

ILLINOIS POLLUTION CONTROL BOARD
September 18, 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 motion for summary judgment filed on September 4, 1997, by Grist Mill Confections, Inc. (respondent) in response to a complaint filed on April 3, 1997, by Bernice Loschen (complainant). Respondent alleges that it has not violated the Illinois Environmental Protection Act (Act) (415 ILCS 5/1 (1996)) and that summary judgment should be granted in its favor. On September 9, 1997, respondent filed a motion to continue or cancel the hearing currently scheduled to proceed on September 23, 1997, on the grounds that it is unlikely the Board will have an opportunity to render a decision on respondent's motion for summary judgment prior to hearing.

On September 15, 1997, complainant filed a letter with the Board requesting additional time in which to file a response to respondent's motion for summary judgment. On September 17, 1997, complainant filed a response to respondent's motion for summary judgment and a motion requesting that the hearing proceed on September 23, 1997, as originally scheduled by the hearing officer. The Board accepts and considers complainant's September 17, 1997 filings.

For the reasons stated below, the Board denies respondent's motion for summary judgment. Accordingly, respondent's motion to continue or cancel the hearing and complainant's motion that the hearing proceed are moot. This matter shall proceed to hearing.

BACKGROUND

Respondent's factory is located at 805 N. Griffin Street, Danville, Vermilion County, Illinois, and has been operating at that location since 1990. MSJ¹ at 1, Comp. at 2. The plant

¹ Complainant's complaint filed on April 3, 1997, will be referred to as Comp. at __; respondent's motion to dismiss filed on April 11, 1997, will be referred to as MTD at __; respondent's motion for summary judgment filed on September 4, 1997, will be referred to as

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. MSJ at 2-3. Respondent states that the plant operates from 6:00 a.m. until 5:00 p.m. five to six days a week. MSJ. at 2. 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) Comp. 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. Comp. 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.

The complaint alleges violation of Section 9(a)² of the Act (415 ILCS 5/9(a) (1996)) which is the general prohibition against air pollution.

ARGUMENTS

In its motion for summary judgment, respondent argues that it is in compliance with all applicable rules and regulations. MSJ at 3. Respondent, citing to Darling & Company v. Illinois Pollution Control Board, 28 Ill. App. 3d 258, 328 N.E.2d 122 (1st Dist. 1975), asserts that compliance with the Act constitutes a *prima facie* defense to any legal, equitable, criminal, or administrative action or proceeding that is sufficient unless and until rebutted by sufficient evidence. MSJ at 3. Respondent argues that complainant cannot rebut this defense. MSJ at 3. Moreover, respondent states that the Illinois Environmental Protection Agency (Agency) inspected respondent's facility, concluding that it had obtained and currently maintains air operating permits and related pollution control equipment for all relevant potential sources of air emissions located within the facility. MSJ at 3. Respondent asserts that both the annual emissions data and the conclusions set forth in the inspection report by the Agency indicate that respondent operates at or well below the guidelines set forth in such permits. MSJ at 3. Finally, respondent maintains that complainant's allegations of a "sweet odor" does not mean the emissions from respondent's facility are unlawful. MSJ at 4.

In addition, respondent maintains that it has not violated the Act because the "sweet odor" does not constitute air pollution as defined by the Sections 3.02 or 9 of the Act. MSJ at 4; See 415 ILCS 5/3.02, 9 (1996). Moreover, respondent asserts that, according to Section 31(c) of the Act, the burden of proof is on the complainant to demonstrate that respondent has caused air pollution. MSJ at 4; see 415 ILCS 5/31(c) (1996). In citing Wells Manufacturing Company v. Illinois Pollution Control Board, 23 Ill. 2d 226, 383 N.E.2d 148 (1978), respondent argues that much more than emitting the sweet scent of jellied candies is required to constitute air pollution under the Act. MSJ at 5. In Wells, respondent maintains that the

MSJ at __; complainant's response to respondent's motion for summary judgment filed on September 17, 1997, will be referred to as Resp. at __.

² In its June 5, 1997 order, the Board dismissed Sections 3.02, 3.03, 8, 9(b), and 9.5(a)(1) of complainant's complaint. Bernice Loschen v. Grist Mill Confections, Inc. (June 5, 1997), PCB 97-174.

Supreme Court stated that, in order to determine whether air pollution exists, “the Board must balance the costs and benefits in an effort to distinguish trifling inconvenience, petty annoyance or minor discomfort from a substantial interference with the enjoyment of life and property.” MSJ at 5 citing Wells, 23 Ill. 2d 226, 383 N.E.2d 148 (1978).

Finally, respondent asserts that the facts of the present case are similar to those in Wells. Mot. at 5. Respondent alleges that the candy odors are not unreasonable. MSJ at 5. Respondent further argues that complainant suffers from a unique condition known as MCS. Moreover, respondent maintains that any such candy-related odors, when experienced by persons with ordinary and normal sensory ability, most likely would be viewed as pleasant and enjoyable. MSJ at 5. Further, respondent argues that no other complaints or other related inquiries have been received by either respondent or the Agency with respect to emission of odors. MSJ at 5. In addition, respondent argues that complainant, like the plaintiffs in Wells, was on notice regarding respondent’s existence and of its close proximity to the house. MSJ at 6; Wells at 2. Finally, respondent states that it provides a social and economic value to the area in that it is an employer of over 50 persons and is an important supplier of goods to the community. MSJ at 6.

In her response, complainant alleges that, as a person with MCS, she has experienced an aggravation of symptoms due to the odors emanating from respondent’s factory. Resp. at 2. Complainant asserts that she is unable to move into her home located at 1316 Knox Drive due to the odors from respondent’s facility that negatively impact her MCS condition. Resp. at 2. Further, she maintains that she must continue to live in an apartment where she is exposed to second hand smoke, thereby further exacerbating her MCS condition. Resp. at 2. Finally, complainant argues that the Board’s June 5, 1997 order indicated that complainant alleges a violation of Section 9(a) of the Act and that it would be premature to weigh the factors set forth in Section 33(c) of the Act. Resp. at 5-6; See 415 ILCS 5/9(a), 33(c) (1996).

STANDARD OF REVIEW

The Illinois Supreme Court set forth the standards for considerations of motions for summary judgment in Jackson Jordan, Inc. v. Leydig, Voit & Mayer, 158 Ill. 2d 240, 249, 633 N.E.2d 627, 630 (1994):

A motion for summary judgment is granted if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. [735 ILCS 5/2-1005(c) (1996).] The pleadings, depositions, admissions, and affidavits on file must be construed against the movant and in favor of the opponent of the motion, although the opponent cannot rely simply on his complaint or answer to raise an issue of fact when the movant has supplied facts which, if not contradicted, entitle him to judgment as a matter of law. Summary judgment is a drastic means of disposing of litigation, so the right of the moving party to obtain summary judgment must be clear and free of doubt. Where doubt exists as to the right to summary

judgment, the wiser judicial policy is to permit resolution of the dispute by a trial.

The appellate court explained the burden of each party in prosecuting or defending against a motion for summary judgment in Estate of Sewart, 236 Ill. App. 3d 1, 7-8, 602 N.E.2d 1277, 1282 (1st Dist. 1992) (citations omitted):

The party seeking summary judgment may meet its initial burden of persuasion by presenting facts which, if uncontradicted, would entitle it to judgment as a matter of law. Once the party seeking the summary judgment produces such evidence, the burden of production shifts to the party opposing the motion, who may not rely solely on allegations in the complaint, but is required to come forth with some facts which create a material issue of fact. Although a [party] opposing a motion for summary judgment need not prove her case at this point, she must provide some factual basis which would arguably entitle her to judgment under the applicable law. If the respondent fails to produce such evidence, summary judgment is properly granted.

DISCUSSION

The Board denies respondent's motion for summary judgment. The Board previously determined in this matter that complainant alleges a violation of Section 9(a) of the Act, which contains prohibitions that can be violated by respondent. Bernice Loschen v. Grist Mill Confections, Inc., (June 5, 1997), PCB 97-174. Based on this finding, the Board ordered that this matter should proceed to hearing. See Loschen, (June 5, 1997), PCB 97-174. As for respondent's reference regarding the definition of air pollution under Section 3.02 of the Act, the Board previously found that there could be no violation of this section of the Act. Loschen, (June 5, 1997), PCB 97-174.

Further, although respondent cites to the factors set forth in Wells in support of its argument that it did not violate the Act, those factors considered by the court in Wells are the factors set out in Section 33(c) of the Act. See 415 ILCS 5/33(c) (1996). Respondent asserts that when weighing these factors as the court did in Wells, the Board should find that it did not violate the Act (415 ILCS 5/1 (1996)). The Board previously visited this issue in our June 5, 1997 order. In that order, we found that:

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 (2nd 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 (2nd 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, 1997) PCB 73-30, 27 PCB 371, 372, n.3 (citing Processing and Brooks, Inc., 64 Ill. 2d 68, 351 N.E.2d 865 (1996)).) 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 present 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.

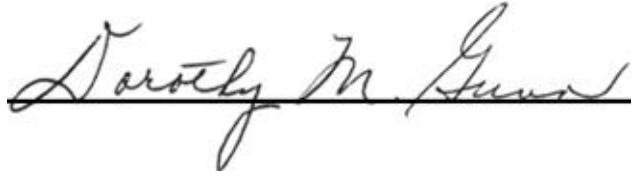
The Board remains unconvinced by respondent’s filings to date that “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Jackson Johnson, Inc., 158 Ill. 2d at 249, 633 N.E.2d at 630. In the present motion, respondent again has failed to convince the Board that no genuine issue of material fact exists. The Board continues to believe here that “the wiser judicial policy is to permit resolution of the dispute by a trial.” Jackson Jordan, Inc., 158 Ill. 2d at 249, 633 N.E.2d at 630.

Moreover, we do not agree with respondent that it is entitled to judgment as a matter of law. Contrary to respondent’s reading of the case in Darling & Company, the Board has repeatedly held that compliance with all applicable Board regulations does not mean that respondent has not violated the Act. See Darling & Company, 28 Ill. App. 3d 258, 238 N.E.2d 122 (1st Dist. 1975) (compliance with applicable regulations does not automatically absolve one from liability under Section 9 of the Act, but only constitutes a rebuttable prima facie defense of such liability).

For all of the foregoing reasons, summary judgment is denied and this matter shall proceed to hearing on September 23, 1997, as scheduled by the hearing officer.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 18th day of September 1997, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board