U.S. Department of Labor

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

In the Matter of:

DAVID MARSHALL HIGH,

COMPLAINANT,

v.

LOCKHEED MARTIN ENERGY SYSTEMS, INC.;
LOCKHEED MARTIN CORPORATION;
OAK RIDGE OPERATIONS OFFICE; and
U.S. DEPARTMENT OF ENERGY,

RESPONDENTS.

ARB CASE NO. 98-075

(ALJ CASE NO. 96-CAA-8)

DATE: March 13, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:
For the Complainant:
Edward R. Slavin, Jr., Esq., *Deerfield Beach, Florida*

For Respondents Lockheed Martin Energy Systems, Inc., and Lockheed Martin Corporation:
Charles W. Van Beke, Esq., *Wagner, Myers & Sanger, P.C., Knoxville, Tennessee*; Patricia L. McNutte, Esq., *Lockheed Martin Energy Systems, Inc., Oak Ridge, Tennessee*

For Respondents Oak Ridge Operations Office and U.S. Department of Energy:
Robert E. James, Esq., *Oak Ridge Operations Office, U.S. Department of Energy, Oak Ridge, Tennessee*

DECISION AND ORDER OF REMAND

This case arises under the whistleblower protection provisions of, the Clean Air Act, 42 U.S.C.A. §7622 (West 1995) ("CAA"), the Toxic Substances Control Act, 15 U.S.C.A. §2622 (West 1998) ("TSCA"), the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §9610 (West 1995) ("CERCLA"), the Solid Waste Disposal Act, 42 U.S.C.A. §6971 (West 1995) ("SWDA"), and the Safe Drinking Water Act, 42 U.S.C.A. §§300j-9(I) (West 1991) ("SDWA") (collectively, the "environmental acts") and the Energy Reorganization Act, 42 U.S.C.A. §5851 (West 1995) ("ERA"). The employee protection provisions of these statutes generally prohibit employers from discriminating against or otherwise taking action against an employee because the employee reported concerns regarding nuclear or environmental safety.

For the reasons discussed in this Decision, we dismiss all aspects of the complaint against the Respondents Department of Energy and the Oak Ridge Operations Office, whether filed under the environmental acts or the ERA. As to the case against Respondents Lockheed Martin Energy Systems, Inc., and Lockheed Martin Corporation, we dismiss those aspects of the complaint based upon alleged discrimination under the environmental acts; however, we remand High's claim against these respondents under the ERA for further action consistent with this opinion.

BACKGROUND

Lockheed Martin Energy Systems, Inc. ("LMES") is a contractor of the Department of Energy ("DOE") and manages certain DOE facilities in Oak Ridge, Tennessee. As one of its functions, LMES provides security services at the Oak Ridge facilities. Complainant David High is employed by LMES as a Physical Training Coordinator and is responsible for supervising the physical training of security guards at the Oak Ridge facility. LMES is a wholly-owned subsidiary of Lockheed Martin Corporation ("LMC").

In 1992, High began complaining that some guards were not fully participating in the exercise program required by DOE regulations and that their acceptance of pay under these circumstances constituted waste, fraud, and abuse of taxpayer funds. Pursuant to 29 C.F.R. §24.3 (1995), High filed a complaint of discrimination with the Department of Labor's Wage and Hour Division on December 11, 1995. High asserted that his comments regarding the exercise program constituted protected activity under both the environmental acts and the ERA, and that LMES, LMC, and DOE illegally retaliated against him for engaging in such activity by giving him adverse performance appraisals and unequal pay, denying him promotions, and labeling him a troublemaker.[1/]

The Wage and Hour Division investigated High's complaint and concluded that it had no merit. High then requested review of that determination, and the matter was referred to an Administrative Law Judge ("ALJ"). 29 C.F.R. §24.4(d).

Before the ALJ, DOE argued, *inter alia*, that High had never complained about anything other than waste, fraud, and abuse. Asserting that complaints regarding waste, fraud, and abuse do not constitute protected activity under either the ERA or the environmental acts, DOE argued that the complaint was fatally defective. By Order dated June 19, 1997, the ALJ directed High to show cause why the complaint should not be dismissed for "failure of the complaint to state a cause of action under which relief can be granted."[2/] In his response to the order, High characterized his complaints as relating to lax security and its potential effect on the environment and argued that – as so characterized – his complaints constituted protected activity under the Acts. He therefore asserted that the complaint he filed with the Wage and Hour Division was sufficient to satisfy the "liberal, remedial standards for a DOL whistleblower complaint."

After considering the parties' respective positions, the ALJ determined that High's concerns regarding the guards' exercise program involved allegations of waste, fraud, and abuse rather than issues of nuclear or environmental safety. The ALJ reasoned:

[1/] The complaint is 25 single spaced pages containing 100 numbered paragraphs and attaching 30 exhibits.

[2/] In response to this order, LMC and LMES filed a joint motion to dismiss the complaint, in part, because High had not established a *prima facie* case.

> The potential safety problems arising from an unfit group of guards are speculative at best and do not directly concern harm to the environment. The fact that terrorists would have a better chance of stealing uranium if the guards at Oak Ridge are unfit does not necessarily mean that Complainant engaged in protected activity. These speculative fears are not enough to bring Complainant's activities within the protection of the Environmental Statutes stated in his complaint.

Recommended Decision and Order ("RD&O") at 3. Therefore, the ALJ recommended that the complaint be dismissed in its entirety.[3/] This appeal followed.

JURISDICTION

We have jurisdiction pursuant to 29 C.F.R. §24.8 (2000).

STANDARD OF REVIEW

Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions. *See* 5 U.S.C.A. §557(b) (West 1996). As a result, the Board is not bound by the conclusion of the ALJ, but retains complete freedom to review factual and legal findings *de novo. See Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000).

DISCUSSION

On appeal, High contends that the danger posed by LMES' physically unfit guards is not speculative. According to High, "the facts in the complaint, common sense and nuclear proliferation facts all teach that if terrorists get their hands on enriched uranium, damage to the environment is not speculative, but obvious – nuclear weapons exploded in the environment cause damage to the environment . . . ." Complainant's Opening Brief and Motion for Summary Reversal at 3 (filed Oct. 5, 1998). High asserts that the ERA and environmental acts are remedial in nature and must be broadly construed. Given this broad construction, High reiterates that his allegations satisfy the standards for a "DOL whistleblower complaint."

The key question before us is whether the ALJ properly dismissed High's complaint for failure to state a claim upon which relief can be granted. The Labor Department's Rules of Practice and Procedure for Administrative Hearings before Administrative Law Judges (29 C.F.R. Part 18) provide that the "Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. §18.1(a) (2000). The Part 18 rules do not contain procedures for motions to dismiss for failure to state a claim upon which relief can be granted; therefore, Fed. R. Civ. P. 12(b)(6) applies. To justify dismissing a case under Rule 12(b)(6), the court must conclude as a matter of law that the complainant/plaintiff would not be entitled to any relief under any set of facts proven in support of the claims pleaded. *Lewis v. Chrysler Motors*

[3/] The ALJ also found that DOE was not subject to claims under the ERA, TSCA, or SWDA because the federal government has not waived sovereign immunity under these acts. RD&O at 3. In the ALJ's view, High fared no better against DOE under the CAA, CERCLA, and SDWA because High had not shown how DOE's actions had an adverse effect on the terms, conditions, or privileges of his employment with LMES, *i.e.*, that High did not allege DOE involvement in any alleged adverse action. *Id.*

Corporation, 456 F.2d 605 (8th Cir. 1972). Because High's claims under the environmental acts and the ERA raise distinctly different issues, we analyze them separately.

A. High's claim of discrimination under the environmental acts.

To prevail in a case brought under the environmental whistleblower provisions, High must prove by a preponderance of the evidence that he engaged in activity protected by one or more of those provisions, and that the employer retaliated against him based, at least in part, on his protected activity. It is well settled that protected activities under the environmental whistleblower provisions are limited to those which are grounded in conditions constituting reasonably perceived violations of the environmental statutes. An employee's belief that the employer's conduct may have a negative impact on the environment is not, by itself, sufficient to establish protected activity; the issues raised by the employee must be within the scope of the environmental statutes and regulations. *Johnson v. Oak Ridge Operations Office, U.S. Dep't of Energy*, ARB No. 97-057, ALJ Nos. 95-CAA-20, 21, and 22, slip. op. at 9-10 (ARB Sept. 30, 1999) and cases cited therein. Thus, as a matter of law, High does not have a valid claim under the environmental whistleblower provisions unless the concerns he expressed about the physical fitness of the security guards reasonably fall within the scope of the CAA, TSCA, CERCLA, SWDA, or SDWA.

Neither the environmental acts nor their implementing regulations have any provisions that govern the physical conditioning of security guards; thus on its face, High's complaint under the environmental acts does not point to a specific statutory or regulatory provision allegedly violated by any of the respondents. High attempts to bootstrap his complaint into a protected activity by asserting that (1) unfit guards will be unable to deter the theft of nuclear material; (2) this nuclear material could find its way into a nuclear bomb; (3) the nuclear bomb may be detonated in this country; and (4) the resulting explosion would be harmful to the environment. But as we have previously held, this sort of rank speculation cannot support a claim of protected activity. *See Johnson, supra*. Because High has offered nothing other than speculation, which we have found insufficient as a matter of law to constitute protected activity, his concerns are not protected under the environmental acts. Consequently, we see no error in the ALJ's decision to dismiss this part of the complaint for failure to state a claim upon which relief can be granted.

B. High's claim of discrimination under the ERA.

High's claim under the ERA is distinguishable from the discrimination complaint raised under the environmental acts. In addition, although it is unclear whether High is raising different allegations against DOE/Oak Ridge Operations Office than he is raising against LMES/LMC, the viability of High's complaint against these two pairs of respondents must be analyzed under different standards.

1. High's ERA complaint against DOE and the Oak Ridge Operations Office.

High's complaint against the government respondents must be dismissed on sovereign immunity grounds. Any waiver of the government's sovereign immunity must be "unequivocal." *U.S. Dep't. of Energy v. Ohio*, 503 U.S. 607 (1992). Waivers of immunity must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires. *Id*. Thus, in *Teles v. Dep't of Energy*, No. 94-ERA-22 (Sec'y Aug. 7, 1995), the Secretary dismissed an ERA whistleblower complaint against DOE because the legislative history of the 1992 amendments to the ERA demonstrated an intent to exclude DOE from the definition of "employer" in the whistleblower provision. In addition, the Secretary concluded that the references to the United States as a "person" for purposes of legislation in other chapters of Title 42 of the U.S. Code dealing with energy matters were insufficient to constitute the kind of unequivocal waiver of sovereign immunity needed to sustain a whistleblower under the ERA against the government. *Accord, Johnson, supra*.

Because there has been no waiver of sovereign immunity under the ERA whistleblower protection provisions, High's ERA complaint against the government respondents is dismissed.

2. High's ERA complaint against LMES and LMC.

LMES' physical fitness program at DOE's Oak Ridge facility is mandated by 10 C.F.R. Part 1046 (2000).[4/] These regulations governing the physical protection of security interests and establishing physical fitness standards for contractor security personnel at DOE facilities were promulgated by DOE pursuant to the Atomic Energy Act of 1954, 42 U.S.C.A. §2011. Employee concerns about alleged violations of the Atomic Energy Act or the regulations promulgated thereunder are expressly protected by the ERA. 42 U.S.C.A. §5851(a)(1); *see also Johnson, supra*. Therefore, a complaint that security guards were violating 10 C.F.R. Part 1046 by refusing or failing to participate in a DOE-approved physical fitness program, as required by §1046.12(d), might constitute an activity protected under the ERA.

[4/] 10 C.F.R. §1046.12 provides in pertinent part:

> (a) Each incumbent security police officer, who has not met the applicable physical fitness qualification standard, *shall participate in a DOE approved physical fitness training program*. Once an incumbent security police officer has begun a physical fitness training program, it must be completed before the security police officer may take the applicable physical fitness qualification standards test. Once a physical fitness training program is completed, an incumbent security police officer has thirty (30) days to meet the applicable physical fitness qualification standards.
>
> (b) An incumbent security police officer who fails to qualify within thirty (30) days of completing a physical fitness training program *shall participate in an additional training program*. Upon completion of the additional physical fitness training program the security police officer has thirty (30) days to meet the applicable physical fitness qualification standard. No additional training or time extension to meet the standards is permitted except for unusual circumstances as set forth in appendix A to this subpart, paragraph G(2).
>
> (c) A security police officer who fails to requalify within thirty (30) days after his or her yearly anniversary date of the initial qualification *shall participate in a physical fitness training program*. Security police officers have a maximum of six (6) months from the anniversary date to requalify.
>
> (d) After his or her initial qualification, each incumbent security police officer *shall participate in a DOE-approved physical fitness training program on a continuing basis*. This training is for the purpose of ensuring that security police officers maintain the requisite physical fitness for effective job performance and to enable the individual security police officer to pass the applicable annual physical fitness requalification test without suffering any undue physical injury.

Emphasis added.

High did not allege in his complaint that he ever complained to any of the Respondents that he believed security guards were violating 10 C.F.R. §1046.12. However, he did allege that the guards were pretending to exercise when they were in fact not doing so, and were signing in as attending physical fitness training that they did not attend. While we view this as a very close call, we conclude that these allegations are sufficient to survive a motion to dismiss under the very charitable standard applicable to 12(b)(6) motions. Therefore, dismissal of High's complaint against LMES and LMC for failure to state a claim was inappropriate.[5/]

Although we have determined that the ERA portion of this complaint should not have been dismissed, we can certainly understand why the ALJ reached a contrary conclusion. Here, the ALJ questioned whether High's claim was cognizable under the ERA and specifically directed him to show cause why the complaint should not be dismissed. High's response did not address the arguments advanced in Respondents' motions to dismiss, did not explicitly rely upon the allegation that the guards were violating 10 C.F.R. §1046.12, or even set forth any discernable legal theory underlying his case. Instead, he simply offered his theory that unfit guards may lead to a nuclear explosion and asserted that this theory, alone, is sufficient to state a cause of action. Were this the only basis upon which High's claim rested, we would not have been at all reluctant to affirm the ALJ's dismissal. This type of speculative conjecture about the effects of physically unfit guards is not sufficient to support a claim that High engaged in protected activity under the ERA.

We also emphasize that although F.R.Civ. P. 12(b)(6) may not have been the appropriate tool to use when confronted with the kind of prolix, rambling complaint that is involved in this case, an ALJ has the authority to demand that a complainant come forward with a clear articulation of his or her case. *See, e.g.*, *Salahuddin v. Cuomo*, 861 F.2d 40 (2d Cir. 1988) (describing circumstances under which a confused, ambiguous complaint may be dismissed); *Jochnowitz v. Russell Sage College*, 1992 WL 106813 (N.D. N.Y. 1992) (dismissing complaint containing "a labyrinth of unconnected pieces of information").

C. High's allegation of bias on the part of the ALJ.

High argues that a new ALJ should be appointed in this case because the ALJ was biased against him. Specifically, High states:

> The ALJ indulged in an improper *ex parte* contacts [sic] with Respondents' counsel, with no court reporter, transcript or any justification or excuse. The ALJ then got angry at Complainant's counsel for raising concerns about his actions. As a result, the ALJ should be excused from further participation in this case.

Complainant's Opening Brief and Motion for Summary Reversal at 27.

LMC and LMES respond as follows:

> As Complainant knows but failed to explain in his Opening Brief, the alleged "improper ex parte" contact was a short telephone conference call of which the ALJ believed that Complainant's counsel and all other parties were informed several days in advance. The ALJ and the ALJ's aides

[5/] Although dismissal for failure to state a claim was inappropriate in these circumstances, Respondents are not precluded from seeking dismissal on some other ground or from moving for summary judgment.

> attempted to locate Complainant's counsel at the appointed time but he could not be reached. Complainant is also well aware that the ALJ, later that same day, informed Complainant's counsel of the conversation that took place during this conference call, most of it simply an announcement of the ALJ's decisions on several matters, and later set forth in a memo circulated to all parties, including Complainant.

Lockheed Martin Respondents' Response to Complainant's Opening Brief for Summary Reversal at 28.

In order to prevail on an allegation of bias, the appellant must first overcome a presumption of honesty and integrity that accompanies administrative adjudicators. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Ash Grove Cement Company v. FTC*, 577 F.2d 1368, 1376 (9th Cir.), *cert. denied*, 439 U.S. 982 (1978). High has not demonstrated that the ALJ's communication with Respondent's counsel was evidence of bias. Even if the ALJ became angry when confronted with an allegation of bias as High alleges, a momentary loss of judicial temperament, standing alone, is insufficient to overcome the presumption of honesty and integrity that we accord to an ALJ.

CONCLUSION

The claim against all respondents under the environmental acts is dismissed. The claim against the government respondents under the ERA is dismissed. The ALJ's recommendation to dismiss the ERA claim against LMES and LMC is rejected and this matter is **REMANDED** to the ALJ for further proceedings consistent with this opinion.[6/]

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member

[6/] LMC argues that it is not a proper respondent in this case. The ALJ should address this question on remand in light of applicable case precedent. *See, e.g., Stephenson v. NASA*, ARB No. 98-025, ALJ No. 94-TSC-5 (ARB July 18, 2000).