



In the Matter of:

ROBERT E. GERMANN,

ARB CASE NO. 04-008

COMPLAINANT,

ALJ CASE NO. 02-STA-28

v.

DATE: May 31, 2005

CALMAT COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Robert H. Lynn, Esq., San Diego, California

For the Respondent:

**Michael W. Monk, Esq., Michael R. Goldstein, Esq., Elizabeth H. Cudd, Esq.,
Musick, Peeler & Garrett, LLP, Los Angeles, California**

FINAL DECISION AND ORDER

This matter arises under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1996), and the implementing regulations at 29 C.F.R. Part 1978 (2004). On August 29, 2003, the Administrative Law Judge (ALJ) granted summary judgment to Respondent CalMat Company (CalMat) and dismissed Complainant Robert Germann's case. We affirm the ALJ's decision.

BACKGROUND

Robert Germann drove a concrete-mixer truck for CalMat, a subsidiary of Vulcan Materials, Inc. CalMat produces and delivers ready-mixed concrete from its facility in San Diego, California. During all relevant periods, Germann was a union steward for the truck drivers at the CalMat facility.

In May 1998, Germann filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that CalMat wrongfully suspended him for reporting safety violations to the California Highway Patrol (CHP), namely, for reporting that CalMat truckers were violating the regulation that prohibits driving after having been on duty for fifteen hours. 49 C.F.R. § 395.3 (2004); ALJ's Order Granting Motion to Suspend Proceedings, July 11, 2002, slip op. at 2. That matter was eventually resolved with this Board's determination that CalMat's suspension of Germann had violated STAA.¹ *Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 99-STA-15 (ARB Aug. 1, 2002).

In November 1998, CalMat fired Germann.² Germann filed a civil suit against CalMat in California Superior Court alleging that CalMat discharged him in violation of public policy, specifically in violation of state statutes prohibiting an employer from retaliating against an employee who discloses violations of federal or state safety laws to government or law enforcement agencies. *Germann v. Vulcan Materials Co.*, Case No. GIC73880 (Cal. Sup. Ct., Nov. 2001); see Cal. Lab. Code §§ 1102.5 and 6310 (West 2003). Germann's civil suit was tried before a jury that found that his discharge did not violate public policy. *Id.* Germann appealed the decision and the California Court of Appeals affirmed the jury verdict in June 2003. *Germann v. Vulcan Materials Co.*, 2003 WL 2145254 (Cal. App. 4 Dist., June 24, 2003).

In addition, Germann filed a complaint with OSHA alleging that CalMat discharged him for making safety complaints and that the discharge violated the whistleblower provisions of STAA. After an investigation, OSHA deferred to the outcome of the state proceeding. See ALJ's Order Granting Motion to Suspend Proceedings, slip op.

¹ On August 6, 1999, after a five-day hearing, the ALJ issued a Recommended Decision and Order concluding that CalMat's suspension of Germann violated STAA's whistleblower provisions. CalMat appealed the Order, and on August 1, 2002, the ARB affirmed the ALJ's liability finding. *Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 99-STA-15 (ARB Aug. 1, 2002). CalMat appealed the ARB's final decision and in April 2004, the Ninth Circuit Court of Appeals affirmed the ARB's decision. *CalMat Co. v. United States Dep't of Labor*, 364 F.3d 1117 (2004).

² Germann filed a grievance alleging that his dismissal violated the collective bargaining agreement between CalMat and its employees. The grievance was handled through voluntary arbitration, and in a two-to-one decision, the arbitration panel found that CalMat had not violated the collective bargaining agreement when it fired Germann. See ALJ Order Granting Motion to Suspend Proceedings, slip op. at 2, July 11, 2002. Germann also filed a complaint with the Regional Director of the National Labor Relations Board (NLRB), who deferred to the finding of the arbitration panel. *Id.* Germann then appealed the deferral decision to the NLRB, which affirmed the Regional Director's determination. *Id.* Because these matters involved only interpretations of the terms of the collective bargaining agreement, they have no impact on this STAA proceeding.

at 2, July 11, 2002. Nevertheless, Germann requested a hearing before an ALJ, and once the ALJ was assigned, CalMat moved for summary decision arguing that the ALJ should also defer to the outcome of the state proceeding.

On July 11, 2002, the ALJ determined that summary decision should be granted to CalMat because Germann had already had a trial in the California courts and was therefore estopped from having another trial. The ALJ also determined that, because the state court decision was on appeal, his determination should be suspended pending the outcome of that appeal. *Id.* at 6.

The California Court of Appeals remittur, issued August 25, 2003, indicated that the Court had affirmed the judgment of the lower court, namely, that CalMat did not wrongfully discharge Germann. *See* Cal. Lab. Code §§ 1102.5 and 6310 (West 2003). Thus, on August 29, 2003, the ALJ lifted the suspension of the STAA proceeding and ruled that CalMat was entitled to summary decision consistent with the findings set out in his July 11, 2002, Order. Decision and Order Lifting Suspension of Proceedings and Granting Respondent's Motion for Summary Decision, August 29, 2003. It is this Order that we are reviewing.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Pursuant to 29 C.F.R. § 1978.109(c)(1), the ARB "shall issue the final decision and order based on the record and the decision and order of the administrative law judge." Pursuant to 29 C.F.R. § 1978.109(c), this Board has jurisdiction to review the ALJ's Decision and Order Lifting Suspension of Proceedings and Granting Respondent's Motion for Summary Decision.

A grant of summary decision is reviewed *de novo*, i.e., under the same standard the ALJs employ. Set forth at 29 C.F.R. § 18.40(d) and derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits an ALJ to "enter summary judgment for either party [if] there is no genuine issue of material fact and [the] party is entitled to summary decision."

DISCUSSION

We must determine whether the ALJ was correct in granting summary decision to CalMat. As the ALJ's grant of summary decision was based on the doctrine of collateral estoppel, our analysis must begin with this.

The Full Faith and Credit statute requires Federal courts to give the same preclusive effect to state court judgments that the courts of the state that rendered the judgments would give them. 28 U.S.C.A. § 1738 (West 1996); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982). The statute also applies by implication to Federal agencies reviewing state court judgments. *Graybill v. United States Postal Serv.*,

782 F.2d 1567, 1570-1571 (Fed. Cir. 1986) (Merit System Protection Board gives preclusive effect to state court judgment). Accordingly, the Full Faith and Credit statute is applicable to this action.

In California courts, the standard for giving preclusive effect to a decision by another California court is as follows: (1) the issue necessarily decided at the previous proceeding is identical to the one that is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding. *Younan v. Caruso*, 51 Cal. App. 4th 401, 406-07, 59 Cal. Rptr. 2d 103 (1996); *see also Trevino v. Gates*, 99 F.3d 911, 923 (9th Cir. 1996). If this standard is met, other courts in California must give preclusive effect to Germann's civil suit, and so must we.

The first element of the standard requires that "the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated." *Hydranautics v. Filtec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000). The only issue raised in Germann's civil action was whether he was discharged for reporting hours of service violations to the CHP.³ After considerable deliberation, the jury answered the following question provided on the special verdict form: "Did Plaintiff prove, by a preponderance of the evidence, that he was terminated by Defendant because he disclosed information to a law enforcement agency which he had reasonable cause to believe disclosed a violation of a state law or regulation?" The jury responded by answering no and returned a verdict in CalMat's favor. Resp. Br. in Support of ALJ's Dec. at 3. Likewise, the only issue raised in Germann's STAA complaint is whether he was discharged for complaining to the CHP about hours of service violations at CalMat Co. Germann specifically stated in his November 1998 complaint to OSHA that he "was terminated for filling [sic] a complaint with the California Highway Patrol regarding the hours of service violations at CalMat Co." *Id.* at Ex. F, p. 3. Accordingly, we agree with the ALJ that the issue the state court decided is identical to the one Germann raised in his STAA complaint, and thus the first element of the collateral estoppel standard has been met.

The second element requires that the first proceeding ended with a final judgment on the merits. *Hydranautics*, 204 F.3d at 885. Germann's civil trial was on the merits and resulted in a jury verdict for CalMat that the California Court of Appeals affirmed. *See* Resp. Br. in Support of ALJ's Dec. at Exh. D.

The final element of collateral estoppel requires that the party against whom the estoppel is asserted was a party in the first proceeding. *Hydranautics*, 204 F.3d at 885. Not only was Germann a party to the state court action, he initiated the action and was the

³ In May 1998, Germann notified the CHP that CalMat violated the California Vehicle Code, title 13, section 1212.5, subdivision (a)(2)(B), which prohibits intrastate truck drivers from driving for any period after having been on duty 15 hours. *Germann v. Vulcan Materials Co.*, 2003 WL 2145254, *9 (Cal. App. 4 Dist., June 24, 2003).

sole plaintiff. Accordingly, the requirements of collateral estoppel are clearly met here and the ALJ properly denied Germann a hearing on his STAA charge.

In addition to the above, we have an independent ground for deferring to the California court decision, namely, the STAA regulations. The relevant section of the regulations reads as follow:

A determination to defer to the outcome of other proceedings initiated by a complainant must necessarily be made on a case-by-case basis, after careful scrutiny of all available information. Before the . . . Secretary defers to the results of other proceedings, it must be clear that those proceedings *dealt adequately with all factual issues*, that the proceedings were *fair, regular, and free of procedural infirmities*, and that the outcome of the proceedings was not *repugnant to the purpose and policy of the Act*.

29 C.F.R. § 1978.112(c) (emphasis added).

We find that the regulatory requirements for deferral are also met. Germann's state trial dealt with all the factual issues. Not only was the issue to be decided the same in both venues, but the record indicates that Germann had every opportunity to raise all the facts surrounding that issue. At the state trial, which lasted 17 days, Germann was represented by counsel and presented 25 witnesses; CalMat called 9 witnesses and 199 exhibits were introduced. All factual issues were adequately dealt with.

Germann, however, argues otherwise to this Board. Specifically, he states that "there is no evidence in this record that the employee's rights and defenses under STAA were even mentioned during the civil trial, much less enforced by the trial court or considered by the jury." Compl. Br. at 16-18. As an example of this point, Germann states that he was not permitted to present the testimony of Carolyn Vallese. Vallese had been a witness at Germann's hearing regarding CalMat's **suspension** of him.⁴ The trial court ruled that Vallese's testimony would not be allowed because it was not relevant to Germann's discharge or to his reporting of safety violations, etc. See Resp. Br. in Support of ALJ's Dec. at Exh. D, pp. 17-19. The Court of Appeals determined that

⁴ Germann has repeatedly attempted to merge his suspension complaint and its successful outcome with this action on his discharge. For example, in September 2004, Germann filed a "Request for Official Notice in Support of Complainant's Brief," asking the Board to consider the Ninth Circuit decision in his suspension case when reviewing his discharge case. Germann's efforts in this regard are ill-conceived because the suspension and the discharge are separate and distinct issues involving different time frames. The discharge was based on Germann's actions in October and November 1998, more than three months after his return from the May 1998 suspension. See *Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 99-STA-15, slip op. at 2 (ARB Aug. 1, 2002).

Vallese's testimony was properly denied. *Id.* Neither this example nor any of the others raised by Germann persuade us that the state court failed to adequately deal with all the factual issues.

Furthermore, the fact that the California Appeals Court affirmed the trial court decision assures us that the proceeding was "fair, regular and free from any procedural irregularities," and based on our review of the record, it is clear that the state decision is not "repugnant to [STAA's] purpose and policy." Accordingly, we find that the regulatory requirements for a proper deferral have been met.

CONCLUSION

For the reasons set out above, we **AFFIRM** the ALJ's application of collateral estoppel and his grant of summary decision to CalMat. Accordingly, we **DENY** Germann's STAA complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge