U.S. Department of Labor

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

In the Matter of:

C. D. VARNADORE,

COMPLAINANT,

v.

OAK RIDGE NATIONAL LABORATORY, LOCKHEED MARTIN ENERGY SYSTEMS, INC., LOCKHEED MARTIN CORP., AND UNITED STATES DEPARTMENT OF ENERGY

RESPONDENTS.

ARB CASE NO. 99-121

ALJ CASE NOS. 92-CAA-2, 92-CAA-5, 93-CAA-1, 94-CAA-2, 94-CAA-3, 95-ERA-1

DATE: July 14, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Edward A. Slavin, Jr., Esq., *St. Augustine, Florida*
David A. Stuart, Esq., *Clinton, Tennessee*
Jacqueline O. Kittrell, Esq., *American Environmental Health Studies Project, Knoxville, Tennessee*

For Respondents Oak Ridge National Laboratory, Lockheed Martin Energy Systems, Inc., and Lockheed Martin Corp:

Patricia L. McNutt, Esq., G. Wilson Horde, Esq., *Lockheed Martin Energy Systems, Inc., Oak Ridge, Tennessee*
E.H. Rayson, Esq., John B. Rayson, Esq., John C. Burgin Jr., Esq., *Kramer, Rayson, Leake, Rodgers & Morgan, L.L.P., Knoxville, Tennessee*

For Respondent United States Department of Energy:

Don F. Thress, Jr., Esq., *United States Department of Energy, Oak Ridge, Tennessee*

FINAL DECISION AND ORDER

On April 6, 1998, the United States Court of Appeals for the Sixth Circuit issued a decision in these consolidated cases arising under the environmental whistleblower laws[1/] and the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 (1994) (the Acts). *Varnadore v. Secretary of Labor*, 141 F.3d 625 (1998). The Court of Appeals affirmed decisions of the Secretary and the Administrative Review Board (ARB) dismissing a series of complaints filed by Complainant C.D. Varnadore. On October 19, 1998, Varnadore filed a motion with a Department of Labor Administrative Law Judge (ALJ) seeking to reopen these cases, to supplement the record, and to have the decisions of the Secretary and the ARB reconsidered and vacated. The ALJ denied the motion. Thereafter, Varnadore petitioned the ARB for review of the ALJ's order, and the parties filed briefs. We deny Varnadore's motion.

BACKGROUND

The facts in these cases are fully stated in the Court of Appeals decision. *Varnadore v. Secretary of Labor*, 141 F.3d at 626-630. To summarize those facts relevant to Complainant's current motion, Varnadore has worked at Oak Ridge National Laboratory (ORNL)[2/] since 1985. In *Varnadore v. Oak Ridge Nat'l Lab.*, Case Nos. 92-CAA-2, 92-CAA-5 and 93-CAA-1, Sec'y Dec. Feb. 5, 1996 *(Varnadore I)*, Varnadore asserted that in 1985 and 1989 he engaged in activity protected under the environmental whistleblower laws. Varnadore alleged that as a result of the protected activity he was retaliated against in numerous ways. Taken together, Varnadore asserted, these acts of retaliation created a hostile working environment. Following a hearing on the merits and an ALJ recommended decision, the Secretary held that most of the alleged acts of retaliation occurred outside the statute of limitations period.[3/] However, the Secretary reserved decision regarding two actions which were not time barred in order to consider them together with the allegations contained in two subsequent cases in which Varnadore sought to prove other acts of retaliation by ORNL, LMES, and the U.S. Department of Energy.

[1/] The Clean Air Act (CAA), 42 U.S.C. §7622 (1994); the Toxic Substances Control Act (TSCA), 15 U.S.C. §2622 (1994); the Safe Drinking Water Act (SDWA), 42 U.S.C. §300j-9(i) (1994); the Water Pollution Control Act (WPCA), 33 U.S.C. §1367 (1994); and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9610 (1994).

[2/] ORNL is operated by Lockheed Martin Energy Systems, Inc. (LMES), under contract with the Department of Energy.

[3/] The decision was first issued on January 26, 1996. A reformatted version (with no substantive changes) was issued on February 5, 1996. In April 1996 the Secretary created the Administrative Review Board, which acts for the Secretary and is responsible for "issuing final agency decisions on questions of law and fact arising in review or on appeal" in cases such as these. 61 Fed. Reg. 19,978.

On June 14, 1996, the ARB issued its final decision in *Varnadore I, II, and III*. The Board found against Varnadore on all claims in *Varnadore II and III*. *Varnadore v. Oak Ridge Nat'l Lab.*, Case Nos. 92-CAA-2, 92-CAA-5, and 93-CAA-1, 94-CAA-2, 94-CAA-3, 95-ERA-1, ARB Dec. Jun. 14, 1996 (*Varnadore I, II, and III)*. Although the ARB found that the two non-time barred incidents from *Varnadore I* were retaliatory, it held that they did not amount to a hostile working environment. *Id.,* slip op. at 69-70. Accordingly the Board concluded that no actionable discrimination had occurred and dismissed the cases.

Varnadore appealed the decisions of the Secretary and ARB to the United States Court of Appeals for the Sixth Circuit, which affirmed. Varnadore filed a petition for rehearing and moved to supplement the record before the Court of Appeals with seven pages of testimony by Brenda Shelton in a Department of Labor hearing in her whistleblower case. On the advice of the En Banc Coordinator of the Court of Appeals,[4/] Varnadore then filed with this Board a Motion to Supplement the Record with the same transcript testimony. On May 14, 1998, the Board denied Varnadore's motion, because the Shelton testimony did not meet the legal standard typically applied when deciding to reopen a hearing record. First, the Board concluded that the Shelton testimony was not "newly discovered evidence":

> Varnadore openly admits that Shelton's testimony is not "newly discovered" evidence . . . . As his attorney also represents Ms. Shelton, her testimony can have come as no surprise. Yet Varnadore made no attempt to supplement the record in his cases with Shelton's testimony while those cases were still pending before the Department.
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> Varnadore argues that until the Sixth Circuit panel issued its decision there was no reason to believe that his case would turn on whether Varnadore's supervisor "threatened" to return Varnadore to a room allegedly contaminated with radioactive waste . . . . The record simply does not support this contention.
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> First, as early as his complaint before the Wage and Hour Division, Varnadore characterized the supervisor's conversation with him as a threat, amounting to a retaliatory act . . . .
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> Second, both before the ALJ as well as on review before the Department of Labor, Energy Systems argued that the *Varnadore I* complaint was untimely filed. Energy Systems

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[4/] The Coordinator "advised that the motion to supplement the record was not properly before this court as it should be submitted to the Secretary, then renewed in this court if the Secretary denies the motion." Letter from Beverly L. Harris, En Banc Coordinator for the Sixth Circuit, to Edward Slavin, Esq., May 5, 1998.

> specifically addressed the question whether Wright's conversation with Varnadore about possible reassignment to R-151 was actionable retaliation, and could render Varnadore's complaint timely . . . .
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> * * * * *
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> On appeal before the Department of Labor, Energy Systems renewed its contention that the complaint was not timely . . . . Varnadore responded to these arguments before the Secretary of Labor . . . .
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> * * * * *
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> It is impossible to conclude, given the record cited above, that "there was no reason for the Complainant to believe that" Wright's conversation with Varnadore "would become the fulcrum upon which the whole case would turn until the issuance of the Panel decision". . . . Because Varnadore has not shown that Shelton's testimony was "new and material evidence [which became] available which was not readily available" while the Varnadore case was pending before the Department of Labor, we DENY Varnadore's request to supplement the record.

Order, May 14, 1998, slip op. at 3-4. In addition to concluding that the Shelton testimony was not "newly discovered," we emphasized that it was not relevant to Varnadore's complaint:

> Even were we to find that the Shelton testimony was not readily available, we would conclude that it is irrelevant to the issue whether Wright took adverse action against Varnadore when he discussed the possibility of reassigning him to R-151. Shelton was not present at that conversation. More critically, the seven pages of testimony sought to be included in the record relate to her interpretation of a hearsay report recounting what Wright allegedly had said in a conversation with another person months prior to the conversation at issue.

Id. at 4.

Following the Board's denial of his motion, Varnadore renewed his motion to supplement in the Court of Appeals. Motion, dated May 21, 1998. On June 4, 1998, the Court of Appeals denied that motion, and on June 19, 1998, the Court of Appeals denied rehearing. *Varnadore v. Sec. of Labor*, 141 F.3d 625.

Varnadore did not further pursue his appeal by filing a Petition for a Writ of Certiorari to the United States Supreme Court. Instead, following the unfavorable Court of Appeals decision and denial of rehearing, Varnadore filed a motion with a Department of Labor ALJ to reopen the case and supplement the record. Varnadore argued that the record should be supplemented with the deposition of Former Secretary of Energy Hazel O'Leary, which was taken in an unrelated action. Varnadore also asserted that the decisions of the Secretary of Labor and the Board in these cases must be reconsidered in light of two recent Supreme Court decisions on the law of hostile working environment under Title VII of the Civil Rights Act of 1964: *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)(*Faragher)*, and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998)(*Ellerth)*. Varnadore did not include in his motion to the ALJ a renewal of his request to supplement the record with the Shelton testimony.

The ALJ denied Varnadore's motions to reopen and supplement the record with the O'Leary deposition in an order dated December 28, 1998 (Ord.). The ALJ noted that the Sixth Circuit had dismissed Varnadore's cases, Varnadore had not appealed them further, and the Court of Appeals had not remanded any of the cases to the Board or to any ALJ for further proceedings. *Id.* at 3. The ALJ found that Varnadore had failed "to state any theory which would give [an ALJ] or the ARB any remote authority to reopen the records in any of these cases at this juncture." *Id.* Finally the ALJ ruled that, as he was not currently assigned any cases involving Varnadore, he did not have jurisdiction to decide the motions.

Varnadore then petitioned this Board for review. Before the Board he once again requests that we reopen the record for the inclusion of the Shelton testimony; seeks inclusion of the O'Leary deposition in the record; and requests that we "reconsider" and "vacate" the 1996 decisions of the Secretary and the ARB in *Varnadore I, II, and III*, based, at least in part, on the Supreme Court decisions in *Faragher* and *Ellerth*.

DISCUSSION

Varnadore seeks to supplement the record and to gain rehearing by this Board in cases which were dismissed by the Court of Appeals for the Sixth Circuit. His motion flies in the face of some of the most fundamental principles of our judicial system, including the constitutional limits on federal courts, separation of powers, *res judicata*, and finality. We reject this meritless attempt to relitigate a case which has been decided once and for all.

First, Varnadore argues that the Board has the authority to admit "new and material evidence" and "reconsider" the Secretary's and the Board's previous decisions pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Opening Br. on Rule 60(b) at 14, 16. Because the Rules of Procedure of the Office of Administrative Law Judges (OALJ Rules) do not have a rule applicable to the admission of new and material evidence following the entry of judgment, it can be argued that it is appropriate to apply Rule 60(b). *See* 29 C.F.R. §18.1(a) (1999)

(Federal Rules of Civil Procedure shall be applied "in any situation not provided for or controlled by these rules . . . .").[5/]

Rule 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

We doubt that Rule 60(b), which was drafted by federal courts for use in the federal court system, may be applied in an executive branch administrative adjudication to reopen and reconsider a case such as this one, which has been fully and finally decided by the Sixth Circuit Court of Appeals and not remanded by that Court for further proceedings. Any attempt on our part -- without prior approval of the Sixth Circuit -- to revive this action in the aftermath of its final decision would run afoul of the Constitution. Article III of the Constitution allocates the judicial power of the United States to "one supreme Court," and to "such inferior courts" as Congress may establish. U.S. Const. art. III, §1. The powers of Article III courts are circumscribed: they may only decide "cases" or "controversies." *Id.* art. III, §2, cl. 1. Thus, these courts may not issue advisory opinions. Were we to reconsider the Secretary's and the Board's previous decisions in these cases, which were affirmed on appeal by the Sixth Circuit, we would render that court's decision advisory. As the Court of Appeals for the Second Circuit has noted:

> A judgment entered by an Article III court having jurisdiction to enter that judgment is not subject to review by a different branch of the government, for if a decision of the judicial branch were subject to direct revision by the executive or

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[5/] OALJ Rule 54(c), 29 C.F.R. §18.54(c), which provides a mechanism for seeking the admission of "new and material" evidence after the close of the record, contains standards similar to those contained in Rule 60(b).

> legislative branch, the court's decision would in effect be merely advisory.

Town of Deerfield v. F.C.C., 992 F.2d 420, 428 (1993). "It has been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action." *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corporation*, 333 U.S. 103, 113-114 (1948).

Moreover, "[j]udgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of the Government." *Id.* at 113. The judicial branch -- the Court of Appeals for the Sixth Circuit -- has spoken finally in this case, affirming our dismissal of the actions. Varnadore could have, but did not, seek Supreme Court review. He cannot now seek review from this Board, in the form of reconsideration, for we will not attempt to "arrogate" to ourselves "the power to (a) review or (b) ignore the judgments of the courts." *Town of Deerfield v. F.C.C.*, 992 F.2d at 430.

Varnadore's attempt to reopen this case also offends concepts of finality, which find their chief expression in the doctrine of *res judicata* or claim preclusion. The question of the applicability of *res judicata* arises when a party to an action which has been fully litigated and decided brings a second action against the other party to the first action based on the same claim. In such a case

> the [first] judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . . Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

Cromwell v. County of Sac, 94 U.S. 351, 352-353 (1876); *Parklane Hosiery v. Shore*, 439 U.S. 322, 326 n.5 (1979). There are strong policy reasons supporting the doctrine of claim preclusion. As the Supreme Court has recognized

> it ensures "the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals."

Nevada v. United States, 463 U.S. 110, 129 (1983), *quoting Southern Pacific Railroad v. United States*, 168 U.S. 1, 49 (1897). *Res judicata* would bar Varnadore from bringing this action anew. Related principles of finality bar his attempts to perpetuate a case which has been concluded.

It matters not that Varnadore did not seek a writ of certiorari to the United States Supreme Court following his loss in the Court of Appeals. "If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him." *Angel v. Bullington*, 330 U.S. 183, 189 (1947). To borrow from a decision of the Court of Appeals for the First Circuit, "the policies of economy, efficiency, repose and fairness underlying the claim preclusion doctrine are best served" by holding Varnadore "to the consequences of his actions and inactions." *Puerto Rico Maritime Shipping Authority v. Federal Maritime Commission*, 75 F.3d 63, 68 (1996).

Finally, it does not matter whether the prior judgments of the Secretary, the Board, and the Sixth Circuit "are right or wrong or whether subsequent changes in the law, the discovery of additional facts or considerations of fairness should merit a different result in the subsequent litigation." *18 Moore's Federal Practice*, §131.12, at 131-22/23 (3d ed. 1999). The claim preclusion doctrine "is concerned only with bringing an end to litigation after the parties have had a fair opportunity to litigate their claims." *Id.* Varnadore has had a full and fair opportunity to litigate his case before the Secretary, this Board, the Court of Appeals, and the Supreme Court. We hold that he is now barred from relitigating his case.

We have held that Rule 60(b) cannot be invoked in the circumstances of this case without colliding with constitutional principles of separation of powers and the role of Article III courts. Even if we were to hold that Rule 60(b) is available in these circumstances, however, we would conclude that Varnadore has failed to make any showing which would justify invoking that rule, which is an extremely narrow exception to principles of finality, to reopen this case.

Rule 60(b) relief is extraordinary and is only to be granted in exceptional circumstances. *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking, Inc.,* 909 F.2d 1437, 1440 (10th Cir. 1990). *See also C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.,* 726 F.2d 1202, 1205 (7th Cir.1984) (Rule 60(b) relief is an "extraordinary remedy and granted only in exceptional circumstances."). With these general principles in mind we turn to the three matters with which Varnadore seeks to supplement the record in these cases.

First, the vast majority of Varnadore's argument relates to his attempts to admit the Shelton testimony, which could only be admitted under Rule 60(b) if it were "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 60(b)(2). To prevail on a Rule 60(b)(2) motion, the Sixth Circuit has held that the moving party must show: (1) that it exercised due diligence in obtaining the information, and (2) the evidence is material and controlling and clearly would have produced a different result. *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998). As we have described in great detail, Varnadore previously moved to have the Board admit and consider this

testimony. In our May 14, 1998 Order we denied that motion on its merits in no uncertain terms. In his current filings, Varnadore disingenuously asserts that in the May 14, 1998 Order the Board decided it did not have jurisdiction to rule on his request to submit the Shelton testimony. *See, e.g.,* Varnadore's Opening Brief on Rule 60(b) at 11, ¶ 29. As the text of that order demonstrates, we did no such thing.[6/] However, for the reasons stated in that Order, we once again reject Varnadore's frivolous and duplicative effort to have the Shelton testimony admitted in the record.

Second, Varnadore seeks admission of the deposition testimony of former Secretary of Energy Hazel O'Leary which, he claims, "admits the routine pattern and practice of retaliation by DOE and its contractors." Varnadore's Opening Brief on Rule 60(b) at 16. We must assume that Varnadore also seeks admission of this testimony pursuant to Rule 60(b)(2). It is not clear from Varnadore's submissions when he became aware of the deposition of Secretary O'Leary. However, the deposition, which was submitted to the ALJ as an attachment to Varnadore's complaint, is dated May 14, 1998. In any event, even if Secretary O'Leary made an "admission" that there was a "pattern and practice" of discrimination against whistleblowers by the Department of Energy and its contractors, that admission would have no probative value to show that in these particular cases Varnadore was discriminated against. Thus, this "evidence" would have had no effect on the outcome of these cases. *Good v. Ohio Edison Co.*, 149 F.3d at 423. For these reasons, Varnadore's request to reopen the record to admit the O'Leary deposition is denied.

Third, Varnadore urges the Board to grant relief from the judgment in these cases on the basis of *Faragher and Ellerth,* two Supreme Court decisions on the law of sexual harassment and hostile work environment handed down two years after the Secretary's and the Board's decisions. The Court held there that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Faragher,* 524 U.S. at 806.

Faragher and *Ellerth* are completely inapplicable to a case, such as this, in which the Board has found 1) no "actionable hostile environment," and 2) which in any event did not involve actions of a "supervisor with immediate (or successively higher) authority over the employee." In the absence of these predicate findings, there is no occasion to address the issue of vicarious liability decided in *Faragher* and *Ellerth*.

There is, in addition, another important principle applicable here: that a subsequent change in the law cannot in itself constitute extraordinary circumstances sufficient to justify vacating a final judgment. The First Circuit explained:

[6/] Moreover, as we have noted, Varnadore renewed his motion to supplement the record with the Shelton testimony in the Court of Appeals following our denial, and the Court of Appeals also denied it.

> Decisions are constantly being made by judges which, if reassessed in light of *later* precedent, might have been made differently; but a final judgment normally ends the quarrel. Indeed, the common law could not safely develop if the latest evolution in doctrine became the standard for measuring previously resolved claims. The finality of judgments protects against this kind of retroactive lawmaking.

Biggins v. Hazen Paper Co., 111 F.3d 205, 212 (1st Cir. 1997), *cert. denied* 522 U.S. 952 (emphasis in original). *Accord Kansas Public Employees Retirement Sys. v Reimer & Kroger Assoc., Inc.,* 194 F.3d 922, 925 (8th Cir. 1999); *Norgaard v. DePuy Orthopaedics, Inc.,* 121 F.3d 1074, 1076-77 (7th Cir. 1997); *Clifton v. Attorney Gen'l of the State of Calif.*, 997 F.2d 660, 665 (9th Cir. 1993).

CONCLUSION

In light of the foregoing, Varnadore's motion to reopen, supplement the record, reconsider, and vacate is **DENIED**. Varnadore's motion for oral argument is **DENIED**. LMES' motion for sanctions is **DENIED**.

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

E. Cooper Brown, Member, concurring:

I concur with the majority's denial of Complainant Varnadore's motion seeking relief from the 1996 final decisions of the Secretary of Labor and the Board in *Varnadore I*, *Varnadore II and Varnadore III*.[1/] I write separately because I reach my conclusion based upon application of Rule 60(b) of the Federal Rules of Civil Procedure, for I do not share in the majority's opinion that invocation of Rule 60(b) is barred in the instant case by constitutional constraints or the doctrine of *res judicata*/claims preclusion. Mr. Varnadore's motion does not seek to have this Board review, overturn or otherwise ignore the Sixth Circuit's decision in *Varnadore v. Secretary of Labor*, 141 F.3d 625 (1998). Nor does his motion constitute an

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[1/] *Varnadore v. Oak Ridge Nat'l Lab.*, Case Nos. 92-CAA-2 & 5, and 93-CAA-1, Sec'y Decision, February 5, 1996 (*Varnadore I*), and *Varnadore v. Oak Ridge Nat'l Lab.*, Case Nos. 92-CAA-2 & 5, 93-CAA-1, 94-CAA-2 & 3, 95-ERA-1, ARB Decision, June 14, 1996 (*Varnadore I, II and III*).

impermissible attempt to relitigate his original claims. Mr. Varnadore is merely requesting that the Board exercise its inherent authority to reconsider its final decisions in *Varnadore(s) I*, *II* and *III* pursuant to the dictates of Rule 60(b), FRCP.[2/]

The Board's authority to reconsider the prior final judgments herein at issue does not derive from FRCP Rule 60(b) but from the Board's inherent authority under the environmental whistleblower protection laws, as we have held in a number of recent decisions. *See, e.g., Macktal v. Brown & Root*, ARB Nos. 98-112, -122A, 86-ERA-23, Order Granting Reconsideration (Nov. 20, 1998); *Jones v. E. G. & G. Materials*, ARB No. 97-129, 95-CAA-3, Order Granting Reconsideration (Nov. 24, 1998); *Leveille v. N.Y. Air Nat'l Guard*, ARB No. 98-079, 94-TSC 3, 4, Order Granting Reconsideration (May 16, 2000). Rule 60(b)'s relevance is in the evaluation of when and under what circumstances the Board will exercise its authority to reopen and reconsider a prior final judgment, decision or final order. Given that neither the rules of practice promulgated at 29 C.F.R. Part 18 nor any rule of special application provides for or controls the situation where a party seeks relief from a prior judgment of the Board, FRCP Rule 60(b) is applicable in determining the appropriate circumstances under which such relief will be granted. *See* 29 C.F.R. §18.1(a).

As the majority notes, the basis for Complainant's motion is threefold. In essence Mr. Varnadore argues that he is entitled to relief from the Board's 1996 judgments pursuant to Rule 60(b) because of: (1) the existence of "newly discovered evidence" in the form of the 1995 transcript testimony of Ms. Brenda Shelton in another whistleblower case, (2) "newly discovered evidence" in the form of the deposition testimony of former Secretary of Energy Hazel O'Leary, and (3) a change in the decisional law upon which the Board's earlier judgments were based. For the reasons hereafter explained, Mr. Varnadore's motion fails on all three grounds.

Complainant's attempt to set aside the Secretary and Board's 1996 judgments based upon his argument that the 1995 Shelton testimony constitutes "newly discovered evidence" within the meaning of FRCP Rule 60(b)(2) fails for several reasons. To begin with, to constitute "newly discovered evidence" within the meaning of Rule 60(b)(2), the evidence must have been in existence at the time of trial. Moreover, it must be established that the party now seeking relief was not only unaware at the time of trial of such evidence but that, despite the party's due diligence, the evidence could not have been discovered in time to move for a new trial pursuant to Rule 59, FRCP. *Mitchel v. Shalala*, 48 F.3d 1039, 1041 (8th Cir. 1995)*; Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990). *See* 12 *Moore's Federal Practice*, §60.42[3] & [4]

[2/] Rather than "offend[ing] concepts of finality" as the majority suggests, Complainant's Rule 60(b) motion is actually dependent upon the finality of the judgments from which he now seeks relief. 12 *Moore's Federal Practice* §60.23 (3d ed. 1998). Recognizing that final judgments should not be disturbed lightly, Rule 60(b) identifies the limited circumstances in which a court nevertheless will relieve a party from an otherwise final judgment. *See Moore's*, §60.02[2], §60.20; *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1144 (2d Cir. 1994). "Rule 60(b) enables a court to grant a party relief from a judgment in circumstances in which the need for truth outweighs the value of finality in litigation." *Moore's*, §60.02[2].

(3d ed. 1998). In an environmental whistleblower case, the definitional standard for what constitutes "newly discovered evidence" is comparable. *Timmons v. Mattingly Testing Services*, 95-ERA-40, ARB Decision & Order, June 21, 1996, slip op. at 3 & n.3. Required is that the evidence was in existence at the time of the ALJ hearing, that the moving party was at the time of the hearing "excusably ignorant" of such evidence, and that notwithstanding the moving party's due diligence the evidence could not be discovered in time to move, before the ALJ or this Board, to reopen and supplement the evidentiary record pursuant to 29 C.F.R. §18.54(c). *Id.*

The Shelton testimony was elicited August 31, 1995, after the ALJ had issued his recommended decision in *Varnadore I*, but before either the Secretary's subsequent decision therein or the Board's June 14, 1996 Final Consolidated Decision and Order in *Varnadore I, II and III*. However, as the majority notes (quoting the Board's previous order relative to this matter, Order of May 14, 1998, ARB Case No. 98-119), Complainant's attorney also represented Ms. Shelton in the action in which her testimony was elicited. Thus, the record cannot be argued to support a finding that Complainant did not know of, or could not with due diligence have discovered, the existence of Ms. Shelton's testimony in time to seek supplementation of the record pursuant to 29 C.F.R. §18.54(c). *See Moore's*, §§ 60.42[4][b], 60.42[5].

To Mr. Varnadore's credit, he does not argue that he was unaware at the time of the Shelton testimony. Rather, he argues that the evidence should now be considered as a basis for reconsideration of the earlier judgments because it "was not available until over two years after [the ALJ decision] in *Varnadore I*." Complainant argues that his delay in presenting his motion was justified for two reasons: He had no reason to believe that Shelton testimony was relevant until the Sixth Circuit's final ruling and, secondly, the appeal to the Sixth Circuit otherwise tolled the time in which he had to file his Rule 60(b) motion.

Mr. Varnadore's argument fails on both counts. Clearly, misjudgment as to the need to timely introduce testimony does not subsequently make that testimony "newly discovered" when the error is recognized. *See e.g. Washington v. Patlis*, 916 F.2d 1036, 1038 (5th Cir. 1990); *Parrilla-Lopez v. United States*, 841 F.2d 16, 19 (1st Cir. 1988). Yet, even if the Shelton testimony could somehow be construed as "newly discovered evidence" within the meaning of Rule 60(b)(2), the time during which an appeal is pending is counted in determining whether a Rule 60(b) motion has been timely filed. *Nucor Corp. v. Nebraska Public Power Dist.*, 999 F.2d 372, 374 (8th Cir. 1993). *See Moore's*, §60.65[1]. Pursuit of an appeal subsequent to judgment does not stay the time in which a party must file a Rule 60(b) motion, *Transit Casualty Co. v. Security Trust Co.*, 441 F.2d 788, 791 (5th Cir. 1971), nor toll the one year period required of Rule 60(b)(2) motions.[3/] *Hancock Industries v. Schaeffer*, 811 F.2d 225, 239 (3d Cir. 1987); *Eggers v. Phillips*, 710 F.2d 292, 329 (7th Cir.), *cert. denied* 464 U.S. 918 (1983). *See Moore's*,

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[3/] Rule 60(b), FRCP, mandates that motions thereunder must be made "within a reasonable time," and in the instance of Rule 60(b)(2) motions, not more than one year from the date of the final judgment from which relief is sought. *See Moore's*, §60.65[1].

§60.65[2]. In the instant case, the final decision and judgment from which relief is sought is that rendered by the Board on June 14, 1996. Thus, Mr. Varnadore had one year from that date, or until June 14, 1997, in which to timely file a Rule 60(b)(2) motion based on Ms. Shelton's testimony.

Complainant properly notes the lack of Board jurisdiction pending the Sixth Circuit appeal. While the Board has previously recognized that the parties have a right to seek relief from prior judgments pursuant to Rule 60(b), FRCP, at the same time the Board has held that it is without authority to rule upon such motions "while jurisdiction of the case rests with an appellate tribunal." *Caimano v. Brinks, Inc.*, ARB 97-041, 95-STA-4, Order to Show Cause, Jan. 22, 1997, slip op. at 2. Nevertheless, this does not excuse Complainant from taking action within the one year mandate pertaining to Rule 60(b)(2) motions.

Indeed, Mr. Varnadore had two options available to him with respect to Ms. Shelton's testimony once the appeal to the Sixth Circuit had been taken, either of which he could have timely pursued following entry of the 1996 decisions: Complainant could have timely submitted a Rule 60(b) motion to the Board notwithstanding our lack of jurisdiction to grant such motion -- at which time the Board could either have denied the motion or indicated that we would be inclined to grant the relief requested had we jurisdiction. If we indicated that the Board was inclined to grant the motion, Mr. Varnadore could then have petitioned the appellate court seeking remand to permit the Board to rule upon his motion. *See, e.g., Aldrich Enterprises v. United States*, 938 F.2d 1134, 1143 (10th Cir. 1991); *Travelers Insurance Co. v. Liljeberg Enterprises*, 38 F.3d 1404, 1407 n.3 (5th Cir. 1994); *First National Bank of Salem v. Hirsch*, 535 F.2d 343, 346 (6th Cir. 1976). This procedure is consistent with modern federal court practice. *See Moore's*, §60.67[1] & [2].[4/] The alternative procedure available to Mr. Varnadore (which appears to have been embraced by the Board in *Caimano v. Brinks*[5/] and is now followed by only the Ninth Circuit, *see Moore's*, §60.67[2][c]) would require Complainant to have initially moved the appellate court for remand within the one year limitations period so that the Board might entertain Complainant's motion.

Arguably, Mr. Varnadore sought reconsideration of the Board's prior decisions consistent with the second procedural alternative. As the majority has noted, Complainant previously raised before the Board the Shelton testimony as a basis for reconsideration in May of 1998, while the *Varnadore* cases were pending on appeal. This followed Mr. Varnadore's effort of a month earlier to have the Sixth Circuit reopen and supplement the record with the Shelton testimony. Upon the advice of the Clerk for the Sixth Circuit, that his request was more

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[4/] "Virtually all of the circuits now accept this as the proper procedure for dealing with Rule 60(b) motions while an appeal is pending." *Moore's*, §60.67[2][b].

[5/] In *Caimano v. Brinks, supra*, the Board assumed jurisdiction over the Rule 60(b) motion only after the appeal was, by stipulation of the parties and order of the appellate court, withdrawn from active consideration (without prejudice to reinstatement) pending ruling by the Board on the party's motion.

appropriately a matter for Board consideration, Complainant filed with the Board his motion to reopen and reconsider the Board's previous decisions based on Ms. Shelton's testimony. Assuming the clerk's "advisory" could be construed as, in effect, a "remand" to the Board for the limited purpose of considering his motion, the Board thus properly assumed jurisdiction to enter our ruling in response thereto, properly rejecting his motion based on Ms. Shelton's 1995 transcript testimony.

Neither can the other two factors cited by Complainant be successfully relied upon in the instant case as grounds for reopening and reconsidering the Board's previous decisions.

Secretary O'Leary's 1998 deposition testimony, taken in an unrelated matter, is cited as "newly discovered evidence" justifying reconsideration under Rule 60(b)(2). However, the Secretary's testimony not only fails to meet the basic definition of "newly discovered evidence" (*i.e.* in existence at the time of the judgment from which relief is sought, *see* discussion *supra*), it fails, as the majority notes, to meet the further requirement of Rule 60(b)(2) that the evidence be "material and controlling" and that it "clearly would have produced a different result if presented before the original judgment." *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998). *See also, e.g.*, *Longden v. Sunderman*, 979 F.2d 1095, 1103 (5th Cir. 1992); *Coastal Transfer Co. v. Toyota Motor Sales*, 833 F.2d 208, 211-12 (9th Cir. 1987).

Finally, Mr. Varnadore cites the recent Supreme Court decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998), and *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257 (1998), in support of the proposition that they require setting aside our prior decisions pursuant to Rule 60(b)(5) and/or Rule 60(b)(6). Both cases address to what extent an employer will be held vicariously liable for the creation of an actionable hostile work environment by a supervisor of a victimized employee. In so doing, the Court focused considerable attention on its prior decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986). While both the Secretary and the Board, in reaching our 1996 decisions, relied (in part) on *Meritor*, that reliance was at most for *Meritor's* precedential value in defining what constituted a hostile work environment under the whistleblower statutes. Case law relied upon as precedent in reaching the decision or judgment from which relief is subsequently sought does not constitute the type of "prior judgment" contemplated under Rule 60(b)(5). *Cf. Tomlin v. McDaniel*, 865 F.2d 209, 210-11 (9th Cir. 1989); *Luben v. Selective Service System Local Board No. 27*, 453 F.2d 645, 650 (1st Cir. 1972). *See Moore's*, §60.46[1] & [2]. More importantly, *Meritor* was neither reversed nor otherwise vacated by *Faragher* and *Ellerth*. To the contrary, the Court noted that *Meritor* served in both cases as the foundation upon which its holdings regarding the imposition of vicarious liability were based. *See Faragher*, 524 U.S. at 792; *Ellerth*, 524 U.S. at 763. Accordingly, Complainant's motion based upon Rule 60(b)(5) fails.

For similar reasons, Complainant's motion seeking reconsideration based on *Faragher* and *Ellerth* fails under Rule 60(b)(6). Assuming the Supreme Court's 1998 decisions constitute, as urged by Complainants, a change in the decisional law upon which our 1996 decisions were based, the courts have held that such change, by itself, cannot serve as a basis for reconsideration

under Rule 60(b)(6), FRCP. *See Agostini v. Felton*, 117 S.Ct. 1997, 2018 (1997) ("Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)."). *See Moore's*, §60.48[5].

Complainant's instant Rule 60(b) motion was filed upon conclusion of the Sixth Circuit appeal (and the conclusion of the appellate process). Consequently, the Board is free to reassert its jurisdiction to determine Complainant's motion without the need for appellate court intercession.[6/] *Standard Oil of Calif. v. United States*, 429 U.S. 17, 18-19, 91 S.Ct. 31 (1976); *Hancock Industries v. Schaeffer*, 811 F.2d at 239 ("Our affirmance of the judgment on the basis of the record as it existed prior to the appeal '[does] not limit the power of the district court [upon conclusion of the appeal] to consider Rule 60(b) relief.' [citation omitted]." *See Moore's*, §60.67[3]. Upon exercise of that jurisdiction it has proven the case, as herein discussed, that Mr. Varnadore's motion does not meet the requirements of Rule 60(b), FRCP, and thus should be denied.

E. COOPER BROWN
Member

[6/] A Rule 60(b) motion is to be brought "in the court and in the action in which the judgment was rendered," *Moore's*, §60.60[1], which in the instant case would be the Board. A Rule 60(b) motion is considered a continuation of the original proceeding, jurisdiction of which is not divested by subsequent events. *See Moore's*, §60.61. If the court initially had jurisdiction of the original action, it has jurisdiction to subsequently entertain the Rule 60(b) motion, *id.*, subject of course to the limitation, discussed *supra*, that timely appeal will divest the tribunal of its power to grant a Rule 60(b) motion while the appeal is pending. *See Moore's*, §60.67.