U.S. Department of Labor

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

In the Matter of:

DOUGLAS N. MAJORS,

COMPLAINANT,

v.

ASEA BROWN BOVERI, INC.,

RESPONDENT.

ARB CASE NO. 97-017

ALJ CASE NO. 96-ERA-33

DATE: August 1, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

The Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776, 3123-24 (1992), amended the employee protection provision of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1988) (ERA) by, among other things, adding new requirements for termination of the investigation of complaints by the Department of Labor. Pub. L. 102-486, § 2902(d). A complaint must be dismissed and no investigation conducted where the complainant has not "made a *prima facie* showing that [protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint [or where] the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such [protected activity]." As the Eleventh Circuit recently described it, "a complainant must first pass a gatekeeper test before an inquiry may commence." *Stone & Webster Engineering Corp. v. Herman*, 1997 U.S. App LEXIS 16225, at *12 (11th Cir. July 2, 1997).

When the Wage and Hour Division examined Douglas Majors' complaint and the information submitted by him, it determined that the complaint was untimely and that Majors had not made a *prima facie* showing that protected conduct was a contributing factor in the alleged personnel action and it dismissed the complaint without investigation. ALJ Exhibit 1.[1/]

[1/] This is a case of first impression under these new provisions of the ERA and, for the reasons discussed below, is a paradigm of the type of case that can properly be rejected without further investigation. We note that, once a hearing has been requested, the investigative findings, now issued by the Assistant Secretary for Occupational Safety and Health, Secretary's Order No. 6-96 (62 Fed. Reg. 111, Jan. 2, 1997), carry no weight either before the ALJ or the Board.

Majors, who ceased active employment for Respondent Asea Brown Boveri, Inc. (ABB) in 1986 and whose asserted protected activity took place in 1984, alleged that ABB reduced the amount of his long term disability payment in 1993 to offset his Social Security disability payments, in retaliation for that 9 year old whistleblowing. Majors filed his ERA complaint on May 30, 1996. One of the attachments to Majors' complaint, a letter of October 15, 1993 to him from the ABB Manager of Benefits Administration, explains that "[o]ne of the offsets in the Long Term Disability [LTD] benefit is any payment received from Social Security." Another attachment was a November 17, 1993 letter from Majors' attorney to ABB protesting that offset.

Even if we assume that (1) the ABB Benefits Administration Department had knowledge of Majors' protected activity and (2) that ABB was motivated at least in part by that nine year old conduct, we agree with the Administrative Law Judge that this complaint should be dismissed as untimely. Majors received unequivocal notification of the reduction in LTD benefits, at the latest, in October 1993 when he received the above letter as well as a letter detailing in dollars and cents exactly how much his benefit would be reduced. See attachments to ALJ 1. In fact, as the ALJ's exhaustive review of the exchange of correspondence and other documents between the parties shows, ABB repeatedly notified him of the Social Security offset provision of the LTD plan before 1993.

Furthermore, there was nothing in Majors' complaint to Wage-Hour or the attached materials to suggest that there was any basis for tolling the statutory time limit and we agree with the Administrative Law Judge that Majors' offered nothing additional in response to ABB's motion for summary judgment to support tolling. The fact that Majors was represented by counsel in November 1993, two and one half years before he filed his ERA complaint lends additional support to the ALJ's conclusion, which we adopt, that there is no basis for tolling the statute.

We have evaluated Majors' arguments for relaxing the time limit in light of the fact that he is a layman who appeared *pro se*,[2/] but we nevertheless find them without merit. For example, Majors argues that ABB never informed him that he does not have the same rights as any other employee on disability. The record clearly supports a finding that ABB informed Majors of his rights and that they did not differ from those of any other similarly situated employee. Even some of the decisions cited by Majors show that other personnel actions in addition to being fired trigger the statutory time limits. *See, e.g., Larry v. The Detroit Edison Co.*, Case No. 86-ERA-32, Sec'y Dec. June 28, 1991, slip op. at 14 (definitive notice of job transfer would trigger statutory filing period). Majors' allegations of other discriminatory actions, such as transferring him to a non-nuclear position in 1985, are woefully out of time.

We also find that Majors did not make a *prima facie* showing that his protected activity was a "contributing factor" in any action taken by ABB. Majors' interpretation of the language of the LTD plan as not providing for an offset of Social Security benefits awarded after receipt of LTD payments is patently unreasonable and we find is precisely the kind of frivolous claim which the amendment to the ERA was intended to address. His other allegations are similarly without merit.

[2/] For this reason, we have accepted Majors' Initial Brief, even though it obviously violated the type-size requirements of the November 26, 1996 Order Establishing Briefing Schedule.

Even if these allegations harbor intimations of some potentially provable discriminatory conduct, it is not enough, in response to a motion for summary judgment simply to assert "I am not aware of any reason why ABB" would take these actions other than out of discriminatory motives. *Kesterson v. Y-12 Nuclear Weapons Plant*, Case No. 95-CAA-0012, ARB Dec. Apr. 8, 1997, slip op. at 6 ("the non-moving party 'may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial . . . . Instead, the [party opposing summary judgment] must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-257 (1986). *See also, Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).")

Accordingly, the complaint in this case is **DENIED**[3/]

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[3/] Majors' motion for a stay also is denied. There is no order pending to be stayed.