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LUCAS COUNTY

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GENERAL CLEARENCE  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

State, ex rel. Celebreeze,	*	
Plaintiff,	*	Case No. 90-2347
vs.	*	OPINION AND JOURNAL ENTRY.
Toledo Coke Corporation,	*	
Defendant.	*	
	*	

This cause comes before the Court on the defendant's motion to dismiss counts one, four and five of plaintiff's complaint. For the reasons which follow, I find that the motion should be denied.

I.e.

The undisputed pertinent facts in this case include the following. Defendant, Toledo Coke Corporation ("Toledo Coke"), is the owner and operator of a coke production facility which houses a coke oven battery wherein coal is converted to coke.

On June 22, 1989, plaintiff filed a complaint in this Court alleging numerous violations of R.C. Chapter 3704, the

regulations promulgated thereunder, and Toledo Coke's permit to operate an air contaminant source. The parties dismissed the action pursuant to Civ. R. 41, and on July 13, 1990, plaintiff refiled the case alleging violations identical to those previously stated. Specifically, plaintiff alleges unlawful discharge of excessive visible emissions, failure to control the emission of fugitive dust, and failure to admit governmental regulators to the site and to provide them with documents. Plaintiff seeks injunctive relief as well as civil penalties of twenty-five thousand dollars a day, pursuant to R.C. 3704.06, for each violation. Defendant now moves to dismiss counts one, four and five of plaintiff's claim.

## II.

The prerequisites to the granting of a motion to dismiss were summarized by the Supreme Court of Ohio in O'Brien v. University Community Tenants Union (1975), 42 Ohio St. 2d 242, 245, citing Conley v. Gibson (1957), 355 U.S. 41, 45, as follows:

" \* \* \* .

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Accordingly, the complaint is to be construed in a light most favorable to the plaintiff and material allegations in the complaint are taken as admitted. Mitchell v. Lawson Milk Co. (1988), 40 Ohio St. 3d 190, 192.

III.

A. COUNT ONE

In count one of the complaint, plaintiff alleges that Toledo Coke violated R.C. 3704.05(H) and Ohio Adm. Code 3745-17-08(B) on October 15, 1987, February 8 and 9, 1988, and June 1 and 7, 1988. Defendant contends that the above sections do not provide an independent cause of action.

Ohio Adm. Code 3745-17-08(B), however, states in pertinent part:

"(B) No person shall cause or permit any fugitive dust source to be operated; or any materials to be handled, transported, or stored; or a building or its appurtenances or a road to be used, constructed, altered, repaired, or demolished without taking or installing reasonable available control measures to prevent fugitive dust from becoming airborne. \* \* \*."

R.C. 3704.05(H) reads:

"(H) No person shall violate any order, rule, or determination of the director issued, adopted, or made under this chapter."

Plaintiff has alleged that Toledo Coke caused or permitted fugitive dust source to be operated on five occasions. Ohio Adm. Code 3745-17-08(B) and R.C. 3704.05(H) when read together prohibit such activity. Accordingly, taking the material allegations in the complaint as admitted, defendant's motion to dismiss as to count one of the complaint must be denied.

B. COUNT FOUR

In count four of the complaint, plaintiff alleges that Toledo Coke violated R.C. 3704.05(E) on nineteen separate occasions from August 22, 1987 to June 2, 1989.

R.C. 3704.05(E) prohibits companies like Toledo Coke from refusing entry to Ohio EPA inspectors, and provides as follows:

" No person to whom a permit or variance has been issued shall refuse entry to an authorized representative, the director of the environmental protection agency as provided in division (M) [sic] of section 3704.03 of the Revised Code, or hinder or thwart the person in making an investigation."

Division (L) of R.C. 3704.03 states that the director of environmental protection may:

"(L) Through any employee, agent, or authorized representative of the director or environmental protection agency, enter upon private or public property, including improvements thereon, at any reasonable time, to make inspections, take samples, conduct tests, and examine records or reports pertaining to any emission of air contaminants and any monitoring equipment or methods and to determine if there are any actual or potential emissions from such premises, and if so, to determine the sources, amounts, contents, and extent of such emissions, or to ascertain whether there is compliance with Chapter 3704. of the Revised Code, any orders or rules adopted thereunder, or any other determination of the director. The director may, at reasonable times, have access to and copy any such records. If entry or inspection authorized by this division is refused, hindered, or thwarted, the director or his authorized representative may by affidavit apply for, and any judge of a court of record may issue, an appropriate inspection warrant necessary to achieve the purposes of this chapter within the court's territorial jurisdiction."

Since R.C. 3704.05(E) when read alone prescribes warrantless searches, Toledo Coke urges this Court to rule it unconstitutional.

as violative of the Fourth Amendment.

It is well established, however, that an act of the General Assembly enjoys a strong presumption of constitutionality. Before a court may declare an act unconstitutional, it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible. State v. Renalist (1978), 56 Ohio St. 2d 276, 278; Ohio Public Interest Action Group, Inc. v. Public Utilities Comm. of Ohio (1975), 43 Ohio St. 2d 175, paragraph four of the syllabus; Dayton v. S.S. Kresge Co. (1926), 114 Ohio St. 624.

In this case, neither has it been established that R.C. 3704.05(E) was violated nor that R.C. 3704.03(L) was complied with. Whether the Ohio EPA inspectors arrived at reasonable times and whether Toledo Coke actually refused, hindered, or thwarted an inspection remains to be decided. I therefore defer judgment as to R.C. 3704.05(E)'s constitutionality until such time as these and other related issues are determined. Accordingly, Toledo Coke's motion to dismiss count four of plaintiff's complaint is dismissed.

C. COUNT FIVE

The final issue to be decided is whether plaintiff's allegation that on twenty-four occasions Toledo Coke violated R.C. 3704.05(H) and Ohio Adm. Code 3745-17-07(A) and (B), states a claim for relief.

Ohio Adm. Code 3745-17-07(A) and (B) provide that:

"(A) Except as otherwise specified in paragraphs (B) to (E) of this rule, no person shall cause or allow the discharge into the ambient air from any stack any particulate emissions of a shade or density greater than twenty percent opacity.

(B) Except as otherwise specified in paragraphs (C) to (E) of this rule, a person may cause or allow the discharge into the ambient air from any stack for not more than six consecutive minutes in any sixty minutes any particulate emissions of a shade or density not greater than sixty per cent opacity."

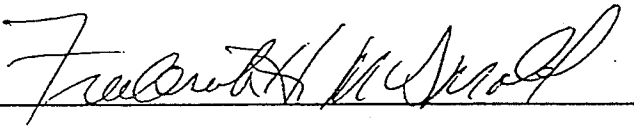
Toledo Coke contends that violations of Ohio Adm. Code 3745-17-07(A) and (B) cannot be enforced independently of the site specific control plans required by Ohio Adm. Code 3745-17-08(C). Specifically, Toledo Coke argues that the discharge into the ambient air from any stack any particulate emissions of a shade or density greater than twenty per cent opacity is not a violation of Ohio Adm. Code 3745-17-07(A) and (B) per se but merely is an indication that Toledo Coke exceeded the mass emission limit applicable to its stack under Ohio Adm. Code 3745-17-10.

On their face, however, Ohio Adm. Code 3745-17-07(A) and (B) prohibit companies from emitting smoke of more than twenty per cent opacity or if smoke of more than twenty per cent opacity is emitted, for more than six consecutive minutes per hour. Plaintiff has alleged such violations; thus, Toledo Coke's motion to dismiss must be denied.

JOURNAL ENTRY

It is hereby ORDERED that defendant Toledo Coke Corporation's motion to dismiss counts one, four and five of the complaint is found not well taken and is denied.

January 2, 1991  
~~December~~, 1990



Frederick H. McDonald, Judge



Attorney General  
Lee Fisher

M E M O R A N D U M

TO: EES Attorneys  
FROM: Chris Korleski and Cheryl Roberto *CR*  
DATE: February 8, 1991  
RE: State v. Toledo Coke Corporation; Challenges to OEPA's  
Air Pollution Control Regulations

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Attached please find Judge McDonald's recent order denying TCC's Motion To Dismiss three counts of the State's Complaint. TCC's Motion To Dismiss attempted to attack the use of Ohio EPA's fugitive dust regulations, opacity regulations, and Ohio EPA's ability to conduct/warrantless searches. This opinion may be helpful to you if you are faced with these issues.

CK/kmh  
1765E/5