

BEFORE THE BOARD OF DIRECTORS
OF THE OFFICE OF COMPLIANCE
LA 200, John Adams Building
110 Second Street, S.E.
Washington, DC 20540-1999

Richard A. Duncan,)
Complainant,)
)
v.)
)
OFFICE OF THE ARCHITECT)
OF THE CAPITOL,)
Respondent.)
)
)

August 5 , 2004

Case No. 02-AC-59 (RP)

Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens, Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

I. Introduction

The Office of Compliance entered into its records the attached decision of Hearing Officer Sylvia Bacon in this proceeding. The hearing officer granted the Respondent/employing office's motion to dismiss the complaint concluding that (1) the complaint fails to state a claim upon which the requested relief may be granted; and (2) the claims made in the complaint are not within the jurisdiction of the Office of Compliance as conferred upon it by Congress. The Appellant/Complainant timely filed a petition for review and a supporting brief. The Respondent timely filed its opposition brief.

The Complaint alleges, in summary, that the Complainant opposed unsafe work practices by refusing a superior's oral direction that he remove his safety hard hat although working in a hard hat designated area. Consequently, that superior became verbally offensive towards the Complainant and forcibly removed Complainant's hard hat from his head. Complainant alleges consequential and lingering physical and

emotional damages therefrom. The Complaint also alleges (1) that the Respondent imposed discipline upon the Complainant; (2) Respondent materially misrepresented facts to prejudice Complainant's related Workers Compensation claim before the U.S. Department of Labor; and (3) Respondent wrongfully denied the Complainant's internal grievance, which was based upon these events. Complainant alleges that each of Respondent's cited acts constituted retaliation proscribed by Section 207(a) of the Congressional Accountability Act ("the Act"), inflicted upon him because Complainant had opposed unsafe working conditions.

II. The Hearing Officer's Legal Conclusions

The hearing officer, noting that the Act's single anti-retaliation provision, Section 207(a), is placed in Part A of Title II of the Act, concluded that 207(a) restricts its protection solely to the exercise of rights under those laws applied by Part A. The hearing officer accorded controlling significance to the fact that the Occupational Safety and Health Act, under which the Complainant claims protected activity, is applied by Section 215, which is placed in Part C of Title II of the Act.

The hearing officer specifically held that the Complainant "is a Congressional employee to whom Congress extended OSHA protections and remedies". However, she found it critical that the OSHA protections in Part C contained no "specific cross-reference" to the remedial provisions in Part A, particularly Section 207(a). The hearing officer ultimately concluded that the Complainant's anti-retaliation remedy exists under OSHA, in common with non-Congressional employees covered by OSHA. The hearing officer concluded that to accord the Complainant and other Congressional employees "private rights of action" under Section 207(a) would afford them greater remedial procedures than those enjoyed by non-Congressional employees.

III. Discussion

Dismissal on the pleadings is only appropriate "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *H.J. Inc. v. Northwest Bell Telephone Co.*, 492 U.S. 229, 249-50 (1989) (internal quotations and citations omitted). See also *Conley v. Gibson*, 355 U.S. 41 (1957). In a motion to dismiss, the court must accept as true all well-pleaded factual allegations contained in the complaint and draw all reasonable inferences in the plaintiff's favor. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1424-25 (3d Cir. 1997). However, a court need not credit a complaint's legal conclusions wherein factual support is lacking. *Glassman v. Computervision Corp.*, 90 F.3d 617, 628 (1st Cir. 1996).

The Board's standard of review for appeals from a hearing officer decision requires the Board to set aside a decision if the Board determines it to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made

consistent with required procedures; or (3) unsupported by substantial evidence. *Section 406(c), CAA; 2 U.S.C. §1406(c)*.

This petition for review implicates review ground (1) *supra.*, inasmuch as the appeal challenges the hearing officer's legal conclusions of her lack of jurisdiction to entertain the Complaint. Accordingly, the Board's review of those legal conclusions should be *de novo*. *Nebblett v. Office of Personnel Management*, 237 F.3d 1353, 1356 (Fed. Cir. 2001).

We disagree with the hearing officer's conclusion that Section 207(a) does not protect from reprisal covered employees who exercise their OSHA rights. We begin with Section 207(a) because it so unambiguously and clearly extends anti-reprisal protection for opposition to any practice made unlawful by the CAA:

Sec. 207. Prohibition of Intimidation or Reprisal

*(a) IN GENERAL.-It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful **by this Act**, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding **under this Act**.*

[Emphasis supplied].

This provision plainly prescribes that its anti-retaliation protections attach to the exercise of rights across the entire Congressional Accountability Act and not just to those rights applied by Part A of Title II of the Act. Nor are we persuaded that the location of Section 207(a) in Part A counsels to the contrary. The referenced placement is consistent with the statutory scheme that places other individual rights of covered employees within Part A of Title II of the Act. These individual rights are enforced through the dispute resolution procedures in Title IV of the Act. *Section 401, CAA; 2 U.S.C. §1401 et seq.* On the other hand, the laws applied by Parts B-D of Title II (Public Services and Accommodations under the Americans with Disabilities Act, Occupational Safety and Health Act, and the Federal Labor-Management Relations Statute) are enforced through proceedings brought by the Office's General Counsel rather than by covered employees. We will not construe the placement of Section 207(a) in Part A to trump its express language when there is another reasonable explanation for that placement.

The legislative history of the Act unequivocally supports this conclusion. While the Act was unaccompanied by any committee reports, two major Senate proponents of the Act, Senators Charles Grassley and Joseph Lieberman, introduced into the Congressional Record their section-by-section analysis of the Act. Addressing section 207(a), the document states, in pertinent part, "This section provides one uniform remedy for intimidation or reprisal taken against covered employees for exercising rights and

pursuing remedies of violations for the violation of rights conferred by this act.”
[*Congressional Record*, p. S624, January 9, 1995].

We also disagree with the hearing officer’s conclusion that covered employees possess a remedy against reprisal under the Act’s OSHA provisions. In fact, Section 210 of the Act selectively applies OSHA provisions, and does not apply OSHA’s anti-discrimination/ retaliation provision, 29 U.S.C. §660(c), which provides:

Discharge or discrimination against employee for exercise of rights under this chapter; prohibition; procedure for relief

(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States District Court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph (2) of this subsection.

Unless Section 207(a)’s reference to “any practice made unlawful by this Act” is understood to encompass practices made unlawful by the Act’s OSHA provisions, covered employees would have no rights or remedies if subjected to intimidation or reprisal for opposing such practices. However, our view of the clear import of Section 207(a) avoids this result.

Once again an examination of the legislative history is quite elucidating. In January 1995, the House of Representatives unanimously passed *H.R. 1*, which tracked *H.R. 4822* from the previous 103rd Congress. *H.R. 1* contained an anti-retaliation provision (*Sec. 101(a)(2)*) limiting its scope to the exercise of rights under statutes applied by that section, which did not include OSHA. Instead, *H.R. 1* provided a separate anti-retaliation provision in the bill’s OSHA section that would have afforded prosecutorial discretion to the Office of Compliance’s General Counsel. [*H.R. 1, Section 106(c)*]. [See, generally, *Legislative History, Congressional Accountability Act of 1995*,

Volume 1, Proceedings in the 103d Congress, Prepared by the Office of Senate Legal Counsel, June 1995, pp. ii-xiii.) Essentially, H.R. 1 would have afforded the OSHA anti-retaliation non-private right of action envisioned by the Hearing Officer.

However, Congress instead ultimately passed *S. 2*, which: (1) imposed a general anti-retaliation provision in *Section 207(a)* to protect exercise of all rights under the Act; and (2) afforded the General Counsel no role in investigating and prosecuting OSHA anti-retaliation claims. It is therefore clear that the Congress considered and rejected the remedial enforcement scheme that the Hearing Officer found to be operative herein. Instead, Congress opted that OSHA retaliation claims be processed under *Section 207(a)* of the Act.

Accordingly, we reverse the hearing officer's decision to grant Respondent's motion to dismiss the Complaint.

ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(d) of the Office's Procedural Rules, the Board remands this matter to the hearing officer to proceed as is consistent with this opinion.

It is so ordered.

Issued, Washington, D.C.: August 5 , 2004

CERTIFICATE OF SERVICE

I hereby certify that on this Fifth (5th) day of August 2004, I delivered a copy of this Decision of the Board of Directors to the following parties by the below identified means:

First-Class Mail Postage-Prepaid

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Re: *Richard A. Duncan, Complainant v. Office of
the Architect of the Capitol*, Case No. 02-AC-59(RP)

Dear Counsel:

Pursuant to *Section 8.01(e)* of the Procedural Rules of the Office of Compliance I am hereby providing you with the Decision of the Board of Directors, dated August 5, 2004, remanding the matter to the Hearing Officer to proceed in accordance with the Board's opinion.

Sincerely,

Paul M. Coran
Acting Executive Director

cc: Hearing Officer Sylvia Bacon

