U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 18 September 2006

Case No.: 2006-ERA-00005

In the Matter of:

HARRY BLANK,
Complainant,

v.

DOMINION NUCLEAR CONNECTICUT, INC.
Respondent.

RECOMMENDED DECISION AND ORDER OF DISMISSAL "WITH PREJUDICE"

This proceeding arises under the Energy Reorganization Act ("ERA") of 1974, 42 U.S.C. § 5851. Any action brought under these statutes is governed by the rules and procedures set forth in 29 C.F.R. § 24. On March 3, 2005, the Respondent terminated the Complainant's employment. On July 28, 2005, the Complainant timely filed a discrimination complaint with the U.S. Department of Labor. After receiving the Assistant Secretary's Findings and Order dated January 19, 2006, which denied the complaint, on January 28, 2006, the Complainant timely filed objections to the Findings and Order.

By a February 6, 2006 Notice of Hearing, I set this case for hearing on April 12, 2006. At the request and agreement of the parties, by a March 29, 2006 order, I changed the hearing to begin on August 15, 2006. I also established a deadline of June 6, 2006 for the filing of any dispositive motions, a deadline of July 3, 2006 for the filing of any responses to dispositive motions, and a deadline of July 12, 2006 for any replies to such responses.

On June 6, 2006, I received a Motion for Summary Decision from the Respondent in this case. I did not receive any response to this motion from the Complainant, however on June 26, 2006, I received a motion from the Complainant seeking a stay of this proceeding pending the resolution of a claim he was making in another forum. On June 26, 2006, I received a response to this motion from the Respondent who opposed the stay. I denied the Complainant's motion to stay this proceeding, and I informed the parties of this decision by phone on June 30, 2006. My decision was later memorialized in a written order issued July 6, 2006.

Subsequently, on July 3, 2006, I received by fax a motion from the Complainant to withdraw from this case. The motion stated that "In light of the recent denial of Mr. Blank's Motion to Stay Proceedings and the concomitant time and expense associated with prosecuting this case and the State proceedings concurrently, the Complainant hereby respectfully withdraws this case."

On July 5, 2006, I held a conference call with counsel representing both parties. After discussing the withdrawal request, I stated then that I approved the withdrawal request and would issue an order granting Complainant's request to withdraw from this case. By the same order, I would also cancel the hearing. The Respondent then asked that I specify in my order that the Complainant's withdrawal is "with prejudice." Counsel for the Complainant argued that the final order should be "without prejudice." At the request of the parties, I set a briefing schedule to brief this remaining issue.

On July 26, 2006, I issued a written order canceling the hearing, granting the Complainant's withdrawal request, and establishing a briefing schedule on the issue of whether or not the withdrawal was "with prejudice." I also specified that, since there was no longer any objection to the Assistant Secretary's Findings and Order dated January 19, 2006, the Assistant Secretary's findings have become the "Final Order of the Secretary of Labor."

I received a brief from the Respondent on the issue of prejudice on August 1, 2006, and I received a reply to that brief from the Complainant on August 8, 2006. After reviewing those briefs and the legal authority they reference, I find that the Complainant's withdrawal is "with prejudice."

DISCUSSION

Neither the ERA nor the procedural rules contained at 29 C.F.R. §§ 18 & 24 address the issue of withdrawal. When the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges do not address a particular procedural situation, the Rules of Civil Procedure for the District Courts of the United States fill the gap. 29 C.F.R. § 18.1(a). In this situation, that means that Federal Rule of Civil Procedure ("FRCP") 41 controls. *See* ***Anderson v. DeKalb Plating Co.***, ARB Case No. 98-158 (Jul. 27, 1999).

FRCP 41 provides for two types of withdrawals. The first, contained in FRCP 41(a)(1), allows a complainant to voluntarily withdraw a case without prejudice and without a court order, but *only* if the respondent has not filed an answer or a motion for summary decision. In this case, the Respondent filed a Motion for Summary Decision on June 6, 2006, so this type of voluntary withdrawal is not available to the Complainant.

The second type of withdrawal, contained in FRCP 41(a)(2), cannot be accomplished without my order and my determination that the terms and conditions of

the withdrawal are proper. A withdrawal under this rule is assumed to be without prejudice unless otherwise specified by the court.

The Administrative Review Board has specified that when a respondent will be prejudiced by a dismissal without prejudice, a dismissal with prejudice is appropriate, and it has identified four factors to be considered when deciding whether a withdrawal under FRCP 41(a)(2) should be with or without prejudice. They are:

1. The Respondent's effort expended in, and the expense of, trial preparation

2. The Complainant's excessive delay and lack of diligence in prosecuting the action

3. The Complainant's sufficient or insufficient explanation for the need to withdraw

4. Whether the Respondent has filed a motion for summary decision

Anderson v. DeKalb Plating Co., ARB Case No. 98-158, slip op. at 2 (Jul. 27, 1999). I will consider each of these factors in turn.

First, the Respondent has expended considerable effort and expense preparing for the anticipated hearing in this case. It has conducted a deposition of the Complainant, defended depositions of the Respondent's employees, and conducted interviews of twenty (20) of the Respondent's current and former employees. It also prepared a forty-four (44) page Motion for Summary Decision supported by five (5) affidavits and thirty-five (35) exhibits. Counsel for the Respondent states that approximately four hundred and fifty hours (450) have been expended in the preparation of this case already, not including the time spent by the Respondent's in-house counsel.

Second, the Complainant has shown a lack of diligence in prosecuting this action. The Complainant has engaged in only limited discovery so far, and he has made no attempt to respond to the Respondent's Motion for Summary Decision. Moreover, he requested an indefinite stay of the proceeding on June 26, 2006 so that he could pursue another claim in another forum before litigating this one. When the stay was denied, he attempted to withdraw his claim rather than respond to the Respondent's motion or otherwise prosecute this action.

Third, neither the Complainant's attempt to withdraw his claim nor his brief on this issue have given a satisfactory justification for why this withdrawal is necessary. The only reasons offered are my denial of his motion for a stay and the time and expense associated with prosecuting a case in this forum and another forum simultaneously. The Complainant could have filed his motion to stay this proceeding months earlier, before the Respondent had expended so much time and effort on

discovery and preparation of its Motion for Summary Decision. The fact that he did not do so until a time when granting a stay would be inappropriate does not make my denial of his request a justification for this late withdrawal only weeks before the scheduled hearing. Additionally, the time and expense of pursuing two actions was within the Complainant's control. He chose his forums, his cases, and his timing, and the Respondent should not be penalized because he is dissatisfied with the results of those choices.

Finally, the Respondent did file a Motion for Summary Decision in this case. Even though my briefing schedule afforded the Complainant almost a month to respond to this motion, he instead chose to wait until twenty days of that time had elapsed and then file his motion for a stay. When that was denied, he filed a withdrawal – on the deadline for his response – instead of responding.

Federal courts have dismissed cases with prejudice under similar circumstances, as have my colleagues in the Office of Administrative Law Judges. *See* ***Place v. Southern Express Co.***, 409 F.2d 331, 334 (7th Cir. 1969); ***Weed v. Asset Acceptance Corp.***, ALJ Case No. 2005-SOX-00063, slip op. at 1-2 (Aug. 5, 2005); ***Stavrulakis v. Forest City Enterprises, Inc.***, ALJ Case No. 2005-SOX-00005, slip op. at 2-3 (Jan. 27, 2005). Moreover, they have done so even when other claims in other forums were pending. *See* ***Zagano v. Fordham Univ.***, 900 F.2d 12, 13 (2nd Cir. 1990); ***Weed v. Asset Acceptance Corp.***, ALJ Case No. 2005-SOX-00063, slip op. at 1-2 (Aug. 5, 2005); ***Stavrulakis v. Forest City Enterprises, Inc.***, ALJ Case No. 2005-SOX-00005, slip op. at 2-3 (Jan. 27, 2005).

In conclusion, I find that the factors enumerated by the ARB mitigate in favor of this withdrawal being with prejudice. This tribunal is not competent to determine whether finding that this withdrawal is with prejudice will effect the Complainant's other actions in other forums, and so, I make no finding as to any such effect.

ORDER

In accordance with FRCP 41(a)(2), the Complainant's ERA whistleblower claim before the U.S. Department of Labor is hereby dismissed with prejudice.

A

WILLIAM S. COLWELL
Administrative Law Judge

Washington D.C.
WSC:MAWV

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).