U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

THOMAS JEFFERSON KESTERSON

COMPLAINANT,

v.

Y-12 NUCLEAR WEAPONS PLANT, ET AL.,

RESPONDENTS.

ARB CASE NO. 96-173

(ALJ CASE NO. 95-CAA-0012)

DATE: April 8, 1997

BEFORE: THE ADMINISTRATIVE REVIEW

FINAL DECISION AND ORDER

The Administrative Law Judge submitted a Recommended Decision and Order Granting Respondents' Motions to Dismiss and/or for Summary Decision (R. D. & O.) in this case arising under the Clean Air Act, 42 U.S.C. § 7622 (1988) (CAA), the Toxic Substances Control Act, 15 U.S.C. § 2622 (1988) (TSCA), the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6971 (1988) (SWDA), the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610 (1988) (CERCLA), and the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (Supp. V 1993) (ERA) (the Acts). The ALJ recommended that the complaint be dismissed on numerous grounds, including untimeliness, sovereign immunity, improper parties, lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and failure to raise a genuine issue of material fact for a hearing. We adopt and append the ALJ's well reasoned recommend decision. R. D. & O. at 8. Complainant excepted to the

R. D. & O. on numerous grounds[1/] but, for the reasons discussed below in addition to those set out in the ALJ's recommendation, the complaint will be denied.

Complainant was a Security Analyst employed in the Security Operations department by Lockheed Martin Energy Systems (LMES) at the Department of Energy (DOE) Oak Ridge, Tennessee nuclear facilities. LMES manages the Oak Ridge facility under contract with DOE. Complainant claims he engaged in several protected activities over a period of three years from 1991 to 1994 and that in retaliation Respondents, among other things, subjected him to a hostile working environment, downgraded his security clearance, threatened reassignment to a less desirable unit, blacklisted him, and made false charges of theft, forgery, purchase of illegal equipment and tampering with evidence.

Two months after being assigned the case, the ALJ issued a scheduling order on June 5, 1995 that, among other things, closed discovery on August 30, 1995 and required all motions related to discovery to be filed by September 15, 1995. ALJ document (ALJ) number 6 in the ALJ case record. The ALJ later modified the schedule to close discovery on October 6, 1995

[1/] Complainant did not except to several of the ALJ's recommended grounds for dismissal:

> 1. That DOE should be dismissed as a party under the ERA and the TSCA on the grounds of sovereign immunity. We note that the Secretary has held that the United States has waived sovereign immunity under the CERCLA, SWDA, and CAA. *See Jenkins v. Environmental Protection Agency*, 92-CAA-6, Sec'y. Dec. May 18, 1994; *Marcus v. Environmental Protection Agency*, 92-TSC-5, Sec'y. Dec. Feb. 7, 1994; *Pogue v. U.S. Department of the Navy*, Case No. 87-ERA-21, Sec. Dec. May 10, 1990.
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> 2. That Respondents Y-12 Nuclear Weapons Plant, K-25 Plant, Martin Marietta Corporation and Martin Marietta Technologies, Inc. should be dismissed on the grounds that they are not the employer of Complainant. We note, however, that as the Secretary found in *Hill and Ottney v. Tennessee Valley Auth.,* Case Nos. 87-ERA-23 and 24, Sec'y. Dec. May 24, 1989, slip op. at 2-10, a person who discriminates against employees of another employer, for example, by directing a subcontractor to fire its employees for whistleblowing, is subject to the provisions of the employee protection laws. *Cf. Christopher v. Stouder Memorial Hosp.*, 936 F.2d 870, 875 (6th Cir. 1991), *cert. denied, Stouder Memorial Hosp. v. Christopher*, 502 U.S. 1013 (holding anti-retaliation provision of Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3, prohibiting retaliation by an employer against "any of his employees or applicants for employment," protects persons whose employment opportunities may be affected by an employer's actions, even those not employed by that employer). We also note, however, contrary to Complainant's characterization, *Hill and Ottney* was not based on the joint employer doctrine.

and require filing of all discovery related motions by October 17, 1995. ALJ 15. DOE moved to dismiss on August 7, 1995, ALJ 10, and LMES and all the other Respondents moved for summary decision on September 29, 1995. ALJ 21. Complainant did not serve any discovery requests on any of the Respondents until July 29, 1996, almost ten months after the ALJ closed discovery.

Complainant alleges he engaged in numerous protected activities beginning in 1991 through 1994 and that Respondents retaliated against him throughout that period up to the date he filed his complaint with the Wage and Hour Division on November 17, 1994.[2/] Complainant claims the following were acts protected under the various whistleblower laws invoked in this case:

- filing internal complaints against a supervisor who was "abusive" toward Complainant in a meeting;[3/]

- giving truthful answers in an internal investigation into who ordered the purchase of allegedly illegal surveillance equipment;

- objecting to an allegedly illegal order to remove files from a computer being held as evidence in a criminal case against a former LMES employee in a Tennessee state court;

- being a friend of another whistleblower;

- being interviewed by LMES attorneys about the August 2, 1994 whistleblower complaint of Harry L. Williams

- refusing requests of a supervisor to help "get rid of" another employee by giving her as much work as possible and documenting her inadequate performance;

Even if Complainant was able to prove that each of these events occurred as he alleged, we find that, with one exception, these activities are not protected under the Acts. The Acts protect employees for making safety and health complaints "grounded in conditions constituting reasonably perceived violations" of the environmental laws, *Johnson v. Old Dominion Security*, Case Nos. 86-CAA-3, 4, and 5, Sec'y. Dec. May 29, 1991, slip op. at 15, but do not protect an employee simply because he subjectively thinks the complained of employer conduct might affect the environment. *Crosby v. Hughes Aircraft Co.*, Case No. 85-TSC-2, Sec'y Dec. Aug. 17, 1993, slip op. at 26. In *Crosby,* the Secretary distinguished between protected acts, such as

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[2/] Curiously, in his complaint filed in 1994, Complainant claims he has been discriminated against for four years beginning in 1992. ALJ 1, ¶ 3.

[3/] Complainant's complaint alleges this incident occurred on July 21, 1991 and that he complained about it on July 22, 1991 and July 22, 1994, and that the supervisor criticized him for "going over my head" on July 22, 1994. ALJ 1, ¶¶ 26, 27, and 28. We assume these were simply typographical errors and that these events took place on July 21 and 22, 1991.

threatening to file a citizens' suit under the environmental laws, and unprotected acts, such as contacting the government and the news media about mischarging by a government contractor. *Id.* at 22-23 and n.15. The Secretary also held that internal complaints about a technical issue which could only threaten the environment if many speculative events all occurred was not protected. *Id.* at 28-29. *See also Minard v. Nerco Delamar Co.,* Case No 92-SWD-1, Sec'y. Dec. Jan. 25, 1994, slip op. at 6 (holding "structure and purpose of the [Solid Waste Disposal] Act strongly support a reasonableness test for whether an employee complaint . . . is protected under the . . . Act," and finding employee protected for complaint about spill of substance a layman reasonably could believe was covered by EPA regulations); *Deveraux v. Wyoming Association of Rural Water,* Case No. 93-ERA-18, Sec'y. Dec. Oct. 1, 1993, slip op. at 2 (employee complaints about inaccurate records, mismanagement and waste not protected under ERA); *DeCresci v. Lukens Steel Co.*, Case No. 87-ERA-113, Sec'y. Dec. Dec. 16, 1993, slip op. at 5-6 (complaint about safety violations not related to nuclear safety not protected under Energy Reorganization Act); *Aurich v. Consolidated Edison Co. of N.Y., Inc.*, Case No. 86-CAA-2, Sec'y. Dec. Apr. 23, 1987, slip op. at 3-4 (distinguishing complaints about public health and safety protected under Clean Air Act from unprotected complaints about occupational safety and health).

Measured by these standards, most of Complainant's alleged protected activity falls short as follows:

1) Mere friendship with another employee who is a whistleblower has no relationship to any action to carry out the purposes of the Acts.

2) Complainant implies that allegedly illegal surveillance equipment obtained by LMES could have been used at some future time to spy on whistleblowers and that his truthful answers to questions about the purchase of the equipment therefore are protected. This is as speculative as the activity found unprotected in *Crosby v. Hughes Aircraft*.

3) Objecting to allegedly illegal orders to remove computer files from a computer held in evidence in a state criminal case may be protected under some states' common law public policy exception to the employment at will doctrine, but not under the Acts.[4/]

4) Complainant's deposition makes it clear that he did not complain about the abusive treatment he received from a manager in a meeting because he was concerned about the manager's psychological fitness for duty and the possible affect his unfitness might have on the environment. Complainant did not question the manager's mental fitness at all; Complainant objected to the manager's military style of supervision. Attachment to ALJ 21 at page 57.

[4/] Complainant himself states in his complaint that the purpose of the order to destroy the computer files was "to destroy evidence of [LMES] criminal copyright infringement."

5) Refusing to assist in an alleged scheme to fabricate reasons to fire a female employee may be protected under other laws, such as Title VII of the Civil Rights Act of 1964, but not under the Acts.

The ALJ's well reasoned analysis of Complaint's failure to allege activities protected under the environmental whistleblower Acts gives additional basis for this result. The only alleged activity which, if proven, would be protected under the Acts was Complainant's interview, some time after August 2, 1994, with LMES attorneys investigating another whistleblower's complaint. Because Complainant did not engage in any protected activity before August 1994, none of the alleged acts of discrimination before that date could have been motivated by conduct protected by the Acts.[5/] For the same reason, none of the alleged acts of reprisal could have formed part of a continuing course of conduct creating a hostile work environment.

The regulations and case law under the Acts and 29 C.F.R. Part 24 (1996) make it clear that a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). In *Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42, Sec'y. Dec. Jul. 17, 1995, slip op. at 4-6, the Secretary explained the parties burdens where a motion for summary decision has been made:

> A motion for summary decision in an ERA case is governed by 29 C.F.R. § 18.40 and 18.41. *See, e.g., Trieber v. Tennessee Valley Authority, et al.*, Case No. 87-ERA-25, Sec. Dec. and Ord., Sept. 9, 1993, slip op. at 7-8. A party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 18 C.F.R.§ 18.40(c).
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> Under the analogous Fed. R. Civ. P. 56(e), the non-moving party "may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial . . . . Instead, the [party opposing summary judgment] must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby,Inc.*, 477 U.S. 242, 256-257 (1986). *See also, Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Carteret Sav. Bank, P.A. v. Compton, Luther & Sons, Inc.,* 899 F.2d 340, 344 (4th Cir. 1990). The non-moving party's evidence, if accepted as true, must support a rational inference that the substantive evidentiary burden of proof could be met. *Bryant v. Ebasco Services, Inc.*, Case No. 88-ERA-31, Dec. and Order of Rem., July 9, 1990, slip op. at 4, citing *Liberty Lobby,* 477 U.S. at 247-252. "[W]here the non-moving party presents admissible direct evidence, such as through affidavits, answers to interrogatories, or depositions, the judge must accept the truth of the evidence set forth; no credibility or

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[5/] Under the ERA as amended, our conclusion is the same but would be phrased slightly differently: before August 1994, Complainant did not engage in any behavior protected by 42 U.S.C. § 5851(a)(1)(A) through (F), and such behavior could not have been a "contributing factor" in any alleged acts of retaliation before that date. 42 U.S.C. § 5851(b)(3)(C).

> plausibility determination is permissible." *Dewey v. Western Minerals, Inc.*, No. 90-35252, 1991 *U.S. App. LEXIS* 1399 (9th Cir. Jan. 29, 1991), *citing T.W. Elec. Serv. v. Pacific Elec. Contractor,* 809 F.2d 626, 631 (9th Cir. 1987).
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> On the other hand, if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," there is no genuine issue of material fact and the movant is entitled to summary judgment. *Celotex*, 477 U.S. at 322-323.

Complainant excepted to the ALJ's recommendation to grant summary judgment on the grounds that this would deny Complainant an opportunity for full discovery, citing *Flor v. Department of Energy*, Case No. 93-TSC-1, Sec'y. Dec. Dec. 9, 1994. Complainant wholly neglects to address the crucial difference between this case and *Flor*. In *Flor*, the complainant had filed timely interrogatories and requests for production of documents which the respondent had failed to answer and there was a motion to compel discovery pending. *Id.* at 12. Here, the ALJ established a pre-trial schedule a few months after being assigned the case and set October 6, *1995* as the last date to serve any discovery requests. Without asking for an extension of that date or leave to file discovery requests out of time, Complainant's attorney served his first discovery requests, interrogatories and requests for production of documents, on *July 29, 1996*, 10 months after the ALJ closed discovery. This cavalier attitude toward the proper exercise of the ALJ's authority, 29 C.F.R. § 18.29, *Robinson v. Martin Marietta Services, Inc.,* Case No. 9-TSC-7, Sec'y. Dec. Sep. 23, 1996, slip op. at 4; *Indosuez Carr Futures v. Commodity Futures Trading Commission*, 27 F.3d 1260, 1267 and n.4 (7th Cir. 1994), cannot be condoned and is a striking distinction between this case and *Flor*.

Complainant urges the Board to reject the ALJ's recommendation because the crucial issue in a retaliation case is motivation and argues he has established that a genuine issue of material fact exists on that question. Complainant relies on outdated authority as support for his opposition to summary decision. *See Armstrong v. City of Dallas,* 997 F.2d 62, 66 (5th Cir. 1993) ("The once frequently repeated characterization of summary judgment as a disfavored procedural shortcut no longer appertains.") More current case law makes it clear that "[g]enuine issues of material fact are not the stuff of an opposing party's dreams. On issues where the nonmovant bears the ultimate burden of proof, he must present definite, competent evidence to rebut the motion." *Mesnick v. General Electric Co.*, 950 F.2d 816, 822 (1st Cir. 1991), *cert. denied, Mesnick v. General Elec. Co.,* 504 U.S. 985 (1992), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). The court in *Mesnick v. GE*, an age discrimination and retaliation case also involving difficult issues of motive, went on to hold that "summary judgment can be appropriately entered even where elusive concepts such as motive or intent are involved." *Id.* The court granted summary judgment on both the age discrimination and retaliation claims. Even though the plaintiff had submitted "a plethora" of evidence on his professional competence and some evidence of age-motivated discrimination, the court found that "the summary judgment record contained no evidence from which a rational jury could infer, without the most tenuous insinuations, that [defendant's] legitimate, nondiscriminatory reason for cashiering [plaintiff] was actually a pretext *for age discrimination* [and] the district

court did not err in defenestrating the plaintiff's claim." *Id.* at 826 (emphasis in original).[6/] The court also affirmed summary judgment on the retaliation claim because "[plaintiff] tendered nothing, direct or circumstantial, suggesting a retaliatory animus." *Id.* at 828.

We also reject Complainant's argument that filing a verified complaint is sufficient to establish genuine issues of fact for a hearing without more. First of all, the regulations require more, and if the nonmoving party could successfully respond to a motion for summary decision simply by filing a verified complaint, no such motions could ever be granted. Complainant having offered no affidavits or any other material whatsoever in opposition to the motion for summary decision, and having squandered his opportunity to take discovery which might have generated evidence competent to resist the motion,[7/] we adopt the ALJ's recommendation and reasoning that the remaining allegations, concerning alleged acts of retaliation after August 1994, be denied. In view of our conclusions on the protected activity and summary decision issues, it is not necessary for us to address the other grounds for denial of the complaint in the R. D. & O. Accordingly, the complaint in this case is **DENIED**.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL A. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[6/] This decision is replete with colorful language, including this perhaps unfortunate reference to the traditional Czechoslovakian method of assassination of high government officials.

[7/] In summary judgment cases, "the nonmovant is entitled to a fair opportunity to discover and produce evidence before the summary judgment record may be closed." *Armstrong v. City of Dallas*, 997 F.2d at 67. Ten months is enough.