UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
PAWNS PLUS,	)	**DOCKET NO. CAA-09-96-05**
	)	
	)	
RESPONDENT	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR

ACCELERATED DECISION AS TO LIABILITY

Introduction

On August 20, 1997, the United States Environmental Protection Agency ("Complainant" or "EPA") filed a motion for partial accelerated decision as to the liability of Pawns Plus ("Respondent") in the above cited matter. The Respondent has not responded to the motion. The Complainant's motion is granted as follows.

Findings and Conclusions

The Complaint in this matter is filed under the authority of Section 113(d)(1) of the Clean Air Act, 42 U.S.C. § 7413(d)(1).[(1)] This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.01 et seq.

Section 609(a) of the Clean Air Act, 42 U.S.C. § 7671h, directs the Administrator of the EPA to promulgate regulations establishing standards and requirements regarding the servicing of motor vehicle air conditioners ("MVACs"). These implementing regulations are found at 40 C.F.R. Part 82, Subpart B. Section 609(e) of the Clean Air Act and the implementing regulation at 40 C.F.R. § 82.34(b) provide that it shall be unlawful for any person to sell or distribute, or offer for sale or distribution,

to any person who is not properly trained and certified by an EPA approved certification program or who does not certify to the seller that the purchase is for the purpose of resale only any class I or class II substance that is suitable for use as a refrigerant in a MVAC system and that is in a container which contains less that twenty (20) pounds of such refrigerant.[(2)] The regulations at 40 C.F.R. § 82.42(b)(3) further provide that the seller or distributor is required to verify that the purchaser is properly trained and certified under 40 C.F.R. § 82.40, or, if the purchaser is purchasing the small containers for resale only, the seller must obtain a written statement from the purchaser that the containers are for resale only. CF_2Cl_2-Dichlorodifluoromethane (CFC-12) ("Freon") is listed in Group I under Class I controlled substances. 40 C.F.R. Part 82, Subpart A, Appendix A.

In the Complaint, the Complainant alleges one (1) violation of 40 C.F.R. § 82.34(b), which prohibits the sale of a class I substance in a container of less than twenty (20) pounds to a person who is not properly trained and certified pursuant to 40 C.F.R. § 82.40 or who does not provide a written statement that the container is for resale only pursuant to 40 C.F.R. § 82.42(b)(3). The Complainant proposes a civil administrative penalty of $2,000 for this alleged violation.

Specifically, the Complaint alleges that the Respondent is a business located in Phoenix, Arizona, that sells and buys new and used merchandise. Complaint at ¶¶ 1,2. Count I of the Complaint alleges that the Respondent offered for sale in twelve (12) ounce containers Dichlorodifluoromethane (CFC-12), a class I ozone depleting substance that is suitable for use as refrigerant in MVACs. Complaint at ¶¶ 6,7. Count I of the Complaint further alleges that on September 6, 1995, the Respondent sold two such containers to an EPA investigator, Mr. Kingsley Adeduro, who was not properly trained and certified as provided in 40 C.F.R. § 82.40 and did not represent himself to be properly trained and certified, and who did not certify in writing that the containers were for resale only pursuant to 40 C.F.R. § 82.42(b)(3). Complaint at ¶¶ 8-11.

As noted above, the procedures governing these proceedings are set forth in the Rules of Practice. The regulation governing accelerated decisions provides in pertinent part:

The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the

proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding.

Section 22.20(a) of the Rules of Practice.

On motion for partial accelerated decision on the issue of liability of the Respondent for the violation of 40 C.F.R. § 82.34(b) as alleged in the Complaint, the Complainant contends that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. The Complainant maintains that the material facts for establishing liability are admitted or undisputed by the Respondent and liability, therefore, should be determined by summary adjudication. I agree.

In the Respondent's Answer and prehearing exchange, the Respondent admits the material facts to support a finding of liability as alleged in this matter. The Complainant has established the essential elements to make a prima facie showing of liability. In this regard, I find that the admissions of the Respondent in its Answer and prehearing exchange adequately establish that the Respondent is a "person" as that term is defined in Section 302(e) of the Clean Air Act, 42 U.S.C. § 7602(e), that the Respondent sold or offered for sale containers of a class I ozone depleting substance which is suitable for use as refrigerant in MVACs, and that the container contained less than twenty (20) pounds of such refrigerant. The Respondent's admissions also establish that the seller did not verify that the purchaser was properly trained and certified under an EPA approved program and that the seller did not obtain a written statement from the purchaser stating that the purchase was for resale only.

Further, I note that the Respondent has not responded to the Complainant's motion for accelerated decision on the issue of liability. Pursuant to Section 22.16(b) of the Rules of Practice, if no timely response to a written motion is filed, the party may be deemed to have waived any objection to the granting of the motion.

In the Respondent's Answer and prehearing exchange, the Respondent has set forth several defenses. Specifically, the Respondent maintains the following defenses: The Respondent never engaged in the sale of automotive parts and accessories;

the Respondent never received notice that selling a can of Freon violated the law; the Respondent's former employee who sold the can of Freon failed to follow established store policies; the Respondent can not be held vicariously responsible for acts of its former employee; the profit received from the sale of the containers of Freon was less than $10; the Respondent subsequently was advised on the EPA's stratospheric and ozone hotline that it could give the Freon away or sell it to someone who stated they were using it for other purposes, such as a propellant or carpet cleaner; and the EPA's investigator should have identified himself, explained the law, and sought the Respondent's assurances to correct its conduct.

The Complainant argues that these defenses raised by the Respondent do not constitute any cognizable defense to liability. I agree.

In particular, the Complainant asserts that the Respondent simultaneously yet inconsistently claims that it never received notice concerning the prohibitions governing the sales of small containers of ozone depleting substances but that the employee who sold the containers to the EPA investigator did not follow established store policy. The Complainant persuasively argues that the Respondent could not have been both unaware of the sales prohibitions and yet still have a store policy in place to comply with the prohibition. Moreover, the Complainant correctly points out that the lack of actual notice of the law is no defense to liability. The Respondent is charged with constructive notice of the law and due process does not require actual notice of changes in the law. See North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925); c.f. Atkins v. Parker, 472 U.S. 115, 130 (1985). Also, as noted by the Complainant, the federal regulatory prohibition of the sale of Freon in small containers found at 40 C.F.R. § 82.34 was published in the Federal Register which provided general notice of the law, and that this prohibition has the full effect of the law. Protection of Stratospheric Ozone; Refrigerant Recycling, 59 Fed. Reg. 42950 (1994).

The Complainant argues that the Respondent's contention that it can not be held vicariously liable for the acts of its former employees is without merit. The Complainant maintains that the Respondent is liable for the violation even though its employee processed the sale because an employer remains responsible for the acts of its employees under the general principles of respondeat superior when the employee is acting within the scope of his or her employment. Here, the employee was acting within

the scope of her employment when she sold the containers of Freon displayed and marked for sale.

Finally, the Complainant argues that the Respondent's remaining defenses or contentions are irrelevant. Again, I agree. The regulatory provision in question does not specify that in order for the regulation to be applicable, the Respondent must be in the business of selling automobile parts or accessories. In fact, the regulation at 40 C.F.R. § 82.34 does not differentiate between any types of business engaged in by the seller of the containers. The amount of profit received as a result of the violation is not germane to the issue of liability as such is not specified by the regulation or underlying statute. There is no relevance of the alleged information the Respondent received from the EPA's hotline to the violation charged as the Respondent did not give the EPA investigator free cans of Freon nor did it sell the two cans of Freon to the investigator upon his certification that the containers were for purposes other than as refrigerant in a MVAC. With regard to the Respondent's assertion that it was incumbent upon the EPA investigator to identify himself, explain the law, and seek the Respondent's assurances of future compliance, I note that such action is not required by the governing regulation or underlying statute.

In conclusion, I find that in the above cited matter no genuine issue of material fact exists and the Complainant is entitled to judgment as a matter of law as to the issue of liability. I find that the Respondent violated 40 C.F.R. § 82.34(b) as alleged in Count I of the Complaint. A partial accelerated decision on the issue of liability on the violation alleged in Count I of the Complaint is hereby rendered in favor of the Complainant and against the Respondent.

ORDER

The Complainant's motion for partial accelerated decision as to liability is **Granted**.

Inasmuch as the appropriate penalty remains in issue, as per Section 20.22(b)(2) of the Rules of Practice, the hearing previously scheduled for November 19-20, 1997, in Phoenix, Arizona, will be held as scheduled for the determination of the appropriate penalty.

original signed by undersigned

_____

Barbara A. Gunning

Administrative Law Judge

Dated: 10-09-97

Washington, DC

1. The Complaint was amended by order on June 2, 1997, upon motion by the Complainant. In the First Amended Complaint, the amount of the proposed civil administrative penalty was reduced from $12,000 to $2,000. The term "Complaint" refers to the First Amended Complaint.

2. The ozone depleting substances listed as class I or class II substances are listed in 40 C.F.R. Part 82, Subpart A, Appendices A and B.