IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60390
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BILLY HOPE NGUYEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(1:93-CV-26RR)

September 15, 1995

Before DUHÀ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:*

Billy Hope Nguyen appeals from a decision granting summary judgment for the appellee in an action to enforce the collection of civil penalties for violations of the Endangered Species Act of 1973, 16 U.S.C. § 1531, et seq. The facts and issues in this appeal are very similar to those addressed by the Court recently in United States v. Menendez, 48 F.3d 1401 (5th Cir. 1995). The Court's reasoning is applicable as well; and, therefore, we should reverse and remand for further proceedings not inconsistent herewith.

DISCUSSION

Insufficient summary judgment evidence

Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Menendez says that "summary judgment evidence must consist of more than the mere allegations contained in the NOVA [Notice of Violation and Assessment]; rather, the ALJ must have summary judgment evidence before him in the form of affidavits, depositions, answers to interrogatories and/or admissions." Id. at 1414 (citing Celotex Corp. V. Catrett, 477 U.S. 317, 323-25 (1986)). However, the ALJ here dismissed Nguyen's case on the basis of "untimely" responses to the NOVA and an August 3, 1990, show cause order. Menendez says that such evidence is insufficient to grant summary judgment.

Timeliness of appellant's responses

As to the arguments regarding timeliness, the trial court, in part, decided to grant the government's motion for summary judgment because the appellant had failed to respond to a show cause order. The order was dated August 3, 1990, and directed the several defendants to show cause by September 4, 1994, "why their cases should not be disposed of in the same manner as the case of In the Matter of Tommy V. Nguyen, et al." Id. at 1407. As in Menendez, Nguyen's response came in the form of a facsimile from Margaret Mialjevich. The response merely requested a hearing to "allow[] each respondent a chance to redeem themself [sic] in person, in front of you at a hearing, where they can each dispute the facts of their case (as seen by themself [sic]), explain certain circunstances [sic] beyond their control, and their financial status." The court found the failure of the ALJ to consider the timely response from Mialjevich unjustified.

The trial court found that the appellant's response to the NOVA and request for a hearing was also tardy. The civil penalty assessed was $12,000. Appellant received the NOVA from the National Oceanic and Atmospheric Administration (NOAA) via certified mail on March 19, 1990. Endangered Species Act regulations gave appellant thirty days to respond. One optional response would have been to request a hearing. However, appellant did not respond within the allotted time, so the penalty became the final order of the NOAA on April 18, 1990. United States v. Nguyen, 847 F. Supp. 496, 498 (S.D. Miss. 1994). Although the record is unclear as to when the appellant first requested a hearing, he ultimately did so by fax dated July 13, 1990. The ALJ dismissed the request because it

was late on September 19, 1990. Tab 9 of motion exhibit A. Menendez does not address the lateness of appellant's response to the NOVA, but the only consequence laid out in the regulations is that the assessment becomes the final agency action. 15 C.F.R. §§ 102(a)5, 904.271(d), and 904.273(g), (I). It does not preclude judicial review in federal court. Nguyen, 496 F.Supp. At 502.

In Menendez this court found unjustifiable the ALJ's failure to consider Nguyen's show cause response and the granting of summary judgment on the basis of no more than the assessment allegations themselves. In light of that decision, the lateness of the NOVA hearing request did not warrant summary judgment. Therefore we reverse the summary judgment for the government and remand the case to district court, consistent with Menendez.