U.S. Department of Labor

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

In The Matter Of:

OFFICE OF FEDERAL CONTRACT COMPLIANCE, U.S. DEPARTMENT OF LABOR,

CASE NO. 87-OFC-20

DATE: September 4, 1996

PLAINTIFF,

v.

KEEBLER COMPANY,

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

FINAL DECISION AND ORDER

The Office of Federal Contract Compliance (OFCCP) filed this complaint alleging that the Keebler Company (Keebler) violated Section 503 of the Rehabilitation Act of 1973, as amended (Act), 29 U.S.C. § 793 (1988) when it terminated Monica DeAngelis (DeAngelis). While the case was pending review before the Assistant Secretary for Employment Standards, the district court issued *Washington Metro. Area Transit Auth. v. DeArment*, 55 (CCH) EPD ¶ 40,507 (D.D.C. 1991) (*WMATA*). The court in *WMATA* invalidated the Department's waiver

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[1/] On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under this statute and the implementing regulations to the newly created Administrative Review Board (ARB). Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996 (copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the ARB now issues final agency decisions. A copy of the final procedural revisions to the regulations implementing this reorganization, 61 Fed. Reg. 19982, is also attached.

regulation[2/] at 41 C.F.R. § 60.741.3(a)(5) (1991) and narrowed the scope of coverage under Section 503.

At the time of *WMATA*, and at the time the instant case was filed, Section 503 required government contractors, "in employing persons to carry out such contract[s]," to take affirmative action to employ and advance qualified handicapped individuals. 29 U.S.C. § 793(a). The *WMATA* court found this quoted language "quite plain," and held that the Department's waiver regulation was inconsistent and could not be used to sweep in all employees of the contractor. 55 EPD at 65,560. Accordingly, the court concluded that coverage did not extend to an applicant for a carpenter position where the employer's government contract was to provide certain shuttle bus services. *Id.*

The Department dismissed its appeal of *WMATA* and the Assistant Secretary agreed that the decision set forth a new "working-on-the-contract" standard that significantly changed existing law. *See OFCCP v. Yellow Freight Sys., Inc.*, Case No. 79-OFCCP-7, Aug. 24, 1992; *OFCCP v. Rowan Cos., Inc.*, Case No. 89-OFC-41, May 28, 1992; *see also OFCCP v. Norfolk Southern Corp.*, Case No. 89-OFC-31, Oct. 3, 1995, slip op. at 4-5, and cases cited therein; *OFCCP v. CSX Transp. Inc.*, Case No. 88-OFC-24, Oct. 13, 1994, slip op. at 26-29. Since the record in this case did not contain evidence meeting the *WMATA* standard, the case was remanded to the Administrative Law Judge (ALJ) for development of evidence and findings on the working-on-the-contract issue. *See* Decision and Order of Remand dated December 21, 1994.

On remand the parties engaged in discovery and offered numerous affidavits. By Recommended Decision and Order (R. D. and O.) dated July 20, 1995, the ALJ granted Keebler's motion to dismiss for failure to meet the *WMATA* standard. OFCCP filed exceptions and Keebler filed a response. Upon review, we deny OFCCP's exceptions and accept the ALJ's recommended decision as modified below.

We note that the court's decision in *WMATA* was legislatively overturned by Pub. L. 102-569, § 505(a), 106 Stat. 4427 (1992), which amended Section 503 by striking the working-on-the-contract limitation. *See* 29 U.S.C. § 793(a) (Supp. V 1993). Therefore, this case, arising before Congress invalidated the "working-on-the-contract" provision, but pending at the time the court in *WMATA* invalidated the waiver regulation, is in a unique posture.

[2/] The waiver regulation provided that all of a contractor's facilities were covered and subject to Section 503 affirmative action requirements unless the contractor had obtained a waiver from the Director of OFCCP, exempting particular facilities which were separate and distinct from performance of the covered contract. In the absence of such waivers, employees of, or applicants for employment with, a government contractor who might not individually be involved in government contract work were deemed covered by Section 503 in view of the contractor's inaction in seeking and obtaining a waiver. *OFCCP v. Yellow Freight Sys., Inc.*, Case No. 79-OFCCP-7, Aug. 24, 1992, slip op. at 2.

Facts

DeAngelis was a production attendant at Keebler's Raleigh, North Carolina facility from January 7, 1985 through April 16, 1985. She helped produce a snack food called Tato Skins. The Tato Skins were not earmarked or designated for particular destinations but were shipped to between 65 and 70 distribution centers. Exhibit E at 11-12, 16. Another Keebler facility located in Bluffton, Indiana also produced and shipped Tato Skins to the distribution centers. The distribution centers then filled orders placed by customers, including the government. During the period of DeAngelis' employment, Keebler had several government contracts under which it provided Tato Skins to military bases and commissaries. R. D. and O. at 5.

Analysis

The ALJ found that OFCCP failed to meet its burden of proof. Noting that discovery and the production of evidence were hampered by the passage of time, he found the record insufficient to show that the Tato Skins used to fill the government contracts were produced either at the Raleigh facility or the Bluffton facility or both. He explained that while the possibility existed that those Tato Skins were produced at DeAngelis' Raleigh facility, a finding to that effect would be conjectural. R. D. and O. at 5-6. The ALJ rejected OFCCP's argument that the determination of who is employed by a contractor to carry out a government contract should be based on job categories, and that in this case coverage should therefore extend to all production attendants at both the Raleigh and Bluffton facilities. He found that accepting OFCCP's argument would improperly place the burden on Keebler and, as a practical matter by lumping together employees of the two facilities, would reinstitute the underlying rationale of the waiver rule held invalid by *WMATA*. R. D. and O. at 6. We agree.

The Act, prior to the 1992 amendments, was worded narrowly to require affirmative action with respect to persons or individuals employed to carry out the contract. To establish coverage of the individual complainant, OFCCP must prove by a preponderance of the evidence that the individual was working or would have worked on a government contract absent the discriminatory act. Here, the evidence establishes only that DeAngelis had a randomly equal chance, the same as all production attendants from both facilities, to have worked on the Tato Skins used to fill Keebler's government contracts. R. D. and O. at 6; *see* OFCCP's Brief at 9, 17, 21. Such a showing is not sufficient to carry OFCCP's burden of proof.

OFCCP charges that because of Keebler's distribution system, it would have been impossible at any time to demonstrate that DeAngelis or the Raleigh plant worked on Tato Skins that fulfilled a government contract. The evidence, however, shows that during the relevant time period products could be traced back to the manufacturing facility. Doan W. Edmonston testified that as the Raleigh plant manager, he occasionally received complaints from the corporate office about foreign objects in the products. Exhibit E at 17. The corporate office could identify and distinguish the facility by the location code and date stamped on the packaging. *Id*. at 18. Contrary to OFCCP's argument, its proof failed not because Keebler did not separate its production attendants and commingled packages of Tato Skins at the distribution

center, but because invoices, corporate records, and packages containing location and date codes were no longer available when this discovery was conducted. *See, e.g.*, Exhibits B and C; R.D. and O. at 6. Thus, OFCCP's burden was not impossible or unworkable, and we find no reason to resort to the Department's proposed regulations for instruction as OFCCP urges.[3/]

Finally, OFCCP contends that a narrow interpretation of Section 503 is inconsistent with the 1992 statutory amendment and general principals favoring a broad interpretation of remedial legislation. The amendment does not retroactively operate to give the Act under which Keebler contracted a different meaning. Statutory amendments and administrative rules are not construed to have retroactive effect absent clear congressional intent favoring such a result. *Landgraf v. USI Film Prod.*, 114 S. Ct. 1483, 1500, 1505 (1994) and cases cited therein (explaining presumption against statutory retroactivity); *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) (explaining rule against retrospective operation that interferes with antecedent rights); *OFCCP v. Burlington Northern, Inc.*, Case No. 80-OFCCP-6, Fin. Dec., Dec. 11, 1991, slip op. at 16-17.

[3/] The *WMATA* decision does not support the legal standard based on job categories that OFCCP proposes. The *WMATA* court focused on job categories only in response to OFCCP's arguments and to illustrate the direct nexus required to establish coverage.

OFCCP also relies on various other cases by analogy, however, none of those cases arise under statutes containing a working-on-the-contract or similar provision. In addition, the ALJ's recommended ruling in *OFCCP v. Yellow Freight Sys., Inc.*, Case No. 89-OFC-40, ALJ Dec., May 17, 1994, relied on by OFCCP is not binding authority. A final decision on that ruling was never issued because the parties subsequently submitted a consent decree that was approved by the Assistant Secretary on February 29, 1996.

Accordingly, the complaint IS DISMISSED.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member