U.S. Department of Labor

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

In the Matter of:

JUDY K. STEPHENSON,

COMPLAINANT,

v.

NATIONAL AERONAUTICS & SPACE ADMINISTRATION,

RESPONDENT.

ARB CASE NO. 96-080

ALJ CASE NO. 94-TSC-5

DATE: April 7, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER

This case arises under the employee protection provision of the Clean Air Act (CAA), 42 U.S.C. § 7622 (1994). On February 13, 1997, this Board remanded this case to the Office of Administrative Law Judges for a hearing. We found that Respondent National Aeronautics & Space Administration (NASA) could be held liable for retaliating against "any employee"[1/] if it had acted as an employer with regard to the employee, *e.g.,* by establishing, modifying or interfering with the employee's compensation, terms, conditions or privileges of employment. NASA has filed a motion for reconsideration and vacation of that decision, a motion to stay the proceedings pending reconsideration, a motion to adopt the recommended decision of the Administrative Law Judge (ALJ)[2/] and a motion to strike a

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[1/] CAA section 7622(a) states that "[n]o employer may discharge any employee or otherwise discriminate against any employee" who has engaged in protected activity. The provision further states that a complaint may be filed by "any employee who believes he has been discriminated against by any person in violation of subsection (a)." 42 U.S.C. § 7622(b)(1). The term "employee" is not defined in the statute. The term "person" is defined to include "any agency, department or instrumentality of the United States . . . ." 42 U.S.C. § 7602(e).

[2/] The ALJ found that the case should be dismissed because Complainant was employed by one of NASA's contractors, rather than by NASA, and thus was not an "employee" protected under the (continued...)

declaration filed by Complainant Judy Stephenson. Complainant opposes the motions. NASA's motion for reconsideration **IS GRANTED** in part as to the issue discussed below which we hereby reconsider.

In arguing that our February 13 remand decision be vacated and the ALJ's decision be adopted, NASA cites a purported discrepancy between our decision and certain administrative precedent.

First, NASA argues that our remand decision is foreclosed by language contained in *Varnadore v. Oak Ridge National Laboratory (Varnadore III),* Case No. 95-ERA-1, ARB Consol. Dec., Jun. 14, 1996, slip op. at 59-60. There, we stated that no basis existed for concluding that the complainant was employed by the Department of Energy (DOE) and that he had not even alleged that he was the employee of an individual respondent, M. Elizabeth Culbreth. We also stated that "an employment relationship between complainant and respondent is an essential element of any [whistleblower] claim . . . ." *Id.* at 60. This language should not be read to mean that only the direct or immediate employer of a discriminatee is subject to suit under the whistleblower provision. A complaint requires an allegation of employment discrimination, *i.e.,* that an employer's action adversely affected a complainant's employment, *i.e.,* the compensation, terms, conditions or privileges of employment. In this sense, an "employment relationship" is essential to the complaint. The employment relationship may exist between the complainant and the immediate employer. In appropriate circumstances, however, protection may extend beyond the immediate employer. Such circumstances existed in *Hill v. TVA and Ottney v. TVA (Hill and Ottney),* Case Nos. 87-ERA-23/24, Sec. Rem. Dec., May 24, 1989.

In *Hill and Ottney,* employees of a contractor complained that the contracting agency, the Tennessee Valley Authority (TVA), retaliated against them for activity protected under the whistleblower provision of the Energy Reorganization Act of 1974, as amended (ERA). Hill, Ottney and the remaining 22 complainants worked for Quality Technology Company which had contracted with TVA, a licensee of the Nuclear Regulatory Commission, to develop and implement a program for identification, investigation and reporting of employee concerns about quality and safety at nuclear power plants under construction for TVA. In retaliation for disclosure of safety problems, TVA canceled the contract, thereby disemploying the complainants. The Secretary of Labor found that these complainants were "employees" covered under the ERA in a complaint filed against TVA. 42 U.S.C. § 5851 (1994).

The *Hill and Ottney* complainants and Complainant Stephenson are distinguishable from the *Varnadore III* complainant who failed to articulate any association between his

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[2/](...continued)
whistleblower provision against retaliation by NASA.

immediate employer, respondent Lockheed Martin Energy Systems (Energy Systems), and DOE or Ms. Culbreth, also named as respondents, which resulted in adverse employment action.[3/] Energy Systems operated Oak Ridge National Laboratory (ORNL), complainant Varnadore's workplace, and DOE provided funding for ORNL's operation. Varnadore failed even to allege that DOE's funding policies adversely affected his employment or that DOE harbored any animus against him. All Varnadore alleged with regard to Culbreth was that she was retained by Energy Systems to provide advice on his whistleblower complaints. Dismissal of the *Varndadore III* complaint thus turned on more than the mere lack of an immediate employment relationship between the complainant and the Federal and individual respondents. Not only did Varnadore fail to show that DOE and Culbreth employed him directly; he also failed to articulate any relevant nexus between either DOE or Culbreth and his immediate employer, respondent Energy Systems.[4/]

NASA also argues that our remand decision in the instant case is foreclosed by *Robinson v. Martin Marietta Services, Inc.,* Case No. 94-TSC-7, ARB Dec., Sept. 23, 1996, slip op. at 7-8. There, we considered the standard adopted in *Reid v. Methodist Medical Center of Oak Ridge,* Case No. 93-CAA-4, Sec. Dec., Apr. 3, 1995, slip op. at 12-13, *aff'd,* No. 95-3648 (6th Cir. Dec. 20, 1996), in determining whether NASA exercised sufficient control over the manner and means by which complainant Robinson's work product was accomplished[5/] to render it liable as a co-employer for discrimination by the Martin Marietta employer. We noted, however, that Robinson did not allege the type of contractual interference at issue in *Hill and Ottney* and thus we did not consider that circumstance. *Robinson* at 7, n.4 (in *Hill and Ottney,* TVA "so interfered with its contract with a separate

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[3/] In the present case, the ALJ characterized Complainant's allegation of an association between her immediate employer (Martin Marietta Services, Inc.) and NASA as follows: "[I]t is alleged that NASA . . . ordered Martin Marietta management to take certain specified adverse actions against Complainant, to wit: ordering her not to talk to NASA officials, ordering her not to go onto [Johnson Space Center] property and pulling her unescorted access clearance." Recommended Order at 3.

[4/] The *Varnadore* decision questioned whether ERA protection extended to employees of contractors only because of the legislative history which describes the provision as "provid[ing] protection to employees of Commission licensees, applicants, contractors, or subcontractors." H.R. Conf. Rep. No. 1796, 95th Cong., 2d Sess. 16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7304, 7309. That the conference report contains this reference is understandable since the use of multiple contractors and subcontractors is prevalent in the nuclear industry and the ERA had been amended to cover these employers. That the legislative history of the more generic CAA does not refer to employees of contractors and subcontractors is not dispositive of the coverage issue. The CAA applies to a wide variety of industries which do not necessarily share common employment arrangements.

[5/] The *Reid* "factors" for determining degree of control include the level of skill required, the source of instrumentalities and tools, work location, the hiring party's right to assign additional projects, the hiring party's discretion in scheduling work, the hired party's role in hiring and paying assistants, provision of employee benefits, and tax treatment.

company that it caused the termination of the complainants' employment"). Rather, Robinson argued that NASA was a "joint employer" along with Martin Marietta because he was supervised for a three-month period by an undergraduate student working as an intern at NASA. We found that the record did not support a finding that Robinson was supervised by the intern. *Id.* at 7-8. The application of the *Reid* factors in *Robinson* is not inconsistent with our remand decision in the instant case. The issues framed by the complainants' allegations in the respective cases merely required different analyses. The underlying question in both instances is the same, however: did NASA *act* as an employer with regard to the complainants, whether by exercising control over production of the work product or by establishing, modifying or interfering with the terms, conditions or privileges of employment?

We are not persuaded that the February 13, 1997, remand decision in the instant case is contrary to administrative precedent, and we decline to vacate it. NASA's motion for reconsideration of additional issues not discussed herein **IS DENIED**. NASA's remaining motions **ARE DENIED**.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate