U.S. Department of Labor

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

In The Matter Of:

OFFICE OF FEDERAL CONTRACT COMPLIANCE, U.S. DEPARTMENT OF LABOR,

PLAINTIFF,

v.

KEEBLER COMPANY,

DEFENDANT.

CASE NO. 87-OFC-20

DATE: December 12, 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

ORDER VACATING FINAL DECISION AND ORDER AND ESTABLISHING SUPPLEMENTAL BRIEFING SCHEDULE

On September 4, 1996, the Board issued a Final Decision and Order dismissing this complaint under Section 503 of the Rehabilitation Act of 1973, as amended (Act), 29 U.S.C. § 793 (1988). On September 11, 1996, the Office of Federal Contract Compliance (OFCCP) filed a motion to alter or amend the final decision on the basis of a new regulation that became effective after the parties filed briefs in this case. The Keebler Company (Keebler) filed a brief opposing OFCCP's motion. After carefully considering the arguments of the parties, we conclude that the intervening regulation applies and requires that we vacate our previous decision dismissing this case.

In the September 4 decision the Board held that OFCCP failed to establish that the alleged discriminatee, Monica DeAngelis, was a covered employee under the Act. At the time this case was filed, coverage under the Act was limited to persons employed to carry out government contracts. 29 U.S.C. § 793(a) (1988). The Board concluded that to meet its burden OFCCP was required to prove by a preponderance of the evidence that DeAngelis was working or would have worked on

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[1/] On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under this statute and the implementing regulations to the newly created Administrative Review Board (Board). Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996. Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Board now issues final agency decisions.

Keebler's federal contracts absent the alleged discriminatory act. In reaching that decision the Board was unaware that a new regulation, 41 C.F.R. § 60-741.4(a)(2) (1996), establishing a standard for coverage based on job categories had become final and effective just one week earlier on August 29, 1996. *See* 61 Fed. Reg. 19336, 19353 (1996).

On October 21, 1992, in response to the district court's decision in *Washington Metro. Area Transit Auth. v. DeArment*, 55 (CCH) EPD ¶ 40,507 (D.D.C. 1991), the Department published a proposed paragraph intended "to more closely conform the regulations to the general statement of coverage in Section 503(a) of the Rehabilitation Act." 57 Fed. Reg. 48084, 48092 (1992); *see also* 61 Fed. Reg. 19336, 19341. On October 29, 1992, just eight days later, legislation was signed into law striking the limiting language in the Act, and OFCCP subsequently revised the proposed regulations to reflect the legislative change. The revised regulations were published on May 1, 1996, and became effective on August 29, 1996.

DISCUSSION

Keebler first argues that the new regulation, Section 60-741.4(a)(2), should not be applied retroactively to this case which was filed in 1987. Keebler points out that another final regulation that was promulgated concurrently, 41 C.F.R. § 60-741.84, generally provides:

> **§ 60-741.84 Effective Date.**
>
> This part shall become effective August 29, 1996, and shall not apply retroactively. Contractors presently holding Government contracts shall update their affirmative action programs as required to comply with this part by December 27, 1996.

61 Fed. Reg. 19336, 19362.

However, it is clear from both the specific language of Section 60-741.4(a)(2) and the accompanying published explanation that the regulation applies here. Section 60-741.4(a)(2) provides:

> (2) *Positions engaged in carrying out a contract.* (I) With respect to the contractor's employment decisions and practices occurring before October 29, 1992, this part applies only to employees who were employed in, and applicants for, positions that were engaged in carrying out a government contract; with respect to employment decisions and practices occurring on or after October 29, 1992, this part applies to all of the contractor's positions irrespective of whether the positions are or were engaged in carrying out a Government contract. A position shall be considered to have been engaged in carrying out a contract if:
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> (A) The duties of the position included work that fulfilled a contractual obligation, or work that was necessary to, or that facilitated, performance of the contract or a provision of the contract . . . .

61 Fed. Reg. 19336, 19353. In unambiguous terms Section 60-741.4(a)(2) bifurcates the analysis to reflect the different schemes for coverage before and after the statutory amendment. The explanation for adopting the regulation states:

> Th[e statutory] amendment had prospective effect only. . . . . [T]he limitation applies only to the contractor's employment decisions and practices occurring before the amendment's effective date - October 29, 1992. The proposed standards governing the determination whether the position is engaged in carrying out a contract have been carried forward in the final rule without substantive change. (Stylistic revisions reflecting the jurisdictional limitation's retroactive application have been incorporated throughout paragraph (a)(2) as well as Appendix D, which sets out guidance regarding positions engaged in carrying out a contract.) Thus, for instance, in investigating whether a contractor covered by section 503 has discriminated against an individual with a disability in violation of the act, the issue whether the discriminatee was employed in, or was an applicant for a position engaged in carrying out a government contract will be relevant only if the alleged discrimination occurred before October 29, 1992. This section still has practical utility because there are a number of pending section 503 complaints involving alleged violations of the act which occurred before the amendment.

61 Fed. Reg. 19336, 19341-42.

It is axiomatic that a specific provision, here Section 60-741.4(a)(2), controls over a general provision such as Section 60-741.84, particularly since the two are interrelated and closely positioned, both contained within Part 60-741. *See HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (stating this basic principle of statutory construction). To read Section 60-741.84 as controlling would render the plain language of Section 60-741.4(a)(2), providing for retroactive application, absolutely meaningless. *See, e.g., United States v. Turkette*, 452 U.S. 576, 580 (1981) (in construing statutory language absurd results are to be avoided); *Shields v. United States*, 698 F.2d 987, 989 (9th Cir. 1983), *cert. denied*, 464 U.S. 816 (1983) (stating rule of statutory construction that one provision should not be interpreted in a way that renders other provisions of the same statute inconsistent or meaningless).

It is also well established that administrative agencies are bound by their promulgated regulations. *See, e.g., OFCCP v. Ozark Air Lines, Inc.*, Case No. 80-OFCCP-24, June 13, 1986, slip op. at 5, citing *National Wildlife Fed'n v. Clark*, 577 F. Supp. 825 (D.D.C. 1984); *Heavy Constrs. Assoc. of the Greater Kansas City Area*, Case No. 94-13, Dec. 30, 1994 (Davis-Bacon and Related Acts, 40 U.S.C. § 276a); *Collectively-Bargained Premium Wage Rates at Clear Air Force Base, Alaska*, Case No. 94-07, Oct. 31, 1994 (McNamara-O'Hara Service Contract Act, 41 U.S.C. § 351); *see generally* 2 AM. JUR 2d *Administrative Law* § 237 (1994). The validity of the regulations must be assumed. *See OFCCP v. Western Electric Co.*, Case No. 80-OFCCP-29, Apr. 24, 1985, slip op. at 12-15. Thus, we hold that by its express terms, Section 60-741.4(a)(2) applies to this case that was filed before October 29, 1992.

Keebler also argues that even applying the regulation, OFCCP failed to meet its burden. We disagree. Under the regulation coverage extends to employees who were employed in, and applicants for, positions that were engaged in carrying out a government contract. To establish coverage OFCCP must show that the duties of the position included work that fulfilled, was necessary to, or facilitated a contract.

During the relevant period DeAngelis was a production attendant at one of only two Keebler facilities that produced a snack food called Tato Skins. Keebler had several Government contracts under which it provided Tato Skins to certain military installations. The production attendants at the two facilities were not separated according to who worked on goods destined to fill government contracts. The Tato Skins were not earmarked or designated for any particular destination. All production attendants at both facilities, including DeAngelis, had an equal chance to have worked on Keebler's government contracts. While the evidence is insufficient to prove that DeAngelis in particular worked or would have worked on a government contract, it is clear that the duties of a "production attendant" for Keebler included work on government contracts. We, therefore, conclude that under Section 60-741.4(a)(2), OFCCP has established that DeAngelis was a covered employee.

Our conclusion is also supported by Example 11 of the Appendix to the regulations which states:

> . . . if a plant with several assembly lines produced automobiles, some of which were shipped to the Government and others sold commercially, the application of Section 503 would have been limited if the Government contract automobiles were made on only one of the assembly lines. In that case, employees who were on the other lines, which never produced automobiles for the Government, were outside the Act. If, however, the contractor did not segregate the contract from noncontract production, the employees on each of the lines were covered.

61 Fed. Reg. 19365. We agree with OFCCP that there is no reason to treat the two plants at issue in this case differently than the two assembly lines within a single plant described in the example.[2/]

Accordingly, the Board's September 4 Final Decision and Order dismissing this case for OFCCP's failure to establish coverage is vacated. The Board will proceed and consider the merits of OFCCP's complaint that Keebler terminated DeAngelis in violation of the Act. However, in view

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[2/] We note that at the time of the contract and the alleged violation, applicable regulations, 41 C.F.R. § 60-741.3(a)(5) (1991), provided that all of a contractor's facilities were covered and subject to the affirmative action requirements of 41 C.F.R. Part 60-741 unless the contractor had obtained a waiver from the OFCCP Director exempting particular facilities which are separate and distinct from performance of the covered contract. There is no indication that Keebler sought any waiver. Thus, when Keebler signed the contract in question it expected DeAngelis and all of its other employees to be covered under the Act. The new regulation therefore imposes no unexpected burden or obligation on Keebler.

of the length of time that has passed since the parties briefed the merits of this case, they are hereby permitted time in which to file supplemental briefs. OFCCP may file a brief within forty days of the date of this order. Keebler may file a response within eighty days of this order.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member