U.S. Department of Labor

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

In the Matter of:

TOD N. ROCKFELLER,

COMPLAINANT,

v.

**CARLSBAD AREA OFFICE (CAO),
U.S. DEPARTMENT OF ENERGY;
WESTINGHOUSE ELECTRIC CO., (WID),**

RESPONDENTS.

ARB CASE NO. 00-039

**ALJ CASE NOS. 99-CAA-21
99-CAA-22**

DATE: May 30, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward Slavin, Jr., Esq., *St. Augustine, Florida*

For the Respondent:
Elizabeth C. Rose, Esq., *U.S. Department of Energy, Carlsbad, New Mexico*

FINAL DECISION AND ORDER

In this, the fifth in a series of complaints filed by Complainant Tod Rockefeller against the same Respondents, Rockefeller alleges again the same violations of the employee protection provisions of the Clean Air Act, 42 U.S.C.A. §7622 (1995), and the Surface Transportation Assistance Act, 49 U.S.C.A. §31105 (West 1997), as he raised in the previous four complaints.[1/] In addition, Rockefeller has alleged that the Respondent Department of Energy (DOE) destroyed certain documents that were the subject of his Freedom of Information Act (FOIA) request. The Occupational Safety and Health Administration investigated Rockefeller's complaint and found

[1/] Citations to the previous cases are: ARB No. 99-002, ALJ Nos. 98-CAA-10, 98-CAA-11 (*Rockefeller I*); ARB No. 99-067, ALJ No. 99-CAA-1, (*Rockefeller II*); ARB No. 99-068, ALJ No. 99-CAA-4 (*Rockefeller III*); ARB No. 99-063, ALJ No. 99-CAA-6 (*Rockefeller IV*).

it to be without merit. Rockefeller then sought a hearing before a Department of Labor Administrative Law Judge (ALJ).

DOE moved to dismiss Rockefeller's complaint on the grounds, supported by an affidavit of a DOE attorney, that the documents in question had not been destroyed, and that the originals of the documents in question were in her custody. See Dec. 6, 1999 Declaration of Elizabeth C. Rose, Acting Area Office Counsel, DOE Carlsbad Area Office, attached to DOE Motion to Dismiss. Rockefeller opposed the motion, but did not provide any basis for his assertion that the original documents had been destroyed. Thereafter, the Administrative Law Judge (ALJ) issued an order recommending dismissal of the complaint.

The ALJ held that collateral estoppel applied to all the claims from the first four *Rockefeller* cases realleged in this complaint, since those claims had all been dismissed by ALJs. Recommended Decision and Order of Dismissal (R.D.&O.) at 2. The ALJ also found that "[n]o evidence was offered to overcome the fact that the originals [of the requested documents] were never destroyed." *Id.*

DISCUSSION

Complainant's attorney has filed a largely incomprehensible brief in support of this frivolous case. The brief includes no background, no statement of facts, no statement of issues, and no coherent argument. Instead, the brief contains an "Introduction," and a section captioned "The Judge Erred by Dismissing the Complaint." That section of the brief consists of 44 numbered paragraphs dealing with a variety of topics, including alleged destruction of evidence, laches, timeliness, conflict of interest, and collateral estoppel. Every case litigated under the environmental whistleblower provisions requires the investment of time by the parties, the investigating agency, the Office of Administrative Law Judges, and **S** if there is an appeal **S** this Board. The resources of the Department of Labor are finite; therefore the hearing and appeal of one case means that another case must wait. It is in large part for this reason that frivolous cases are extremely damaging to the adjudicatory process. As then Circuit Judge Breyer explained with reference to the appellate courts, "as a general matter, the more time we spend on frivolous cases, the less time we have for the problems of more serious litigants. Thus, the 'frivolous' appeal hurts other litigants and interferes with the courts' overall mission of securing justice." *Natasha v. Evita Marine Charters,* 763 F.2d 468, 471 (1st Cir. 1985).

I. Collateral Estoppel

Rockefeller argues that collateral estoppel – more appropriately termed issue preclusion **S** does not apply to the claims raised in the first four *Rockefeller* cases and realleged in this case, because the initial decisions of the ALJs in those cases were not final but were only recommended decisions reviewable by the Administrative Review Board. At the time Rockefeller filed his brief his point might have been well taken, as the Board had not yet issued its decision in *Rockefeller I, II, III,* and *IV*. However, it is well settled that a judge has the discretion to dismiss "a complaint which simply duplicates another pending related action." *Finch v. Hughes Aircraft Co.,* 926 F.2d 1574,1577 (Fed. Cir. 1991). *See, e.g., Oliney v.*

Gardner, 771 F.2d 856, 859 (5th Cir. 1985). Therefore, irrespective of the merits of Rockefeller's collateral estoppel claim, the ALJ clearly did not abuse his discretion in dismissing the repetitious claims.

In any event, in the interim the ARB has issued a final decision in the four previous *Rockefeller* cases on October 31, 2000, dismissing them. *Rockefeller v. U.S. Dep't of Energy*, ARB Nos. 99-002, 99-067, 99-068 and 99-063, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6, *appeal docketed*, No.00-9545 (10th Cir. Dec. 28, 2000). Therefore Rockefeller is now also barred by the doctrine of issue preclusion from relitigating the issues raised in the previous cases. *See Sawyers v. Baldwin Union Free School District*, No. 85-TSC-00001, slip op. at 18 (Sec'y Oct. 24, 1994); *Agosto v. Consolidated Edison Co.*, ARB Nos. 98-007, 98-152, ALJ Nos. 96-ERA-2, 97-ERA-5, slip op. at 6 (ARB July 27, 1999).

II. Destruction of Evidence

Rockefeller devotes most of his brief to his argument that "DOE [i]ntentionally [d]estroyed [d]iscoverable [e]vidence." Complainant's Opening Brief at ¶¶ 2-22. We agree with the ALJ that Rockefeller's CAA[2/] claim should be dismissed, but for a reason in addition to the one articulated by the ALJ.

To state a claim under the employee protection provision of the CAA, a complainant must allege that he engaged in activity protected by the CAA, and that the respondent took adverse employment action against him because of that protected activity. *Shelton v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-100, ALJ No. 95-CAA-19, slip op. at 6-7 (ARB Mar. 30, 2001). Rockefeller's claim that DOE destroyed documents he had requested under the Freedom of Information Act, 5 U.S.C.A. §552 (West 1996), does not raise a cognizable claim of an adverse *employment* action. *See* Clean Air Act, 42 U.S.C.A. §7622 ("No employer may . . . discriminate against any employee with respect to his compensation, terms, conditions or privileges *of employment* . . . .) (emphasis added). The alleged destruction of documents had no effect on Rockefeller's *employment status*. *See, e.g., Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001) (under Title VII "'evidence that the terms, conditions, or benefits of employment were adversely affected' is the sine qua non of an 'adverse employment action'"); *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 n.4 (10th Cir. 1997)(FLSA retaliation claim).

Furthermore, it is nonsensical for Rockefeller to claim that he was denied "discovery" in his whistleblower case, thereby resulting in "tangible job detriment," in light of the fact that he was provided redacted copies of the documents in question as provided by the Freedom of Information Act. 5 U.S.C.A. §552(b)(6). *See* Exhibit A, attachment to Rockefeller's complaint of July 4, 1999.

[2/] Rockefeller's claim under the STAA is dismissed for the reason articulated in *Rockefeller I, II, III*, and *IV*, slip op. at 6-7.

Finally, we also agree with the ALJ that, in light of DOE's supported and uncontradicted assertion that the originals of the documents were not, in fact, destroyed as alleged by Rockefeller, his complaint is groundless.

For these reasons, the complaint in this case is **DISMISSED**.

SO ORDERED.

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member