



In the Matter of:

**LINDA L. PLUMLEE,**

**COMPLAINANT,**

**v.**

**CORPORATE EXPRESS DELIVERY SYSTEMS, INC.,**

**RESPONDENT.**

**ARB CASE NO. 99-052**

**ALJ CASE NO. 98-TSC-9**

**DATE: June 8, 2001**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

Glen Plumlee, *Danbury, Texas*

*For the Respondent:*

Neil Martin, Esq., Nicole Perdue, Esq., *Gardere Wynne Sewell & Riggs, L.L.P., Houston, Texas*

**FINAL DECISION AND ORDER**

On April 16, 1998, Linda L. Plumlee filed a complaint with the Secretary of Labor against Respondent Corporate Express Delivery Systems, Inc. ("Corporate Express") and Dow Chemical Co. ("Dow")<sup>1/</sup> under the employee whistleblower protection provisions of the Toxic Substances Control Act, 15 U.S.C. §2622 (1994); the Federal Water Pollution Control Act, 33 U.S.C. §1367 (1994); the Solid Waste Disposal Act, 42 U.S.C. §6971 (1994); and the Clean Air Act, 42 U.S.C. §7622 (1994) (collectively the "Environmental Acts"). Plumlee claimed that Corporate Express and Dow wrongfully terminated her employment because she had engaged in activities protected under the Environmental Acts. Both Dow and Corporate Express opposed Plumlee's claim because they maintained that she was an independent contractor rather than a covered employee.

Although Plumlee filed one complaint, the Occupational Safety and Health Administration ("OSHA") conducted two investigations and issued two decisions which separately addressed

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<sup>1/</sup> This Final Decision and Order is one of two related final decisions issued simultaneously by the Administrative Review Board following appeal by Complainant Plumlee from Recommended Decisions and Orders of Dismissal entered February 25, 1999, in ALJ Nos. 1998-TSC-8 and 1998-TSC-9. The related Final Decision and Order of the ARB is entered in *Plumlee v. Dow Chemical Co.*, ARB No. 99-052.

Plumlee's claims against Corporate Express and Dow. OSHA dismissed Plumlee's complaint against Corporate Express because it found that Corporate Express was not a covered employer and also because Plumlee's expressed concerns did not represent violations of the Environmental Acts. Plumlee appealed OSHA's determination and requested a hearing before a Department of Labor Administrative Law Judge ("ALJ"). Before the ALJ, Corporate Express filed a motion to dismiss asserting that Plumlee was an independent contractor and not an employee of Corporate Express within the meaning of the Environmental Acts. After limited discovery, and after allowing the parties to fully brief the issue,<sup>2/</sup> the ALJ issued a Recommended Decision and Order (R.D.&O.) finding that Plumlee was an independent contractor and not an employee of Corporate Express, and dismissing Plumlee's complaint on the grounds that she had not established that the Department of Labor had jurisdiction over her claims under the Environmental Acts. Plumlee filed a timely appeal of the ALJ's R.D.&O. with this Board. We have jurisdiction over this matter pursuant to 29 C.F.R. §24.8 (2000).

### STANDARD OF REVIEW

The Board engages in *de novo* review of the recommended decision of the ALJ. *See* 5 U.S.C. §557(b) (1994); 29 C.F.R. §24.8; *see also Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 97-ERA-53, slip op. at 13 (ARB Apr. 30, 2001), and the cases cited therein.

### BACKGROUND

Corporate Express is a nation-wide delivery company providing services to businesses, including internal delivery services. In November 1995, Corporate Express and Plumlee entered into a contract whereby Plumlee agreed to provide delivery services for Corporate Express's customers. The contract identified Plumlee as an independent contractor. Pursuant to this contract, Plumlee was paid for delivery services she rendered to any Corporate Express customer on a commission basis, as a percentage of the amount Corporate Express charged its customer.

In July 1996 U.S. Delivery Systems, Inc. contracted to supply Dow Chemical Company ("Dow") with drivers and vehicles to handle Dow plant deliveries. Pursuant to this contract, Corporate Express, an affiliate of U.S. Delivery Systems, Inc., agreed to supply drivers who would work at the direction and discretion of Dow's warehouse management in completing daily deliveries.

As part of its effort to meet its obligations under the Dow contract, Corporate Express sought and secured Plumlee's services under their pre-existing contract. Thereafter, Plumlee performed delivery services at the Dow plant facility. However, in April 1998, Dow informed Corporate Express that it wished Plumlee reassigned. As Dow was the only company in the area for which Corporate Express provided delivery services, Plumlee's contract with Corporate Express was

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<sup>2/</sup> The ALJ, upon acceptance of affidavits and other relevant documents submitted by Corporate Express, properly converted the motion to dismiss into one for summary decision pursuant to 29 C.F.R. §18.40.

terminated as her services were no longer required.<sup>3/</sup> The instant complaint ensued (as well as Plumlee's companion complaint against Dow).

The dispositive issue in this case is whether Plumlee was a covered employee within the meaning of the Environmental Acts, or, instead, was an independent contractor. Based upon our review of the ALJ's Recommended Decision and Order and the record and the briefs and arguments of the parties on appeal, the Board concludes that the ALJ's Recommended Decision and Order finding that Plumlee was not an employee of Corporate Express is legally correct. Subject to the following discussion, we adopt the ALJ's decision and append a copy of it to our decision.

## DISCUSSION

### I. Discovery

Plumlee argues that the ALJ committed reversible error by unduly restricting discovery. Brief of Complainant at 6. We disagree.

Plumlee was represented by her husband, Glen Plumlee, who obtained several subpoenas from the presiding ALJ. On November 5, 1998, Glen Plumlee served subpoenas on Dow and Corporate Express employees for the purpose of deposing them. On November 6, 1998, Plumlee served Dow and Corporate Express with Requests for Interrogatories and Production of Documents. Dow then filed a Motion to Stay Discovery And For Preliminary Determination of Claimant's Employment Status with Dow. Dow and Corporate Express also filed Motions to Quash. The ALJ granted the Motions to Quash and also granted Dow's motion to limit discovery to the issue whether Plumlee was a covered employee.

Plumlee argues that the ALJ erred by restricting discovery to the issue whether she was a covered employee. We disagree. "ALJs have wide discretion to limit the scope of discovery and will be reversed only when such evidentiary rulings are arbitrary or an abuse of discretion." *Hasan v. Burns & Roe Enters., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 4 (ARB Jan. 30, 2001). Previously, we have held that it is appropriate to suspend discovery pending a decision on a motion potentially dispositive of the case. *Rockefeller v. Carlsbad Area Office, U.S. Dep't of Energy*, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 98-CAA-10, 98-CAA-11, 99-CAA-1, 99-CAA-4, 99-CAA-6, slip op. at 18 (ARB Oct. 31, 2000). In this case it was entirely appropriate for the ALJ to suspend full discovery until Plumlee established the threshold requirement that she was a covered employee under the Environmental Acts. We find that the ALJ's order limiting discovery was not an abuse of discretion and the ALJ did not err in limiting discovery.<sup>4/</sup>

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<sup>3/</sup> Dow was the only company in the Freeport area for which Corporate Express provided delivery service. Corporate Express claimed that requiring Plumlee to drive to Houston, the site of its nearest contract, was unfeasible. Corporate Express also claimed that similar work was not available in the Houston area. Brief of Respondent Corporate Express at 3 n. 7.

<sup>4/</sup> Plumlee raised several other arguments in her brief which are without merit and do not warrant a separate discussion in this order.

## **II. Jurisdiction**

Having found that Plumlee was not a covered employee, the ALJ recommended that her claim be dismissed for lack of jurisdiction. R. D. & O., slip op. at 7. However, by filing a complaint alleging a violation of the whistleblower protection provisions of the Environmental Acts, Plumlee properly invoked the Department of Labor's jurisdiction to adjudicate the complaint. *Sasse v. U.S. Dep't of Justice*, ARB No. 99-053, ALJ No. 98-CAA-7, slip op. at 4 (ARB Aug. 31, 2000). The ALJ should have dismissed Plumlee's complaint because she was not a covered employee under the Environmental Acts.

## **CONCLUSION**

We adopt the ALJ's Recommended Order and **DISMISS** Plumlee's complaint.

**SO ORDERED.**

**PAUL GREENBERG**

Chair

**E. COOPER BROWN**

Member

**CYNTHIA L. ATTWOOD**

Member