



In the Matter of:

CHARLES E. ILGENFRITZ, JR.,

COMPLAINANT,

ARB CASE NO. 99-066

ALJ CASE NO. 99-WPC-3

v.

DATE: August 28, 2001

U.S. COAST GUARD ACADEMY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

Appearances:

For the Complainant:

Scott W. Sawyer, Esq., *New London, Connecticut*

For the Respondent:

LCDR C.P. Reilly, *U.S. Coast Guard, Portsmouth, Virginia*

FINAL DECISION AND ORDER

This case is before the Department of Labor based on Complainant Charles Ilgenfritz’s allegation that Respondent U.S. Coast Guard Academy retaliated against him and ultimately terminated his employment in violation of the whistleblower protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C.A. §9610 (West 1995), and the Solid Waste Disposal Act (“SWDA”), 42 U.S.C.A. §6971 (West 1995) (collectively “the environmental acts”). After reviewing this matter, a Labor Department Administrative Law Judge (“ALJ”) recommended that we dismiss the complaint. By this Order and for the reasons set forth below, we accept the ALJ’s recommendation.

BACKGROUND

Respondent hired Ilgenfritz as a Boiler Equipment Mechanic in 1991 and assigned him to work in the steam plant. In 1993, Ilgenfritz’s supervisor, Eugene Bergeron, appointed Ilgenfritz to act as the steam plant’s Hazardous Materials Coordinator (“HMC”) in addition to his regular duties as a mechanic.

^{1/} This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

As HMC, Ilgenfritz continued to work in the plant, which consisted of a tool room, boiler room, a kitchen, and a bathroom. The tool room contained a desk and telephone. Although the desk and telephone were available to all the employees of the plant, Ilgenfritz used the desk more than anyone else and regarded the tool room as his work station. Ilgenfritz also had access to Bergeron's computer which he used to maintain an inventory of hazardous waste materials.

Between 1995 and 1996, Ilgenfritz reported three incidents involving hazardous waste. The first occurred in 1995, when he reported an oil spill under the steam plant's emergency generator. The second occurred in 1996, when he reported the improper disposal of a grit blaster.^{2/} The third also occurred in 1996, when he reported that his co-workers chipped paint that he suspected contained heavy metals.

Shortly after the paint-chipping incident, James Simmons, Ilgenfritz's second line supervisor, requested that Bergeron have the desk (and telephone) removed from the tool room because some of the employees were regularly using the area as a "gathering place." Ilgenfritz viewed the removal of the desk and telephone as an action directed against him. Around this time, Bergeron changed the password to his computer which effectively prevented anyone from gaining unlimited access to all of the programs. Although it is not entirely clear from the record, it appears that Bergeron did not give Ilgenfritz the entry codes for the HMC programs because he was in the process of reassigning those duties to another employee. Ilgenfritz viewed Bergeron's action as retaliatory.

Bergeron testified that when he assigned Ilgenfritz to be HMC in 1993, he knew that implementation of the hazardous waste program would be difficult. By 1996, the program was going smoothly and he believed that all of the employees could benefit from having HMC responsibilities. Therefore, in August 1996, Bergeron, through Simmons, notified Ilgenfritz that the HMC duties would be reassigned to another co-worker. Ilgenfritz viewed the loss of the HMC duties as a demotion.

After being relieved of the HMC duties, Ilgenfritz returned to performing his mechanic work on a full time basis. However, the mechanic work was physically demanding and Ilgenfritz complained that it was causing him pain in his shoulder. As time went on, the pain in his shoulder became progressively worse. Ilgenfritz's doctor recommended light duty, but Bergeron maintained that there was no such duty available at the plant. Ultimately, Ilgenfritz's shoulder pain became so severe that he was unable to perform his duties. Ilgenfritz stopped working for Respondent and started receiving worker's compensation effective April 7, 1997. Respondent engaged a temporary employee to perform Ilgenfritz's duties.

Although Ilgenfritz was no longer working at the plant, he stopped by once a week to check his mailbox and deliver worker's compensation paperwork to Bergeron. In June 1997, Bergeron sent Ilgenfritz a letter advising him that the plant was considered an industrial work area and that, for his own safety, he was not to enter the plant until such time as he was able to return to a normal working status. Ilgenfritz viewed this action as punitive.

^{2/} A grit blaster is a machine that removes paint from an object by blasting it off with grit sand directed under pressure. The machine generated hazardous waste and was considered part of a hazardous waste stream.

LCDR George Stephanos began working for Respondent as the Chief of Public Works in July 1997. When it appeared unlikely that Ilgenfritz would ever return to work, Stephanos began to pressure Bergeron to remove Ilgenfritz from the position so that a replacement employee could be hired on a permanent basis. Bergeron wrote to Ilgenfritz in June 1998 and stated as follows:

You have been in a continuous non-duty status since 03 APRIL 1997 in connection with a job-incurred disability for which you are receiving benefits under the Federal Employees' Compensation Act ("FECA"). The law provides for agency separation of any employee whose disability exceeds one year. Therefore, because your recovery period has surpassed the one-year limitation, you have the following options:

1. Return to work fully recovered for duty per a physician's medical report.
2. Request from your supervisory chain additional leave without pay in increments of three months
3. Apply for disability retirement
4. If you are not fully recovered due to a permanent partial disability you may be able to return to work in another position with duties you would be able to perform within the limits of your disability
5. Resign.

Complainant's Exhibit (CX) 79. In the letter, Bergeron advised Ilgenfritz that, if he did not chose one of the options, he could be separated under the adverse action procedures. Bergeron further advised Ilgenfritz to respond to the letter by June 12, 1998, and state his intentions regarding the options available to him. Ilgenfritz decided to apply for disability retirement, but did not respond to Bergeron's letter.

By letter dated July 1, 1998, Bergeron issued Ilgenfritz a notice proposing to remove him based on his physical inability to perform the duties of his position. CX 82. Although Ilgenfritz was given an opportunity to respond to the notice, he did not do so. Consequently, the Chief of the Academy's Facilities Engineering Division, CDR Brown, issued a final decision terminating his employment effective September 4, 1998. The termination action had no affect on Ilgenfritz's retirement application.

As part of his retirement package, Ilgenfritz received a performance appraisal for the rating period beginning April 1996 and ending March 1997. Although his overall rating was "proficient," the evaluation contained several comments on areas in which Ilgenfritz could improve his performance. Ilgenfritz viewed these comments as negative.

On October 2, 1998, Ilgenfritz filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that, because he engaged in protected activity, he had been subjected to a continuing series of adverse actions, including an adverse performance appraisal, which eventually resulted in his termination. OSHA determined that Ilgenfritz had notice of the separation action prior to September 2, 1998, and, therefore, dismissed the complaint as untimely.^{3/} Ilgenfritz objected to that determination, and the matter was referred to an Administrative Law Judge.

After conducting a hearing and reviewing the evidence, the ALJ found that the complaint was untimely with regard to all matters except the performance appraisal and the separation action. As to the performance appraisal and the separation action, the ALJ found that Ilgenfritz had failed to present sufficient evidence to prove that Respondent took these actions in retaliation for his having engaged in protected activity. Therefore, the ALJ recommended that the complaint be dismissed. *Ilgenfritz v. United States Coast Guard Academy*, ALJ No. 1999-WPC-3 (Mar. 1999). This appeal followed.

JURISDICTION

We have jurisdiction pursuant to the employee protection provisions of the environmental acts and 29 C.F.R. §24.8 (2000).

STANDARD OF REVIEW

Under the Administrative Procedure Act (“APA”), the Board has plenary power to review an ALJ’s factual and legal conclusions *de novo*. See 5 U.S.C.A. §557(b) (West 1996); *Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000).

DISCUSSION

Ilgenfritz asserts that the ALJ erred because the ALJ did not give the parties an opportunity to file post-hearing briefs. According to Ilgenfritz, the APA requires that parties be afforded an opportunity to file proposed findings and conclusions with the ALJ. Inasmuch as he did not have an opportunity to file a post-hearing brief, Ilgenfritz argues that he was effectively denied the right to file proposed findings and conclusions as required by the APA. Ilgenfritz’s argument is misplaced.

The APA requires that parties to administrative proceedings must be given an opportunity to argue their positions, but provides agencies with flexibility to determine when this will occur during the proceeding:

^{3/} 42 U.S.C.A. §9610(b) and 42 U.S.C.A. §6971(b) both provide that “Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination.”

Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions –

- (1) proposed findings and conclusions; **or**
- (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
- (3) supporting reasons for the exceptions or proposed findings or conclusions.

5 U.S.C.A. §557(c) (emphasis added).

Thus, parties may be given an opportunity to file proposed findings and conclusions before a recommended decision is issued. Alternatively, after a recommended decision is issued by a subordinate decision maker, the agency can provide the parties with an opportunity to file exceptions to the recommended decision. The Department of Labor has clearly taken this second course by creating this Board and allowing parties to petition this Board to review any recommended decision issued by an ALJ under the whistleblower protection provisions of the environmental acts. See 29 C.F.R. § 24.1 *et seq.*. Ilgenfritz has had an opportunity to take exception to the recommended decision by filing a brief before this Board and that opportunity fully satisfies the requirements of the APA.^{4/}

With regard to the merits of his case, Ilgenfritz asserts that Respondent subjected him to a hostile work environment, that Respondent's hostile acts were of a continuing nature, and that the continuing nature of these hostile acts constitutes an equitable exception to the thirty-day time limit for filing a complaint. In Ilgenfritz's view, the hostile nature of the environment is evident from the following facts:

- 1) In January 1996, Ilgenfritz submitted an application for leave, but Bergeron denied it.
- 2) In June 1996, Bergeron removed the desk and telephone from the tool room.
- 3) In or around June 1996, Ilgenfritz broke the steam plant's microwave oven and Bergeron asked him to replace it.
- 4) In June 1996, Bergeron changed the password on his computer, which effectively prevented Ilgenfritz from using it.

^{4/} To the extent that Ilgenfritz expected to file a post-hearing brief with the ALJ, or asserts that he was entitled to file a post-hearing brief "as a matter of right," his expectation was unwarranted. The Department's procedural regulations governing whistleblower complaints state, in pertinent part, "Post-hearing briefs will not be permitted except at the request of the administrative law judge." 29 C.F.R. §24.6 (e)(3).

- 5) In July 1996, Bergeron denied Ilgenfritz's request for overtime pay.
- 6) In August 1996, Bergeron reassigned the HMC duties from Ilgenfritz to another employee.
- 7) In the fall 1996, Ilgenfritz was directed to undergo retraining in boiler operations after he had difficulty lighting a boiler.
- 8) In June 1997, Bergeron sent him a letter barring him from the plant.
- 9) In the fall 1997, Bergeron continued to send him correspondence by certified mail even though Ilgenfritz had requested that he discontinue the practice.
- 10) In August 1998, Respondent terminated him despite being aware that he was in the process of applying for disability retirement.

To prevail on a whistleblower claim under the environmental acts, Ilgenfritz must show that he engaged in protected activity and that Respondent took an "adverse employment action" or "unfavorable personnel action" against him based on that protected activity. *See Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9 (ARB Feb. 29, 2000); *Carroll v. Bechtel Power Corp.*, No. 91-ERA-46, slip op. at 11, n.9 (Sec'y Feb. 15, 1995), *aff'd*, *Carroll v. Department of Labor*, 78 F.3d 352 (8th Cir. 1996). We have previously held that a hostile work environment can constitute an adverse action under the whistleblower protection provisions of the environmental acts. *Varnadore v. Oak Ridge Nat'l Laboratory*, ALJ Nos. 92-CAA-2, *et al.*, slip op. at 71 (ARB June 14, 1996), *aff'd*, *Varnadore v. Secretary of Labor*, 141 F.3d 625 (6th Cir. 1998). However, as the ALJ pointed out, claims alleging illegal conduct that occurred more than 30 days prior to the filing of a complaint on October 2, 1998, are time-barred unless either (a) equitable tolling is appropriate or (b) the Respondent's actions constitute a continuing pattern of retaliatory conduct that is apparent only with the passage of time.

The ALJ considered the possibility that equitable tolling applied to this case, noting that there are three principle situations where equitable tolling is appropriate:

- 1) when the defendant has actively misled the plaintiff respecting the cause of action;^{5/} or

^{5/} Technically, this first basis for "equitable tolling," which involves conduct on the part of a defendant or respondent which causes a complainant to delay the filing of legal action, might be better characterized as a form of "equitable estoppel." *See, e.g., Overall v. TVA*, ARB Nos. 98-111/128, ALJ No. 97-ERA-53, slip op. at 42-43 (ARB Apr. 30, 2001); *Frazier v. Delco Electronics. Corp.*, No. 99-2710, 2001 WL 964933, at *3 (7th Cir. Aug. 24, 2001).

- 2) the plaintiff has in some extraordinary way been prevented from asserting his rights; or
- 3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

See Gutierrez v. Regents of the Univ. of California, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3 (ARB Nov. 1999), citing *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981). The ALJ concluded that none of these circumstances are present in this case, and we agree. Therefore, tolling the limitations period for conduct occurring before September 2, 1998, is unwarranted.

Ilgenfritz's complaint fails no better under the continuing violation doctrine. In a case arising under the Energy Reorganization Act, the Second Circuit offered this characterization of the applicable standard for finding a continuing violation in a whistleblower action:

Under the continuing violation standard, a timely charge with respect to any incident of discrimination in furtherance of a policy of discrimination renders claims against other discriminatory actions taken pursuant to that policy timely, even if they would be untimely if standing alone. A continuing violation exists where there is a relationship between a series of discriminatory actions and an invalid, underlying policy. Thus in cases where the plaintiff proves i) an underlying discriminatory policy or practice, and ii) an action taken pursuant to that policy during the statutory period preceding the filing of the complaint, the continuing violation rule shelters claims for all other actions taken pursuant to the same policy from the limitations period.

Connecticut Light & Power Co. v. Secretary of the U.S. Dep't of Labor, 85 F.3d 89, 96 (2d Cir. 1996) (citations omitted), quoted in *Overall*, slip op. at 46. *Accord Berkman*, slip op. at 14-15; *Varnadore*, slip op. at 61, 66.

Like the ALJ, we find that the continuing violation doctrine is inapplicable on the facts of this case. There was no prolonged employer decision-making process that made it difficult for Ilgenfritz to determine the actual dates of the allegedly discriminatory acts, nor can we discern any underlying policy or pattern of discrimination. The acts of which Ilgenfritz complains were discrete and varied in kind, and were implemented by several different supervisors in his chain of command. Most of the complained-of actions were distant in time from Ilgenfritz's filing of his complaint following his termination – in some instances, by multiple years – lending weight to the ALJ's conclusion that these earlier events were unrelated to his later termination. Based on these facts, we see no basis upon which to toll the limitations period because of a continuing violation.

There are only two allegations in Ilgenfritz's complaint that were timely filed: (a) his allegation regarding the *performance evaluation* for the April 1996 to March 1997 rating period, and (b) his *termination*. With regard to the performance evaluation, Ilgenfritz complains that, although

his overall rating was “proficient,” the evaluation contained several negative comments. Although Ilgenfritz obviously found the comments less than flattering, “not everything that makes an employee unhappy is an actionable adverse action.” *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996). In order to be actionable, the action must implicate some tangible job consequence. *Shelton v. Oak Ridge Nat’l Laboratories*, ARB No. 98-100, ALJ No. 95-CAA-19, slip op. at 8-9 (ARB Mar. 30, 2001).

Ilgenfritz has not demonstrated that his performance evaluation played any role in Respondent’s decision to terminate him. In fact, Ilgenfritz has not shown that his performance evaluation had any tangible job consequences whatsoever. A negative performance evaluation, absent tangible job consequences, is not an adverse action. *Oest v. Illinois Dep’t of Corrections*, 240 F.3d 605 (7th Cir. 2001); *Lucas v. Grainger, Inc.*, 257 F.3d 1249 (11th Cir. 2001). As the Eleventh Circuit has noted:

Employer criticism, like employer praise, is an ordinary and appropriate feature of the workplace. Expanding the scope of Title VII to permit discrimination lawsuits predicated only on unwelcome day-to-day critiques and assertedly unjustified negative evaluations would threaten the flow of communication between employees and supervisors and limit an employer’s ability to maintain and improve job performance. Federal courts ought not be in the position of monitoring and second-guessing the feedback that an employer gives, and should be encouraged to give, an employee.

Davis v. Town of Lake Park, 245 F.3d 1232, 1242 (11th Cir. 2001).

As for the termination action, Mary Hafey, the Staff Advisor for the Coast Guard personnel command, testified that if an employee is still incapacitated after having been in a leave without pay status for over one year, then it is appropriate to initiate a removal action. The decision to initiate the process was based on Stephanos’ recommendation. Stephanos testified that he made that recommendation based solely on the desire to fill the position with a permanent employee and that it had nothing to do with Ilgenfritz’s environmental activities. The ALJ found that testimony credible and so do we. Thus, we find that Ilgenfritz’s termination was not the result of unlawful discrimination.

In summary, Ilgenfritz has not proven that Respondent took adverse action against him in retaliation for his engaging in activity protected under the environmental acts. Therefore, we agree with the ALJ that the complaint should be **DISMISSED**.

SO ORDERED.

PAUL GREENBERG
Chair

RICHARD A. BEVERLY
Alternate Member