

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 February 2007

CASE NO.: 2004-CAA-00015

In the Matter of:

**LARRY EDMONDS,
Complainant**

v.

**TENNESSEE VALLEY AUTHORITY,
TVA CHAIRMAN GLEEN L. McCULLOUGH, JR., and
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS LOCAL UNION No. 852,
Respondents.**

RECOMMENDED ORDER OF DISMISSAL

On July 7, 2006, the undersigned administrative law judge issued a Second Order to Show Cause which advised the Complainant to “show cause within thirty (30) days of the date of this Order why this action should not be dismissed for failure to prosecute or respond to previous Orders as well as based upon the merits of Respondents’ motion [for summary decision, filed on June 14, 2005]” and that “[a] failure to respond will result in a recommended dismissal of this action.” A previous Order to Show Cause, issued on September 23, 2005, directed that Complainant respond within thirty days and show cause, if any, why the complaint should not be dismissed within the same period. By Order of November 9, 2005, Complainant’s motion for extension of time was granted, and Complainant was ordered to respond within sixty days, or by January 9, 2006. However, no response has been filed by Complainant, who is unrepresented, to either of the Show Cause Orders. On November 27, 2006, Respondent responded to the Show Cause Orders, stating that “[i]t is TVA Respondents’ position that Complainant’s time to respond to the orders has long expired, that their Motion for Summary Decision is due to be granted, and that this case should be dismissed.” I agree that dismissal is appropriate.

BACKGROUND

Complainant Larry Edmonds (“Complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that Respondent Tennessee Valley Authority (“Respondent”) terminated his employment, through a letter dated September 24,

2003, for reporting safety issues.¹ On June 30, 2004 OSHA issued findings stating that the complaint lacked merit, and Complainant filed objections and requested a hearing on June 12, 2004.

Complainant was initially represented by Mr. Edward Slavin, Jr., who was subsequently denied authorization to appear in any representative capacity before the Office of Administrative Law Judges in a March 31, 2004 Order, which was affirmed by the Administrative Review Board (ARB).² *In re: Edward A. Slavin*, ARB No. 04-088, ALJ No. 2004-MIS-2 (April 29, 2005). Moreover, Mr. Slavin was suspended from the practice of law for two years by the Supreme Court of Tennessee on August 27, 2004, and the Administrative Review Board also suspended his practice on October 20, 2004. *In re: Edward A. Slavin*, ARB No. 04-172 (Oct. 20, 2004).

As a result of the denial of Mr. Slavin to appear, Complainant was directed in a July 14, 2004 Order to retain new counsel for this proceeding. Thereafter, on November 18, 2004 Complainant was ordered to show cause why the hearing should not be scheduled. On December 2, 2004 Complainant filed a request to stay the proceedings until Mr. Slavin was able to represent him, and on December 22, 2004 Complainant's request was denied and he was given thirty (30) days to retain new counsel. The case was assigned to the undersigned administrative law judge, and I issued a Notice of Assignment and Order on January 12, 2005 staying the proceedings for a period of thirty (30) days to allow Complainant an opportunity to seek replacement counsel.

Respondent Tennessee Valley Authority and Glenn L. McCullough, Jr. filed a motion for summary decision on June 14, 2005.

My September 23, 2005 Order to Show Cause provided the following:

To date, no appearance by a replacement attorney has been entered on the record, and thus Complainant is proceeding as an unrepresented party. Therefore, it is necessary to ensure that Complainant fully understands the proceedings and is provided a fair opportunity to present his claim. This Order provides Complainant with the last opportunity to respond to the Motion for Summary Decision before the matter is ruled upon.

As stated, Respondent's Motion for Summary Decision is pending before the undersigned administrative law judge, and Complainant has failed to respond

¹ As amended, the complaint in the instant case arises under the Clean Air Act, 42 U.S.C. §7622 ("CAA"); the Energy Reorganization Act of 1978, 42 U.S.C. §5851 ("ERA"); the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. §9610 ("CERCLA"); the Safe Drinking Water Act, 42 U.S.C. §300j-9 ("SDWA"); the Solid Waste Disposal Act, 42 U.S.C. §6971 ("SWDA"); Toxic Substances Control Act ("TSCA"), 15 U.S.C. 2622; and the Federal Water Pollution Control Act, 33 U.S.C. §1367 ("FWPCA").

² An interlocutory appeal of the denial of Mr. Slavin to appear (contained within a July 21, 2004 letter from the Chief Administrative Law Judge relating to a Freedom of Information Act and Privacy Act request associated with the complaint in the instant case) was dismissed by the ARB on July 22, 2005. *Edmonds v. TVA*, ARB No. 05-002, ALJ No. 2004-CAA-15 (July 22, 2005). Complainant had failed to respond to an Order directing him to show why his appeal was not moot in view of the ARB's affirmance of the March 31, 2004 Order. *Id.*

or offer any support for his claim. In the event that Respondent's Motion is granted, a judgment in favor of the Respondent will be entered as a matter of law. This Decision and Order will *become final and the case will be closed*, subject to appeal rights. Complainant will be given thirty (30) days from the date of this Order to respond to the Motion for Summary Decision outlining why the claim should not be dismissed. If a response is not received within thirty (30) days, the undersigned will proceed to rule upon the Motion without further delay.

The Show Cause Order explained the standards for summary decision and advised the Complainant of the following:

In this case, Respondent submitted a Motion for Summary Decision with supporting affidavits in an effort to demonstrate that no issue of material fact exists in this case, and Complainant now has the burden to show that there is a disputed material issue of fact. If there is no factual dispute, and Respondent is therefore entitled to a Summary Decision as a matter of law, the complaint in this case will be dismissed. However, if Complainant is able to demonstrate through [his] filings either that a factual dispute exists or that Respondent is not entitled to summary decision based upon the undisputed facts, then the case will proceed to a hearing for full adjudication.

Complainant filed a response to the Show Cause Order, consisting of his October 24, 2005 motion for enlargement of time, pursuant to which he moved for an extension of time of "at least 30 days" to respond to Respondents' Motion for Summary Decision and the Order to Show Cause. In support, Complainant asserted that (1) Respondent TVA had not responded to his July 19, 2004 Interrogatories and Requests for Production of Documents; (2) his previous counsel had sought reconsideration from the ARB of his bar to appear and had challenged the actions of the ARB and the State of Tennessee before the Inter-American Human Rights Commission; and (3) he had a Constitutional right to legal counsel and should not be required to answer the Respondents' motion or this tribunal's Order pro se.

On November 4, 2005, Respondents filed an opposition to Complainant's motion because this case had been repeatedly delayed in the past; Respondents also disputed the three bases for the Motion. With respect to the first ground, Respondents noted that their motion for protective order was granted on August 4, 2004, before this case was assigned to the undersigned. As to the second ground, Respondents argued that it was frivolous. On the third ground, Respondents agreed Complainant has a right to counsel but not to representation by Mr. Slavin. Respondents did not claim any prejudice that would result from the granting of Complainant's motion.

My Order of November 9, 2005, provided that representation by Complainant's former counsel was no longer an option but provided that "Complainant should have the benefit of responses to discovery as well as the opportunity to retain counsel prior to responding." The Order recognized that new discovery requests might need to be propounded by Complainant, but that would not relieve him of his responsibility to respond to the show cause order and motion for summary decision. Accordingly, the Order granted Complainant's Motion for Enlargement of Time and ordered Complainant to respond to Respondents' Motion for Summary Decision

and the Order to Show Cause within sixty (60) days of the date of the Order, or by January 9, 2006. No response of any sort was filed by the Complainant to that Order and no appearance was entered by counsel on his behalf.

As noted above, a Second Order to Show Cause was issued by the undersigned on July 7, 2006. Recognizing the Complainant's pro se status, I laid out in some detail what his responsibilities were in terms of responding to the Respondents' Motion for Summary Decision, filed on June 14, 2005 and why his actions were insufficient. Specifically, in the "Discussion" portion of the Second Order to Show Cause, I stated:

More than six months have elapsed since the Complainant was ordered to respond to the summary decision motion and show cause order but he has filed nothing in response. It appears that either he does not wish to prosecute his claim or he has no basis for challenging the Respondents' summary decision motion.

Although it appears that Complainant is still unrepresented, that does not end the matter. While every advantage will be given to an unrepresented party to ensure that a meritorious claim is not dismissed simply because a party has been unable to retain counsel, that does not mean that an unrepresented party is not obligated, at some point, to take action to pursue a claim on his own behalf. That includes responding, as appropriate, to a summary decision motion. Where, as here, many months have gone by, and the party still has not obtained representation, some response is to be expected from a pro se litigant. Specifically, at the very least, Complainant is under the obligation to review the summary decision motion for two purposes: (1) to ascertain whether there are any disputed factual issues, and to specifically point out what, if any, statements of fact asserted by Respondents are inaccurate; and (2) to state what legal conclusions stated by the Respondents he disputes.

Respondents have asserted the following in their summary decision motion and supporting memorandum:

(1) Respondents have asserted that there is no jurisdiction under the Energy Reorganization Act (ERA) because Complainant was employed at Kemper Combustion Turbine, which was not a nuclear facility, and his complaints were unrelated to nuclear safety.

(2) Respondents have asserted that the claims under the environmental whistleblower statutes are untimely because the initial complaint was filed on October 29, 2003, more than thirty days after Complainant received notice of his termination (on September 26, 2003, according to Respondents).³ Implicitly, Respondents also argue that the later amended complaints (adding additional statutes) cannot relate back.

³ The initial complaint (dated October 29, 2003) states that Complainant received the notice of his termination on September 30, 2003 and the certified mail receipt submitted in support of the Declaration of Jeffrey W. Hays (Exhibit C) reflects receipt on September 30, 2003. An Express mail item was received on October 2, 2003, according to the

(3) Respondents have asserted that Complainant's complaints about other employees had nothing to do with violations of any of the environmental statutes and at most related to "industrial safety," not public safety and health.

(4) Respondents have asserted that there is no claim against Mr. McCullough because claims under the environmental statutes may only be brought against employers, not officers or employees.

(5) With respect to the merits of the action, Respondents argue that Complainant cannot establish a prima facie case of discrimination because "he cannot prove that he engaged in protected activity and there is no causal connection to his termination." Specifically, Respondents allege that Complainant cannot show that he was treated differently than similarly situated persons who did not engage in protected activity.

(6) Respondents argue that TVA had a legitimate nondiscriminatory business reason for terminating Complainant's employment, in that Complainant refused to cooperate with the FFD (fitness for duty) evaluation, because he refused to sign a release.

(7) As a final matter, Respondents argue that the findings of the EEOC administrative judge are entitled to res judicata and are binding upon me.⁴

Evidentiary support for Respondents' motion consists of the declarations of Thomas E. Sajwaj, Ph.D. (the Manager of the TVA Psychology and Fitness for Duty program until September 2004); Deborah S. Norton (a Human Resource Consultant for TVA until February 2004); Bart S. Gast (Site Manager of TVA's Kemper Combustion Turbine); and Jeffrey W. Hays (Regional Operations Manager for the Combustion Turbine organization), together with supporting documentation. All four individuals were directly involved in the events leading to Complainant's termination and their declarations set out in some detail the basis for Complainant's termination. Further, they are corroborated by documentation, some of which is contemporaneous. If unrefuted, these declarations and documentation would support dismissal of the complaint.

return receipt. (*Id.*, Exhibit D). The only evidence reflecting an earlier delivery is an annotation on the U.S. Postal Service Track & Confirm website for a Priority mail item, indicating that the item was delivered on September 26, 2003; however, there was no return receipt (*Id.*, Exhibit B).

⁴ Although collateral estoppel (issue preclusion) would be more appropriate, I disagree that the EEOC rulings would control under either theory, as this tribunal is a different forum governed by different standards. My review is de novo. Furthermore, the EEOC decision related to alleged discrimination based upon race, national origin, disability, and reprisal, and the reprisal claim related to reprisal for opposing employment practices that were allegedly unlawful under Title VII. The EEOC case did not relate in any way to the environmental statutes.

If Complainant disputes any of the asserted material facts and has supporting evidence, he does not require the services of an attorney to indicate what factual assertions he disputes or to provide evidence that refutes Respondents' submissions. In this regard, he may submit any documentation that calls into question the evidence submitted by the Respondents. If he wishes to support his argument with his own statement, he should either submit (1) an affidavit signed before a notary public or (2) a declaration followed by a certification ("I declare under penalty of perjury that the foregoing is true and correct") and his signature. He may also submit the affidavits or declarations of other witnesses.

Even if Complainant can defeat summary decision, he is also being required to show why this matter should not be dismissed based upon a failure to prosecute and failure to respond, as required by my previous Orders. In this regard, if Complainant is able to demonstrate material factual issues or dispute Respondents' entitlement to judgment as a matter of law, then this matter will proceed to a hearing on the merits. If so, Complainant must be prepared to present his case at a hearing in open court. Given Complainant's failure to respond in the past, some reassurance as to his determination to proceed in the future is being required.

I am laying this out in some detail to make sure that Complainant is aware of his obligations. . . .

Second Order to Show Cause at 3 to 5.

Complainant did not respond in any manner to the Second Order to Show Cause. The only response was the Response to Order to Show Cause filed by the Respondents on November 27, 2006. Moreover, Complainant did not in any way respond to Respondent's response, although more than 60 days have elapsed.

DISCUSSION

As outlined above, Complainant has failed to take action with two respects. First, Complainant has failed to respond to the Orders I have issued. Second, Complainant has left Respondent's Motion for Summary Decision unanswered. Complainant has provided no indication that he intends to respond to either. Complainant's inaction leads me to conclude that the only appropriate course of action is dismissal of his claims.

I. Failure to Prosecute

The various federal statutes these claims fall under place it within the umbrella of 29 C.F.R. Part 24. *See* 29 C.F.R. §24.1. Twenty-nine C.F.R. §24.6(e)(4) states:

(4) *Dismissal for cause.* (i) The administrative law judge may, at the request of any party, or on his or her own motion, issue a recommended decision and order dismissing a claim:

- (A) Upon the failure of the complainant or his or her representative to attend a hearing without good cause; or
- (B) Upon the failure of the complainant to comply with a lawful order of the administrative law judge.

(ii) In any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which may include a recommended order dismissing the claim, defense or party.

Consistent with this regulation is a court's inherent power to dismiss a case for lack of prosecution. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962). This power is vested in a court (or administrative tribunal) so that it can more efficiently manage its affairs and promote orderly and expeditious disposition of its cases. *Id.*; see also *Mastrianna v. Northeast Utilities Corp.*, ARB No. 99-012, ALJ No. 1998-ERA-33, at 2 (Sept. 13, 2000) (dismissing complainant's claim for failing to state why he could not comply with ARB's briefing schedule).

The Administrative Review Board ("ARB") has demonstrated its willingness to allow a claim's dismissal when a complainant fails to respond to lawful orders issued by a tribunal. In a case brought upon alleged violations of the CAA, SDWA, and the SWDA, the ARB dismissed complainant's action after she failed to respond to its orders. *Gass v. Lockheed Martin Energy Systems, Inc.*, ARB Case No. 03-093, ALJ No. 2000-CAA-22 (Jan. 29, 2004). After the complainant failed to file an opening brief, the ARB issued an order requiring her to show cause why the case should not be dismissed for failure to prosecute. *Id.* at 1. The complainant subsequently requested, and was granted, three extensions of time to respond to the order, but ultimately never responded. *Id.* at 1-2. Because the complainant failed to respond to the ARB's orders and provided no reason why she should be allowed to continue with her action, the ARB dismissed her case for lack of prosecution. *Id.* at 2.

The *Gass* decision contains similarities to the instant case. As discussed in greater detail *supra*, I issued two Orders to Show Cause as to why this action should not be dismissed for Complainant's failure to respond. Like the complainant in *Gass*, Complainant in the instant case sought and was granted an enlargement of time, but never provided a substantive response. As of the issuance of this Order, Complainant has failed to provide any reason why he would be prevented from filing a response.

Although Complainant is no longer represented by counsel, that does not relieve him of his obligation to take appropriate action if he wishes to proceed with this claim. See *Dickson v. Butler Motor Transit/Coach USA*, ARB Case No. 02-098, ALJ Case No. 2001-STA-039 (July

25, 2003). In *Dickson*, the Board upheld the ALJ's decision to dismiss the *pro se* complainant's action after he continuously failed to provide discovery or communicate with the ALJ or the ARB after his counsel withdrew. *Id.* at 4. The Board found that the complainant's lack of legal training did not explain his refusal to pursue his case, so it was entirely appropriate to dismiss for failure to prosecute. *Id.*⁵ Although *Dickson* arose under another whistleblower statute, the Surface Transportation Assistance Act (STAA), I still find its analysis persuasive. Like the complainant in *Dickson*, Complainant in the instant case cannot claim that lack of legal training has hampered his abilities to pursue his claim. My Second Order to Show Cause issued on July 7, 2006, explicitly and unambiguously set out Respondent's grounds for summary decision and outlined Complainant's responsibilities in terms of responding to it. I also specifically told him that he had to tell me why he did not respond to my Orders and why he failed to prosecute his claim, as well as provide some reassurance of his determination to proceed. He has failed to do so. Furthermore, Complainant has offered no explanation why he has not sought the assistance of counsel (apart from his prior counsel, who has been barred from this forum). Therefore, despite Complainant's *pro se* status, he has been provided sufficient leeway to pursue his case, but has simply chosen not to.

I find that it is appropriate to dismiss this action based upon Complainant's failure to prosecute. Complainant was required to respond to my Orders and take appropriate action to pursue his case, but has failed to do so or provide any reason why he could not.

II. Failure to Respond to Summary Decision

In addition to failing to respond to the Orders I issued, Complainant has provided no response to Respondent's Motion for Summary Decision.

Twenty-nine C.F.R. §18.41, Summary decision, provides, in relevant part:

(a) *No genuine issue of material fact.* (1) Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard. Any final decision shall conform to the requirements for all final decisions.

* * * *

(b) *Hearings on issue on fact.* Where a genuine question of material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

See also Rule 56, Fed. R. Civ. P. If a party has moved for summary decision with supporting affidavits, "a party opposing the motion may not rest upon the mere allegations or denials of such a pleading" and its response "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 20 C.F.R. § 18.40(c).

⁵ For instance, the complainant refused to accept mail delivery of a July 23, 2002, notice from the ARB setting the opening brief schedule. *Dickson*, at 4.

As this claim arose in the Sixth Circuit, I am required to apply Sixth Circuit case law concerning summary judgment in deciding this matter's disposition. *See Hooker v. Westinghouse Savannah River, Co.*, ARB No. 03-036, ALJ No. 2001-ERA-16 (ARB Aug. 26, 2004) (applying Fourth Circuit precedent on summary judgments to the case, which arose from the Fourth Circuit). The Sixth Circuit has held that granting summary judgment solely on the grounds that the non-moving party failed to respond is inappropriate. *See Carver v. Bunch*, 946 F.2d 451, 455 (6th Cir. 1991). Rather, the court, at a minimum, is required to examine the moving party's motion to ensure that he has satisfied his burden under Federal Rule of Civil Procedure 56(c). *Id.*; *see also* 29 C.F.R. §§18.40(d), 18.41(a) (outlining requirements for an administrative law judge to grant summary decision).

Despite the fact that Complainant has not yet responded to Respondent's Motion for Summary Decision, and has therefore not disputed any material facts alleged, I will not examine Respondent's Motion to see whether it has satisfied its burden. I find that regardless of whether or not Respondent has met its burden, this action should still be dismissed for Complainant's failure to pursue his case or respond to Orders, as discussed *supra*. Therefore, a decision on Respondent's Motion for Summary Decision is unnecessary.

ORDER

IT IS HEREBY RECOMMENDED that the complaint in this matter be **DISMISSED WITH PREJUDICE** based upon a failure to prosecute the case or respond to previous Orders.

A

PAMELA LAKES WOOD
Administrative Law Judge

Washington, DC

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).