U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of

LAXMI N. KHANDELWAL, **ARB CASE NO. 98-159**

COMPLAINANT, **ALJ CASE NO. 97-ERA-6**

v. **DATE: November 30, 2000**

SOUTHERN CALIFORNIA EDISON,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Stephen M. Kohn, Esq., Debra G. Oliver, Esq., *Kohn, Kohn & Colapinto, P.C., Washington, D.C.*

For the Respondent:
Thomas A. Schmutz, Esq., Paul J. Zaffuts, Esq., *Morgan, Lewis & Bockius L.L.P., Washington, D.C.*, Beth J. Pearce, Esq., *Southern California Edison, Rosemead, California*

SECOND DECISION AND ORDER OF REMAND

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C. §5851 (1994). Complainant Laxmi N. Khandelwal alleges that he was terminated by Respondent in retaliation for engaging in activities protected under the ERA. This case is before the Board for the second time.

PROCEDURAL BACKGROUND

Khandelwal initially filed his whistleblower complaint with the Labor Department in September of 1995. After investigation, Khandelwal's complaint was referred to an Administrative Law Judge ("ALJ") for hearing. However, on November 26, 1996, Respondent filed a Motion for Summary Decision. The ALJ granted Respondent's Motion in a Recommended Order issued January 17, 1997, in which he recommended that Khandelwal's complaint be dismissed.

Khandelwal appealed the ALJ's decision to this Board, which rejected the ALJ's recommendation in a Decision and Order of Remand dated March 31, 1998. The Board remanded the case to the ALJ for a hearing on the merits of the complaint.

On remand, the ALJ found that Khandelwal had engaged in activity protected under the ERA. However, the ALJ also found that Khandelwal failed to prove by a preponderance of the evidence that Respondent's decision to terminate him was motivated, in whole or in part, by his protected activity. Therefore, by Recommended Decision and Order dated August 12, 1998, the ALJ again recommended that the Board dismiss Khandelwal's complaint. This appeal followed.

On appeal, Khandelwal disputes the ALJ's conclusion on the merits that Respondent did not discriminate against him when it terminated his employment. In addition, Khandelwal argues that the ALJ committed reversible error by improperly denying his request for a continuance as well as the opportunity to engage in meaningful discovery.

We have jurisdiction pursuant to the Energy Reorganization Act, 42 U.S.C. §5851, and the implementing regulations found at 29 C.F.R. §24.8 (2000).

STANDARD OF REVIEW

Under the Administrative Procedure Act, we have plenary review over an ALJ's factual and legal conclusions. See 5 U.S.C. § 557(b). As a result, in this Part 24 case, the Board is not bound by the conclusions of the ALJ, but retains complete freedom to review factual and legal findings *de novo*. *See Masek v. Cadle Co.*, ARB Case No. 97-069, ALJ Case No. 95-WPC-1, Dec. and Ord., Apr. 28, 2000, slip op. at 7.

We review allegations of procedural errors by the ALJ under the abuse of discretion standard. *See generally Malpass v. General Electric Co.,* Case Nos. 85-ERA-38, -39, Sec'y Fin. Dec. and Ord., Mar. 1, 1994, slip op. at 5-6 (discussing ALJ's authority to conduct hearings under 5 U.S.C. §556(c)).

DISCUSSION

Khandelwal argues that the ALJ committed reversible error in his conduct of this case following the Board's March 1998 remand: (1) that the ALJ erred in denying Khandelwal a continuance so that he would have a reasonable opportunity to obtain counsel; and (2) that the ALJ committed errors in the discovery process. For the reasons discussed below, we agree.

Following our remand of this case, the ALJ issued two orders on April 7, 1998: one order set the case for hearing on May 28, 1998, while the other, in part, established a timetable for discovery. According to the discovery order, the parties were required to complete discovery and depositions by May 8, 1998.

On April 13, 1998, Khandelwal mailed and telefaxed a motion for continuance, requesting that the hearing date be postponed for 30 days. In support of the motion, Khandelwal submitted a jury summons for April 20, and stated that he would not have the option of avoiding that obligation because he had postponed fulfilling that responsibility on two previous occasions. He also stated that he had been acting *pro se* up until that time and that he "may have to find and hire an attorney who has expertise in these kind [sic] of cases." In addition, Khandelwal's motion stated that he did not believe that he could complete discovery by May 8, 1998.

By Order dated April 16, 1998, the ALJ denied Khandelwal's motion stating, "Complainant has had ample time to retain counsel for this matter, and Complainant's scheduled jury duty is not prohibitive of the necessary discovery." Thus, the ALJ denied Khandelwal's request for additional time, both for the purpose of obtaining counsel and for the purpose of conducting discovery. The one-paragraph order denying Khandelwal's request did not cite any regulatory or other legal standard against which the ALJ evaluated Khandelwal's request.

The determination whether to grant a continuance is a question committed to the sound discretion of the ALJ and will not be disturbed absent a clear showing of abuse. In reaching a decision to grant or deny a continuance, the ALJ may properly consider the length of the delay requested, the potential adverse effects of that delay, the possible prejudice to the moving party if denied the delay, and the importance of the testimony that may be adduced if the delay is granted. *See PATCO v. FLRA,* 685 F.2d 547, 588 (D.C. Cir. 1982); *Administrator, Wage and Hour Div., and Nurses PRN of Denver v. HCA Med. Ctr. Hosp.,* ARB Case No. 97-131, ALJ Case No. 94-ARN-1, Second Ord. of Rem., June 30, 1999, slip op. at 9-11*; see also* 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §2352, Continuances (2d ed. 1995) (concerning practice under the FRCP). The ALJ should also take into consideration that complaints filed under the ERA are subject to an expedited process. *See* 29 C.F.R. §§24.1(a), 24.4 - 24.8; *see also* 41 U.S.C. §5851(b) (requiring Secretary's decision in ERA case be issued within 90 days of receipt of complaint); 29 C.F.R. §24.6(a) ("no requests for postponement shall be granted except for compelling reasons or with the consent of all parties"). However, even an expedited process must be applied in a manner that is fundamentally fair and thus provides the parties an adequate opportunity for presentation of the case. *See Timmons v. Mattingly Testing Servs.,* ARB Case No. 95-ERA-40, Dec. and Ord. of Rem., June 21, 1996, slip op. at 5-6.

Opportunity to retain counsel – In this case, we find that it was unreasonable for the ALJ to deny Khandelwal's request for a continuance to obtain counsel. First, the ALJ's conclusion that Khandelwal had ample opportunity to engage counsel is flawed. The "ample opportunity" referred to by the ALJ includes the period prior to the issuance of the ALJ's January 17, 1997 [First] Recommended Order as well as the period during which Khandelwal's first appeal was pending before the Board.

As to the period prior to the issuance of the ALJ's [First] Recommended Order, Khandelwal had no meaningful opportunity to retain counsel during the very compressed time frame for conducting discovery and responding to Respondent's summary judgment motion.

We note that, on November 18, 1996, the ALJ issued an order scheduling a hearing for December 12, 1996. Additionally, on November 26, 1996, Respondent filed a motion for summary judgment. On November 27, 1996, the ALJ directed Khandelwal to show cause no later than December 13, 1996 why Respondent's motion for summary judgment should not be granted. In a letter to the ALJ dated December 5, 1996, Khandelwal advised the ALJ that he was having difficulty engaging counsel, a problem no doubt exacerbated by the fact that he had less than 30 days notice of the hearing date.[1/]

As to the period when Khandelwal's appeal previously was pending before this Board, the ALJ's view that Khandelwal should have retained counsel during that period appears to be premised on the assumption that Khandelwal knew or should have known that, if the Board decided the appeal in his favor, the ALJ would expect him to literally "hit the ground running" with his counsel in tow. Even in an expedited hearing under Part 24, it would be unreasonable to require Khandelwal to meet the ALJ's expectation. *See Timmons,* slip op. at 5-6. Thus, in our view, Khandelwal's failure to retain counsel during this period cannot rationally be construed as evidence of dilatory behavior.

Once the Board issued its March 31, 1998 remand order, Khandelwal's position instantly changed from that of a complainant who did not know whether his case would be summarily dismissed to that of a complainant facing a full blown evidentiary proceeding in a highly specialized area of the law. Although Khandelwal made clear his desire to retain counsel, the ALJ nevertheless concluded that Khandelwal had chosen to represent himself and then proceeded to trial.[2/] We find that, under these circumstances, the ALJ's failure to allow Khandelwal a meaningful opportunity to retain counsel prejudiced his ability to present his case and constituted an abuse of discretion.

Discovery schedule – With regard to Khandelwal's request to extend the discovery deadline, we note that the ALJ's April 7, 1998 order set May 8, 1998 as the deadline for

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[1/] At least one court has recognized that most attorneys would hesitate to take a case scheduled to begin trial within a month without a continuance. *Lowe v. City of East Chicago*, 897 F.2d 272, 275 (7th Cir. 1990).

[2/] At the hearing of the case on May 28, 1998, the ALJ revisited the issue of whether Khandelwal had been afforded an adequate opportunity to obtain counsel, beginning with December 1996 when the case was initially before the ALJ. In an exchange with Khandelwal at the beginning of the hearing, the ALJ stated that he had given Khandelwal an extension of time in December 1996 and, as Khandelwal had not found an attorney at that time, or since, the ALJ understood that Khandelwal had decided that he did "not want to have an attorney." Tr. at 25-26; *see* Tr. at 28. Khandelwal objected, noting, "[I]n December 5 of '96, there was no trial – ." Tr. at 26. The ALJ reiterated his view that Khandelwal had "chosen to represent [himself]." *Id.* Khandelwal then reminded the ALJ that he had filed a motion for continuance in April 1998. *Id.* The ALJ then recounted that his law clerk had spoken with Khandelwal by telephone at that time and had suggested that he contact a lawyer referral service. Tr. at 27. Khandelwal responded that he had attempted to obtain counsel but had been unable to find an attorney who was familiar with an administrative proceeding of this type. *Id.* The ALJ stated, "I appreciate the fact that you were unable to get [an attorney] and you've decided to proceed by yourself." Tr. at 28.

completing discovery and depositions. The order failed to explain how the discovery period was to be allocated between requests and responses, or to designate a time frame in which the parties could resort to the filing of motions to compel or seek protective orders, if necessary to resolve conflicts arising in the discovery process. *Cf. Kesterson v. Y-12 Nuclear Weapons Plant,* ARB Case No. 96-173, ALJ Case No. 85-CAA-0012, Apr. 8, 1997, slip op. at 3 (ALJ's scheduling order specified deadline for close of discovery and subsequent deadline approximately two weeks later for filing of discovery related motions). These omissions plainly complicated Khandelwal's task; even arguments made by Respondent before the ALJ regarding the discovery period underscore the ambiguities inherent in the April 7 order. As urged below by Respondent, if the ALJ intended the Section 18.19(d) 30-day response period to apply, Khandelwal's request for production of documents would have to have been filed with Respondent on the day after the ALJ issued the April 7 prehearing order, in order to meet the May 8 deadline for completion of discovery.[3/] Southern California Edison Reply to Comp. Motion to Compel at 1. As also noted below by Respondent, the ALJ's April 7 order left open the question of whether Respondent could rely on the additional five-day period provided by Section 18.4(c)(3) to enlarge its response period. *Id.* at 2.

Against this backdrop, Khandelwal requested that the ALJ extend the discovery deadline because he had a jury duty obligation that could not be postponed. The ALJ gave this excuse such short shrift that he did not even bother to articulate why an obligation to serve on jury duty is an unwarranted basis for seeking a continuance. In the absence of some explanation for the ALJ's action, we find it arbitrary and prejudicial. An "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" warrants reversal. *Amarin Plastics, Inc. v. Maryland Cup Corp.,* 946 F.2d 147, 151 (1st Cir. 1991); *see United States v. 9.19 Acres of Land,* 416 F.2d 1244, 1244-45 (6th Cir. 1969).[4/]

For the foregoing reasons, we decline to adopt the ALJ's recommendation in this case and remand it to him for further proceedings consistent with this opinion. Because we agree with Khandelwal that the ALJ committed reversible procedural error, and therefore remand this case for further proceedings, it is unnecessary for us to consider the other arguments raised in

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[3/] Although the Office of Administrative Law Judges Rules of Practice and Procedure found at 29 C.F.R. Part 18 are generally applicable to hearings under Part 24, those provisions must yield when inconsistent with the Part 24 regulations or relevant statutory authority or executive order. 29 C.F.R. §18.1(a).

[4/] Khandelwal has also challenged the ALJ's May 18 and 19, 1998 rulings limiting discovery. In view of our disposition of the case, we need not reach the parties' arguments concerning those rulings. We nonetheless view the following issue regarding the scope of discovery as worthy of comment. When an employer's personnel records are sought in discovery, the confidentiality of information that otherwise qualifies as discoverable may be protected through restrictions on the use of that information. *See Lyoch v. Anheuser-Busch Cos.,* 164 F.R.D. 62, 68-69 (E.D.Mo. 1995). Such restrictions may be embodied in a mutual agreement between the parties or a protective order issued under Section 18.15. *See Lyoch*, 164 F.R.D. at 68-69; 29 C.F.R. §18.15.

this second appeal.[5/] Finally, we note that in remanding this case to the ALJ, we reach no conclusions, nor should any be inferred, regarding the merits of the complaint.

SO ORDERED.

PAUL GREENBERG
Chair

RICHARD A. BEVERLY
Alternate Member

Concurring Opinion of E. Cooper Brown:

I concur in the majority's disposition of this case, and write separately only to address certain discovery issues raised by the parties. I believe that these issues, concerning the scope of permissible discovery in employment discrimination cases, merit additional discussion in light of the further proceedings before the ALJ that are required by our remand order.

Without explanation the ALJ denied Khandelwal's motion to compel the production of specified documents that had been requested in discovery.[6/] In so doing, the ALJ in my estimation denied Khandelwal access to information which might well have established the existence of the discrimination which Khandelwal had alleged. Thus, if the ALJ is required on remand to determine whether information that is sought by the parties is properly subject to discovery, the ALJ should consider and apply the following authority.

[5/] However, we do note that Respondent questions the propriety of the ruling in the Board's March 31, 1998 decision, which rejected Respondent's argument that this complaint was barred by a July 1995 severance agreement entered into by Khandelwal and Respondent. We see no reason to reconsider that ruling.

[6/] Specifically, the ALJ denied Khandelwal's motion to compel SCE to produce the following:

* Performance appraisals for "all Grades 7 and 8 engineers in the Electrical Engineering Department of Nuclear Engineering Division for years 1993, 1994 and 1995."
* "All management investigations, inquiries, evaluations or documents related to Mr. Khandelwal's complaint to Nuclear Safety Group at San Onofre Nuclear Generating Station, in June 1994 regarding the retaliation for raising the safety concerns."
* "Resumes of all Contract engineers who were working in the Electrical Engineering Department of Nuclear Engineering Division from January 1995 to December 1996."
* "A list of other employees, similarly situated as Mr. Khandelwal (*e.g.* former supervisors whose positions were eliminated and/or who were given below satisfactory Performance Review Evaluations during the same time frame as Mr. Khandelwal (May 1993)[ )]."

Initially it is noted that the provisions regarding the scope of discovery and the definition of relevant evidence contained in the rules of procedure applicable to ALJ proceedings at Part 18 of Title 29 are generally applicable to this case. 29 C.F.R. §§18.14, 18.401; *see also* 29 C.F.R. §§18.1(a) and 18.1101(c) (rules of evidence provided at Subpart B of Part 18 are not applicable when inconsistent with statutory or regulatory authority). Also of relevance is 29 C.F.R. §24.6(e)(1), which concerns evidence admissibility. 29 C.F.R. §§18.14(b), 24.6(e)(1); *see Seater v. Southern California Edison,* ARB Case No. 96-013, ALJ Case No. 95-ERA-13, Dec. and Ord. of Rem., Sept. 27, 1996, slip op. at 4-8.[7/] As discussed by the Board in *Seater*, the Section 24.6(e)(1) prohibition against the application of formal rules of evidence is consistent with the broad range of circumstantial evidence that may be probative of retaliatory intent. *Seater,* slip op. at 4-8; *accord Hollander v. American Cyanamid Co.,* 895 F.2d 80, 85 (2d Cir. 1990) (noting that complainants in employment discrimination cases "often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer.").

In employment discrimination cases, the courts have held that discovery should be permitted "unless it is clear that the information sought can have no possible bearing upon the subject matter of the action." *Marshall v. Electric Hose & Rubber Co.*, 68 F.R.D. 287, 295 (D.Del. 1975) (citations omitted). "In such cases, the plaintiff must be given access to information that will assist the plaintiff in establishing the existence of the alleged discrimination." *Lyoch v. Anheuser-Busch Companies, Inc.*, 164 F.R.D. 62, 65 (E.D. Mo. 1995) (citations omitted). *Accord Trevino v. Celanese Corp.*, 701 F.2d 397, 405 (5th Cir. 1983) (vacating protective order which limited discovery in part because, "imposition of unnecessary limitations on discovery is especially frowned upon in Title VII cases."); *Flanagan v. Travelers Insurance Co.*, 111 F.R.D. 42, 45 (W.D.N.Y. 1986) (same). Consistent with this body of case law, the Secretary of Labor and the ALJs have recognized the broad scope of discovery to be afforded parties in whistleblower cases. *See, e.g., Malpass v. General Electric Co.*, Case Nos. 85-ERA-38/39, Sec'y Dec., Mar. 1, 1994, slip op. at 12; *Holub v. Nash, Babcock, et al.*, Case No. 93-ERA-25, ALJ Disc. Ord., Mar. 2, 1994, slip op. at 6. *See generally Timmons v. Mattingly Testing Services, Inc.*, ALJ Case No. 95-ERA-40, ARB Dec. & Ord. of Rem., June 21, 1996, slip op. at 4-6 (discussing the "full and fair presentation" of a whistleblower case by the parties).

Accordingly, and as Khandelwal has urged, a broad view of the extent to which employers' records are properly subject to discovery under the FRCP in employment discrimination cases is required. For example, the United States Supreme Court has held that discovery rules must be liberally construed to ensure plaintiffs under Title VII of the Civil Rights Act of 1964 "broad access to employers' records." *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 657 (1989). In defining the parameters for discoverable materials, Section 18.14 provides for the discovery of unprivileged, relevant information but does not require that the

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[7/] The *Seater* decision refers to Section 24.5(e)(1), which was the former designation for the identical provision now found at Section 24.6(e)(1). 63 Fed. Reg. 6614, 6619 (1998).

information, or documents, qualify as admissible evidence. 29 C.F.R. §18.14(a),(b). Specifically, Section 18.14 provides that unprivileged information may properly be sought through discovery if the information is "reasonably calculated to lead to the discovery of admissible evidence." This standard, which is adopted from FRCP 26(b)(1), has frequently been addressed by the courts within the context of employment discrimination complaints. *See EEOC v. Ian Schrager Hotels,* 2000 WL 307470 (C.D. Ca. Mar. 8, 2000); *Jackson v. Montgomery Ward & Co.,* 173 F.R.D. 524, 526 (D. Nev. 1997). More to the point, a number of court decisions explore the extent to which an employer's records may be relevant to a complainant's discrimination theory in a case involving a reduction in force termination. *See*, *e.g., Carman v. McDonnell Douglas Corp.,* 114 F.3d 790 (8th Cir. 1997); *Barfoot v. Boeing Co.,* 184 F.R.D. 642 (N.D. Ala. 1999).

Before both the ALJ and this Board, Respondent SCE raised the privacy interests of its employees as a bar to the disclosure of certain personnel information that Khandelwal requested. HT at 359-64; SCE Brief at 29 n.102. Once the party seeking discovery has demonstrated the relevancy of the information or documents sought, the party seeking to avoid disclosure of information or documents that otherwise qualify for discovery bears the burden of establishing a basis for the denial or limiting of discovery. *See Ladson v. Ulltra East Parking Corp.,* 164 F.R.D. 376 (S.D. N.Y. 1996); *Barfoot,* 184 F.R.D. at 643-45; *Administrator, Wage and Hour Div. and Nurses PRN of Denver v. HCA Med. Ctr. Hosp.,* ARB Case No. 97-131, ALJ Case No. 97-ARN-1, Second Order of Remand, June 30, 1999, slip op. at 10. Assuming the party seeking to avoid disclosure meets his burden, as noted in the majority opinion (*see* discussion *supra* n.4), the confidential nature of the information sought may nevertheless be ensured without a denial of discovery. For example, the parties may agree to an order ensuring the confidential use of such information. *See Lyoch v. Anheuser-Busch Cos.,* 164 F.R.D. 62, 68-69 (E.D. Mo. 1995); *Zeid v. MCI Telecommunications,* 1985 WL 653 (N.D. Ill. Apr. 16, 1985) (Agreed Protective Order). If the parties cannot reach agreement on the confidentiality issue, the ALJ should evaluate the question of whether to afford protections under 29 C.F.R. §18.15, including the imposition of restrictions on the use of information obtained in discovery, in accordance with these and other court decisions concerning discovery in employment discrimination cases.

E. Cooper Brown
Member