U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 January 2006

Case No.: 2005-CAA-11

In the Matter of:

EDWARD A. SLAVIN, JR.,
Complainant

vs.

DEAN, DENNIS J. AIGNER,
Respondent.

RECOMMENDED DECISION AND ORDER
MOTION TO DISMISS

PROCEDURAL BACKGROUND

This matter arises from a complaint filed by Edward A. Slavin, Jr. (Complainant) against Dean Dennis J. Aigner (Respondent) of the University of California at Santa Barbara (UCSB) Bren School of Environmental Science and Management based on the employee protection provisions of the Clean Air Act (CAA),[1] the Comprehensive Environmental Response Compensation and Liability Act (CERCLA),[2] the Federal Water Pollution Control Act (FWPCA),[3] the Safe Drinking Water Act (SDWA),[4] the Solid Waste Disposal Act (SWDA),[5] the Toxic Substances Control Act (TSCA),[6] and the applicable regulations.[7]

[1] 42 U.S.C. § 7622 (2004).
[2] 42 U.S.C. § 9610 (2004).
[3] 33 U.S.C. § 1367 (2004).
[4] 42 U.S.C. § 300j-9 (2004).
[5] 42 U.S.C. § 6971 (2004).
[6] 15 U.S.C. § 2622 (2004).
[7] 29 C.F.R. Part 24 (2004).

Complainant's formal pleading alleges that the UCSB's Bren School of Environmental Science and Management, with Dean Dennis J. Aigner, worked for and received funds from the Department of Energy (DOE), the Environmental Protection Agency (EPA), and Southern California Edison (SCE).

Complainant further states that he has a history of investigating those institutions, reporting wrongdoing by them, and advocating against them. He then lists his specific protected whistleblower activities.

Complainant also alleges that (1) in September of 2004 he applied for a Corporate Environmental Management position advertised by the Bren School in the London Economist, and for any other pending vacancies; (2) the application materials he provided included notice of his whistleblower activities; and (3) in November of 2004 he was informed that he was not suitable for the position.

The case includes a lengthy history of pre-hearing litigation with a wide variety of discovery, procedural and summary disposition motions, including the dismissal of UCSB as a party on 14 Jul 05.

On 18 Aug 05, Respondent filed a motion to dismiss the case for a lack of jurisdiction over an individual employee under the applicable statutes. Respondent's motion to dismiss is based on his position that he was not subject in his individual capacity to the provisions of any of the applicable statutes. He essentially argues that he does not fall within the statutory definitions of "employers" or "persons" who are subject to the prohibitions and remedies of the employee protection provisions.[8] Respondent also moved to abate discovery until the motion to dismiss was resolved.

On 29 Aug 05, Hurricane Katrina forced the closure of the Department of Labor's Metairie Office of Administrative Law Judges. The offices were damaged and both digital and paper files were unavailable. On 28 Aug 05,[9] Complainant faxed to the Metairie office a motion to stay until 6 Sep 05 to allow for delays caused by the hurricane. On 21 Sep 05 I issued an interim order providing for the tolling of all deadlines and time periods from 26 August to 30 September. The Administrative Law Judge offices were eventually relocated to Covington, LA, where case recovery and file reconstitution began in earnest on 17 Oct 05.

[8] My earlier ruling dismissing UCSB, but not Dean Aigner, as a Respondent, was based on general principles of immunity. Respondent's new motion is based on his argument that the specific statutes lack jurisdiction over him.

[9] The document was discovered in the fax machine under a pile of collapsed ceiling material when court personnel briefly reentered the office on 17 Sep 05. The mailed copy was received 3 Oct 05.

On 3 Nov 05, I issued an order for Complainant to show cause why Respondent's motion to dismiss should not be granted and why discovery should not be stayed pending resolution of the motion to dismiss. Complainant was given 10 days from receipt of the order to respond to the discovery stay motion and 20 days to respond to the motion to dismiss. The order was received at Complainant's address on 17 Nov 05. On 15 Dec 05, Complainant filed a motion stating the Respondent had not cooperated in discovery, and requesting that Complainant be given an enlargement of time to respond to any motion until Respondent meets its discovery obligations. Complainant also moved to consolidate this case with another.[10] Complainant's motion does not address the show cause order.

LEGAL STANDARD OF REVIEW

In situations not specifically addressed by the rules of practice and procedure applicable to administrative hearings under environmental whistleblower statutes, the Federal Rules of Civil Procedure apply.[11] While the administrative regulations do not address motions such as Respondent's, the Federal Rules of Civil Procedure do. In motions to dismiss for legal insufficiency the allegations in the complaint are accepted as true. No evidentiary analysis or consideration is required. The only question is whether, assuming everything he alleges is true, Complainant has a valid legal cause of action upon which he can recover.[12]

ISSUE

For the purposes of this motion, the allegations in Complainant's pleadings and all reasonable inferences in favor of Complainant must be accepted as true. Essentially, Complainant alleges that: (1) he was qualified and properly applied for the faculty position advertised and sought to be filled by UCSB's Bren School; (2) he had been involved in protected activities as defined under the various acts; (3) the Bren School knew of his application, knew he was qualified, and knew of his protected activities; (4) the Bren School refused to hire him because of those protected activities; (5) Respondent Aigner was the Dean of the Bren School; and (6) Respondent Aigner was aware that Complainant had applied and was qualified for the position, but made the decision not to hire Complainant because of his protected activity.

[10] That case is based on the same general cause of action, but is related to a different faculty position for which Complainant applied. *Slavin v. UCSB et al*, 2006-CAA-00002.
[11] 29 C.F.R. §18.1(a).
[12] F.R.C.P. 12(b)(6); *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

SUBSTANTIVE LAW

Upon that factual predicate lies the pivotal question in this motion. Do the statutes invoked in this action establish jurisdiction over an individual employee of an employer, even if that employee is the company's senior manager responsible for the company's actions, the complainant's ultimate supervisor, and the individual who made the decision to take adverse action against the complainant?

The CAA provides that no ***employer*** may discriminate against any employee and that any employee who believes that he has been discriminated against by any ***person*** may file a complaint seeking an order that the ***person*** who committed such violation abate the violation, reinstate the complainant (including back pay), and provide compensatory damages. It defines the term "person" to include an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.[13]

The CERCLA provides that no ***person*** shall discriminate against any employee and that any employee who believes that he has been discriminated against by any ***person*** may apply for abatement of the violation and reinstatement with compensation. It defines "person" to mean an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.[14]

The FWPCA provides that no ***person*** shall discriminate against any employee and that any employee who believes that he has been discriminated against by any ***person*** may apply for abatement of the violation or reinstatement with compensation. It defines "person" as an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.[15]

The SDWA provides that no ***employer*** may discriminate against any employee and that any employee who believes that he has been discriminated against by any ***person*** may file a complaint seeking abatement of the violation, reinstatement with compensation, compensatory damages, and exemplary damages.[16]

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[13] 42 U.S.C. § 7622 (*emphasis added*).
[14] 42 U.S.C. § 9610 (*emphasis added*).
[15] 33 U.S.C. § 1367 (*emphasis added*).
[16] 42 U.S.C. § 300j-9 (*emphasis added*).

The SWDA provides that no ***person*** shall discriminate against any employee and that any employee who believes that he has been discriminated against may apply for abatement including, but not limited to, reinstatement with compensation. It defines "person" to mean an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States.[17]

The TSCA provides that no ***employer*** may discriminate against any employee and that any employee who believes he has been discriminated against by any ***person*** may file for abatement of the violation, reinstatement with compensation, compensatory damages, and where appropriate, exemplary damages.[18]

The Department of Labor's jurisdiction under the CAA, TSCA, SWDA, and CERCLA, extends only to "employers" and "employees." A mere supervisory relationship is insufficient and the respondent must be the employer of the complainant.[19] An employment relationship between the complainant and respondent is an essential element of any claim brought under the environmental whistleblower provisions, and the failure to allege one is grounds to dismiss for failure to state a claim upon which relief can be granted.[20]

Although the CAA refers to both "employers" and "persons," a federal employee is not a proper respondent in a CAA complaint, and only employers are subject to the employee protection provisions of the CAA.[21] The same holds true for the SDWA.[22] The same conclusion has been reached regarding similar language in the Energy Reorganization Act.[23]

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[17] 42 U.S.C. § 6971 (*emphasis added*).
[18] 15 U.S.C. § 2622 (*emphasis added*).
[19] *Kesterson v. Y 12 Nuclear Weapons Plant, et al.*,95 CAA 00012 *aff'd* ARB 96-173 (April 8, 1997).
[20] *Varnadore v.Oak Ridge Nat'l Lab., et al.*, ARB June 14, 1996.
[21] *Stephenson v. National Aeronautics & Space Administration*, 1994 TSC 5 (Sec'y July 3, 1995)
[22] *Gass v. DOE et al.*, 2002 CAA 2 (ALJ).
[23] *Bath v. U.S. Nuclear Regulatory Commission*, 2001-ERA-41, ARB 02-041 (September 29, 2003).

Although the SWDA does not use the term "employer" and refers instead to persons, the remedy provisions of that act make sense only when viewed in terms of a respondent employer, not a respondent co-employee or supervisor.[24] Under the whistleblower protection provisions of the FWCPA, SWDA and CERCLA, a complainant must establish that the respondent was his employer or acted in the capacity of his employer.[25]

DISCUSSION

The clear weight of legal authority holds that under the environmental whistleblower statutes applicable in this case, a complainant must seek relief from an employer. Respondent Aigner may have been the Dean of the Bren School. He may also have been the senior leader and manager for the school, responsible for negotiating salaries on behalf of the school and determining each faculty member's work assignments. He may have been ultimately responsible for the decision not to hire Complainant or even personally made that decision.

Nonetheless, the employer in this case was not Respondent Aigner, but rather UCSB. Had he been hired, Complainant would not have been an employee of the Dean, but rather an employee of UCSB. Complainant would not have had any contractual relationship with the Dean. Had Complainant been in fact hired, his status as an employee would have been unaffected when Respondent Aigner left his position as Dean.[26]

Had he decided to hire Complainant, Respondent Aigner would not have been Complainant's employer. Accordingly, he is not subject to the employee protection provisions of the statutes invoked in this case. Complainant's allegations may or may not be factually accurate or otherwise legally meritorious. In any case, this is not the proper forum for those allegations.

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[24] *Id.*

[25] *Lewis v. Synagro Technologies, Inc.*, 2002-CAA-12 and 14; ARB 02-072 (27 February 2004).

[26] Respondent Aigner was no longer Dean when I dismissed UCSB as a respondent in July of 2005.

RECOMMENDED DECISION AND ORDER

The motion to dismiss is **GRANTED** and the complaint **DISMISSED**.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).