 28, 1997, and a motion to withdraw the motion for an extension of time on April 30, 1997. Finally, the complainant on May 14, 1997 filed a motion to stay so that she may amend the prayer for relief.

For the reasons stated below, the Board denies respondent's motion to dismiss and sets this matter for hearing. The Board does strike complainant's allegations that respondent violated Sections 3.02, 3.03, 8 and 9.5(a)(1) and (a)(2) of the Act because they do not contain any prohibitions, Section 9(b) of the Act due to complainant's failure to state any facts to support the allegation and complainant's request for monetary damages. Additionally, the Board denies complainant's motion to stay and grants complainant's motion to withdraw the motion for an extension of time.

¹ The complaint will be referenced to as (Comp. at) and the motion to dismiss will be referred to as (Mot. at .)

² The complainant's response will be referred to as (Resp. at .)

BACKGROUND

The respondent's factory is located at 805 N. Griffin Street, Danville, Vermillion County, Illinois and has been operating at that location since 1990. (Mot. at 1, Comp. at 2.) The plant receives raw materials such as cornstarch, corn syrup, sugar and juice concentrate, and which, through the use of steam injection cookers, produces candy that is packaged off-site. (Mot. at 2.) The respondent states that the plant operates from 6:00 a.m. until 5:00 p.m. five to six days a week. (Mot. at 2.) The complainant purchased a home near respondent's facility on January 25, 1997, but has not moved into the premises. (Comp. at 2.) Complainant claims that she is afflicted with Multiple Chemical Sensitivity (MCS). (Resp. at 2.) Complainant asserts that the odors emitted from respondent's plant aggravated her disability, MCS, to the point that she felt she should not move into the home. (Resp. at 2.) Complainant lists the following times she visited the home when the odor was noticeable: February 12, February 20, February 25, March 3 and March 11, 1997. (Comp. at 3.)

As a result the complainant is alleging a violation of Sections 3.02 and 3.03 of the Act which define "Air Pollution" and "Air Pollution Control Equipment", respectively and Section 8 of the Act that sets forth the purpose of Title II of the Act and the General Assembly's findings concerning pollution of the air. Furthermore, the complaint alleges a violation of Section 9(a) of the Act which is the general prohibition against air pollution and Section 9(b) of the Act which is the general prohibition to build and operate an emission source without Illinois Environmental Protection Agency (Agency) permitting or in violation of a permit. Finally, the complainant is alleging that respondent violated Sections 9.5(a)(1) and (a)(2) of the Act which set forth the General Assembly's findings concerning toxic air emissions and the adequacy of the federal programs concerning the listing of toxic air contaminants.

Complainant filed a motion to stay this matter so that she may file a motion to amend her form of relief. Complainant indicates in her motion for stay that she is requesting the stay so that she may amend her complaint to request that respondent build higher emission stacks so that the chemical emissions will disperse and hopefully her symptoms will be alleviated. Complainant has not filed the motion to amend her complaint and there has been no response from respondent.

ARGUMENTS

The respondent's first argument is that the complaint requests the Board to grant relief beyond the scope of the Board's statutory authority. (Mot. at 3.) Respondent, citing to CPC Intern, Inc. v. Illinois Pollution Control Board, 24 Ill.App.3d 203, 321 N.E.2d 58 (1974), asserts that the Board may not grant relief in the form of monetary or other compensatory damages for injury to health or property. (Mot. at 3.) Respondent argues that the complainant's request that the Board order respondent to purchase purifier machines for complainant's use and/or to pay money to complainant so that she may purchase a new house at a different location are beyond the Board's statutory authority to grant. Therefore, respondent concludes that the complainant is frivolous. (Mot. at 3.)

Next, respondent argues that it has not violated the Act. (Mot. at 4.) Citing to Wells Manufacturing Company v. Illinois Pollution Control Board, 73 Ill. 2d 226, 383 N.E. 2d 148 (Ill. 1978), respondent asserts that, as in Wells, after weighing the factors of Section 33(c) of the Act 9415 ILCS 5/33(c)(1994) the Board could not possibly find that there is an unreasonable interference. (Mot. at 4-6.) Furthermore, citing to Darling and Company v. Illinois Pollution Control Board, 28 Ill. App. 3d 258, 328 N.E. 2d 1222 (1975), the respondent asserts that "while compliance with the rules and regulations promulgated by the Board under the Act is not a complete defense to an action alleging a violation of the Act, such compliance constitutes a *prima facie* defense to any legal, equitable, criminal or administrative action or proceeding and is sufficient unless and until rebutted by sufficient evidence. (Mot. at 6.) Respondent argues that an Agency inspection report (attached as Exhibit C to its motion) which stated; "[t]he plant production areas have a distinct candy smell, but I didn't detect any odors that would likely be offensive to a person with normal health" demonstrates that there is no violation of the Act. (Mot. at 6.) Therefore, respondent based on these arguments claims that it has not violated Section 9(a) of the Act and that this matter should be dismissed.

Finally, respondent argues that Sections 3.02, 3.03, 8, and 9.5(a)(1) and (a)(2) of the Act do not contain any prohibition which could be violated by any person or entity. (Mot. at 7.) The respondent asserts that these sections either provide general legislative findings or are definitions. (Mot. at 7.) Therefore, respondent concludes that it cannot violate these sections and the complaint should be dismissed.

In response, complainant states that one of the requests for relief from the Board was to order the respondent to stop polluting. (Resp. at 2.) Complainant asserts that this relief could include improving emissions from respondent's plant, closing the plant or notifying complainant when production will take place, all of which are not monetary compensation. (Resp. at 2.) Regarding the specific alleged violations of Sections 3.02, 3.03, 8, and 9.5(a)(1) and (a)(2) of the Act, complainant asserts that respondent's actions meet the described legislative findings or definitions contained in those sections but does not argue whether Sections 3.02, 3.03, 8, and 9.5(a)(1) and (a)(2) of the Act contain any prohibition. (Resp. at 4-7.) Additionally, complainant argues that the evidence that will be presented at hearing will demonstrate that respondent has not met the "high standard required to reflect Grist Mills (sic) *prima facie* defense." (Resp. at 8.)

STANDARD OF REVIEW

The courts have stated that a motion to dismiss a pleading should be granted where the well-pleaded allegations, considered in the light most favorable to the non-movant, indicate that no set of facts could be proven upon which the petitioner would be entitled to the relief requested. (See Uptown Federal Savings & Loan Assoc. v. Kotsiopoulos (1982), 105 Ill. App. 3d 444, 434 N.E.2d 476.) The Board has stated "[a] motion to dismiss, like a motion for summary judgment, can succeed where the facts, taken in a light most favorable to the party opposing the motion, prove that the movant is entitled to dismissal as a matter of law." (BTL Specialty Resins v. Illinois Environmental Protection Agency (April 20, 1995), PCB 95-98.)

Section 103.124(a) of the Board's procedural rules, which implements Section 31(b) of the Act (415 ILCS 5/31(b)), provides:

...If a complaint is filed by a person other than the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the Board agenda for Board determination whether the complaint is duplicitous or frivolous, it shall enter an order setting forth its reasons for so ruling and shall notify the parties of its decision. If the Board rules that the complaint is not duplicitous or frivolous, this does not preclude the filing of motions regarding the insufficiency of the pleadings. (35 Ill. Adm. Code 103.124.)

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. (Brandle v. Ropp (June 13, 1985), PCB 85-68, 64 PCB 263.) An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. (Citizens for a Better Environment v. Reynolds Metals Co. (May 17, 1973), PCB 73-173, 8 PCB 46.)

DISCUSSION

The Board denies the respondent's motion to dismiss. Respondent argues that this matter is frivolous because certain forms of relief requested by the complainant cannot be granted by the Board. The Board agrees with respondent that the Board cannot order the respondent to pay monetary compensation so that complainant may purchase another house; we accordingly strike that portion of the relief requested. However, as complainant asserts, the Board may order respondent to cease and desist from violating the Act by taking appropriate measures. Thus the Board finds that the complaint is not frivolous due to the requests for monetary compensation because the complaint also requests relief that maybe granted.

Respondent also argues that it did not violate the Act. First, respondent argues that when weighing the factors of Section 33(c) of the Act, as the court did in Wells, the Board should find that there is no unreasonable interference. Illinois is a fact-pleading state which requires the pleader to set out ultimate facts which support his cause of action. (LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297 (2d Dist. 1993).) Despite the requirement of fact pleading, courts are to construe pleadings liberally to do substantial justice between the parties. (Classic Hotels, Ltd. v. Lewis, 259 Ill. App. 3d 55, 60, 630 N.E.2d 1167 (1st Dist. 1994).) However, case law is consistent in finding that pleading requirements for administrative review are less exacting than for other causes of action. (Mueller v. Board of Fire and Police Commissioners of the Village of Lake Zurich, 267 Ill. App. 3d 726, 643 N.E.2d 255, 262 (2d Dist. 1994).)

Additionally, a complainant is not obligated to introduce evidence on each of the Section 33(c) factors. (See Incinerator, Inc. v. Pollution Control Board, 59 Ill. 2d 290, 296, 319 N.E.2d 794, 797 (1974); Processing and Books, Inc. v. Pollution Control Board, 64 Ill. 2d 68, 75-77, 351 N.E.2d 865, 869.) Furthermore, the respondent has the burden of proof as to the Section 33(c) factors "to the extent that a factor is not a necessary part of Complainants'

burden as to unreasonableness." (IEPA v. W.F. Hall Printing Company (September 15, 1977), PCB 73-30, 27 PCB 371,372, n.3 (citing Processing and Books, Inc., 64 Ill. 2d 68, 351 N.E.2d 865 (1976)).) The Board finds that it would be premature to weigh the factors of Section 33(c) of the Act at this time, since complainant is not required to present facts in the complaint concerning Section 33(c) of the Act in order to file a sufficient pleading but instead may present facts at hearing. Therefore the Board denies respondent's motion to dismiss prior to hearing because facts could be presented at hearing that demonstrate, after weighing the factors of Section 33(c) of the Act, that respondent has violated Section 9(a) of the Act.

Furthermore, the Board agrees with respondent that Sections 3.02, 3.03, 8, and 9.5(a)(1) and (a)(2) of the Act do not contain prohibitions which can be violated and strikes these allegations from the complaint. Additionally, the Board notes that respondent in its motion to dismiss does not specifically address the alleged violation of Section 9(b) of the Act and that complainant fails to allege any facts concerning this allegation. Since complainant fails to allege any facts to support the allegation in her complaint the Board strikes this allegation. However, the complainant alleges a violation of Section 9(a) of the Act, which does contain prohibitions that can be violated. Therefore the Board denies respondent's motion to dismiss and finds that this matter is not frivolous.

Respondent has not argued that this matter is duplicitous and we have no indication at this time that the matter is identical or substantially similar to one brought in another forum. Therefore we find that this matter is not duplicitous.

Complainant's motion for stay is denied. Complainant states she is requesting a stay so that she may amend the form of relief in her complaint. Complainant's proposed amendment, to require respondent build higher emission stacks, is not requesting any alternative form of relief. Complainant has requested that respondent cease and desist from the alleged violations and to request that respondent build higher emission stacks so that there will no longer be a problem (violation) is merely providing an alternative compliance option for respondent. Complainant may argue at hearing that building higher emission stacks is an economically reasonable and technically feasible compliance option pursuant to Section 33(c) of the Act, but complainant does not need to amend her complaint. (415 ILCS 5/33(c) (1996).)

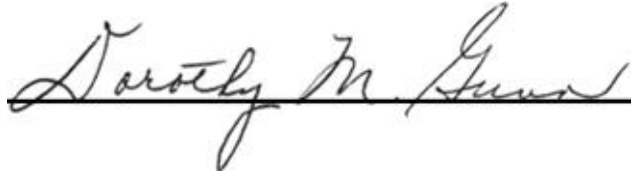
Having found that this matter is neither duplicitous nor frivolous, the Board will set this matter for hearing. The hearing must be scheduled and completed in a timely manner, consistent with Board practices. The Board will assign a hearing officer to conduct hearings consistent with this order and the Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer consistent with this order.

The assigned hearing officer shall inform the clerk of the Board of the time and location of the hearing at least 40 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses and all actual exhibits to the Board within five days of the hearing. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

Board Member J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 5th day of June, 1997, by a vote of 6-1.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board