U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

JACK JORDAN

COMPLAINANT,

v.

DYNCORP INTERNATIONAL, LLC, et al.

RESPONDENTS.

ARB CASE NO. 2019-0027

ALJ CASE NO. 2017-SOX-00055

DATE: September 16, 2020

Appearances:

For the Complainant:
Jack Jordan; *pro se*; Parkville, Missouri

For the Respondents DynCorp International LLC:
Edward T. Ellis, Esq.; Alexa J. Laborda Nelson, Esq.; *Littler Mendelson, P.C.*; Philadelphia, Pennsylvania

For the Solicitor of Labor, Amicus Curiae:
Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Megan E. Guenther, Esq.; Shelley E. Trautman, Esq.; *U.S. Department of Labor*, Washington, District of Columbia

BEFORE: James D. McGinley, *Chief Administrative Appeals*, Thomas H. Burrell and Heather C. Leslie, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. The Complainant, Jack Jordan, filed a retaliation complaint with the Department of Labor's Occupational Safety and Health Administration

(OSHA) under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act,[1] and its implementing regulations.[2]

Complainant alleged that DynCorp International (DynCorp) and its attorneys violated his rights under SOX by seeking a protective order on the grounds of privilege concerning two emails in an unrelated case, while Administrative Law Judges Almanza and Merck (the Respondent Judges) violated his rights by declining to order the release of the contents of the two emails in previous decisions. OSHA determined that the Respondent Judges were not covered parties under SOX, and the allegations appear to be duplicative of issues that have been raised or are pending in another claim. Thus, the Administrator dismissed the complaint. Complainant objected and the case was referred to the Office of Administrative Law Judges (OALJ) at Complainant's request. The Administrative Law Judge (ALJ) granted the Respondents' motions to dismiss based on Complainant's failure to state a claim and specifically notes that Complainant has not alleged any adverse action by any respondent that discriminates against him "in the terms and conditions of employment." In addition, the ALJ found that the Respondent Judges in this case are entitled to absolute immunity from suit and liability for their judicial acts. Complainant filed a petition for review of this decision with the Administrative Review Board (ARB) which was not accepted.

The ALJ also issued an Order Imposing Sanctions and Attorneys' Fees (April 9, 2018). The ALJ found that sanctions were necessary and thus admonished Complainant against making legal contentions that are unwarranted by either existing law or by an argument for extending, modifying, or reversing existing law or for establishing new law.[3] In addition, the ALJ ordered Complainant to pay to Respondent DynCorp the sum of $1,000.00, as reasonable attorneys' fees. The ALJ denied Complainant's motion for reconsideration. Complainant filed a petition requesting that the Administrative Review Board (ARB) review the ALJ's order and the denial of reconsideration. We granted that petition and now affirm.[4]

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[1] 18 U.S.C. § 1514A (2010) (SOX).

[2] 29 C.F.R. Part 1980 (2019).

[3] 29 C.F.R. § 18.35(b)(2).

[4] By Order dated January 29, 2019, the Board consolidated this appeal with Complainant's subsequent appeal, ARB No. 18-0035, for purposes of rendering a decision. We have determined that judicial efficiency would be better served by separating the appeals and issuing individual decisions. Thus, this decision will only address the appeal ARB No. 19-0027.

The Secretary of Labor has delegated authority to the Administrative Review Board to issue agency decisions under the SOX.[5] The ARB reviews the ALJ's factual findings for substantial evidence, and conclusions of law de novo.[6] In considering a dismissal for failure to state a claim, the ARB must accept the non-moving party's factual allegations as true and draw all reasonable inferences in the non-moving party's favor.[7]

Upon review of the ALJ's Order Imposing Sanctions and Attorney's Fees and the Decision and Order Declining to Reconsider Imposition of Sanctions and Attorney's Fees, and the parties' arguments, we conclude that the ALJ's decision is in accordance with the law and is well-reasoned. As a result, we **ADOPT** and **ATTACH** the ALJ's decisions.[8]

Accordingly, the ALJ's Order imposing sanctions and awarding Respondent an attorney's fee to be paid by Complainant is **AFFIRMED**.

SO ORDERED.

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[5] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)). 85 Fed. Reg. 13,186 (Mar. 6, 2020); see 29 C.F.R. § 1980.110(a).

[6] 29 C.F.R. § 1980.110(b). *Gunther v. Deltek, Inc.*, ARB Nos. 2013-0068, -0069, ALJ No. 2010-SOX-00049, slip op. at 2 (ARB Nov. 26, 2014).

[7] *Tyndall v. U.S. EPA*, ARB No. 1996-0195, ALJ Nos. 1993-CAA-00006, 1995-CAA-00005, slip op. at 2 (ARB June 14, 1996).

[8] *Jordan v. DynCorp. Int'l LLC*, ALJ No. 2017-SOX-00055 (ALJ Apr. 9, 2018) and *Jordan v. DynCorp. Int'l LLC*, ALJ No. 2017-SOX-00055 (ALJ Jan. 3, 2019).

U.S. Department of Labor

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Issue Date: 03 January 2019

CASE No.: 2017-SOX-00055

In the Matter of:

JACK JORDAN,
Complainant,

v.

UNITED STATES DEPARTMENT OF LABOR,[1]
Respondent.

DECISION AND ORDER DECLINING TO RECONSIDER IMPOSITION OF SANCTIONS AND ATTORNEYS' FEES

This case arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (hereinafter "the Act"), P.L. No. 107-204, as codified as 18 U.S.C. § 1514A, and implemented at 29 C.F.R. Part 1980. On February 15, 2018, I issued a Decision and Order dismissing the complaint in this matter (hereinafter "the Dismissal Order"). On March 1, 2018, Complainant timely filed a Petition for Review with the Department of Labor Administrative Review Board (hereinafter "ARB"). As there is no evidence that the ARB accepted the petition for review,[2] the Dismissal Order became the final order of the Secretary of Labor no later than March 31, 2018. *See* 29 C.F.R. § 1980.110(b).

In my order dismissing the complaint, I also invited any respondent seeking reasonable attorney fees to file a fee petition with appropriate supporting documentation, and expressly retained jurisdiction over these matters in the decretal

[1] Complainant originally identified DynCorp International as the respondent, along with the following law firms, attorneys, and administrative law judges as co-respondents in his request for hearing: Littler Mendelson, P.C.; Ethan Balsam; Jason Branciforte; Edward T. Ellis; Vorys, Sater, Seymour, and Pease LLP; Pamela A. Bresnahan; Honorable Larry Merck; and Honorable Paul Almanza. On appeal, the United States Court of Appeals for the Eighth Circuit authorized the substitution of the Department of Labor for the named parties. Accordingly, I will hereinafter refer to the current respondent as "the Department," and the named respondents as "the original Respondents."

[2] Complainant has not provided any evidence that his petition for review was accepted by the ARB.

language of my Order. After considering the matters submitted by the parties, I imposed sanctions upon Complainant and awarded partial attorneys' fees to original Respondent Dyncorp in an Order issued and served on April 9, 2018 (hereinafter "the Sanctions Order"). *See* 29 C.F.R. § 18.30(a)(2)(ii). On April 23, 2018, the Sanctions Order became the final order of the Secretary of Labor. *See id.* § 1980.110(b).

On May 4, 2018, Complainant filed a document styled "Complainant's Motion for Extension of Time to File Motion for Reconsideration" (hereinafter "Extension of Time Request") in which it was asserted that Complainant had been away from home during the period April 9-25 and had not received the Order until April 26th. On May 7, 2018, Complainant filed a document styled "Complainant's Motion for Reconsideration" (hereinafter "First Motion"), in which he asserted that my Order imposing sanctions and awarding attorneys' fees did not contain adequate explanation for its conclusions, was an "abuse of discretion," and operated to deny Complainant "due process." Complainant's arguments culminated in an assertion that any refusal to reconsider the award of attorneys' fees in this matter "would constitute evidence of a scheme to defraud" on the part of the undersigned along with one or more of the Respondents. *First Motion* at i. As will be explained below, I did not act upon Complainant's motions due to the procedural posture of the case.

On June 8, 2018, Complainant filed a Petition for Review of my Dismissal Order with the United States Court of Appeals for the Eighth Circuit (hereinafter "the Court of Appeals").[3] Upon subsequent motion by counsel for the Department of Labor, the Court allowed the substitution of the Department for all named respondents and ultimately dismissed Complainant's petition because the appeal was not within the Court's jurisdiction. *See Judgment*, *Jordan v. U.S. Department of Labor,* Case No. 18-2254, United States Court of the Appeals for the Eighth Circuit, dated August 22, 2018. After denying various motions and petitions by Complainant, the Court of Appeals issued its formal mandate in this matter on November 14, 2018.

On December 10, 2018, Complainant filed with the undersigned a document styled "Complainant's Second Motion for Relief under FRCP 60 (hereinafter "*Second Motion*")." In sum, Complainant alleges that he is entitled to relief from sanctions because judges and staff of the Office of Administrative Law Judges (hereinafter "OALJ") are involved with the original respondents in a criminal conspiracy to deny him access to certain pieces of electronic mail that were sought from DynCorp in other

[3] Complainant also requested review of my preliminary order to show cause, issued on February 15, 2018, in which I directed Complainant to explain the legal basis of his complaint under the Act against judges and opposing counsel in other litigation with which Complainant was involved. Complainant did not expressly seek review of the Sanctions Order in his petition to the Court of Appeals.

litigation described in my Order dismissing the Complaint in this matter. Complainant avers that I still possess jurisdiction over his original request for an extension of time to respond to my Sanctions Order issued and served on April 9, 2018, as well as a subsequent request to reconsider my decision in the same. In support, Complainant noted that departmental counsel sought to dismiss his appeal due to lack of appellate jurisdiction in that the Dismissal Order was actually not a final agency action in light of Complainant's pending requests for extension of time and reconsideration of the collateral Sanctions Order. *See Second Motion* at 10. Original Respondent DynCorp filed a response encouraging denial on December 26, 2018, but no response was received from counsel for substituted Respondent. For the reasons stated below, I decline to grant the relief requested by Complainant.

Legal Background

In matters arising under the Act, a decision by an administrative law judge (hereinafter "ALJ") "will become the final order of the Secretary unless a petition for review is timely filed with the ARB, and the ARB accepts the petition for review." 29 C.F.R. § 1980.109(e). To be "timely filed," a petition for review must be filed with the ARB within 14 days of the date of the decision of the ALJ. *Id.* 1980.110(a). However, a judge retains jurisdiction after the issuance of a decision and order "to dispose of appropriate motions, such as a motion to award attorney's fees and expenses . . . or a motion for reconsideration." *Id.* § 18.90(c). "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application . . . for any form of reconsideration." 5 U.S.C. § 704. *But cf. Stone v. INS*, 514 U.S. 386, 392 (1995) (endorsing tolling rule for cases arising under the Administrative Procedure Act providing that that "timely filing of a motion to reconsider renders the underlying order nonfinal for purposes of judicial review."). "A motion for reconsideration of a decision and order must be filed no later than 10 days after service of the decision on the moving party." 29 C.F.R. § 18.93. I may, for good cause, extend the time "[o]n motion made after the time has expired if the party failed to act because of excusable neglect." *See id.* § 18.32(b)(2).

There is no provision in the *Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges* (hereinafter "*Rules of Practice and Procedure*") for relief from a judgment or order. However, the *Federal Rules of Civil Procedure* (hereinafter "FRCP") "apply in any situation not provided for or controlled by [the *Rules of Practice and Procedure*], or a governing statute, regulation, or executive order." 29 C.F.R. § 18.10(a). Accordingly, as provided by the FRCP, I "may relieve a party or its legal representative from a final judgment, order, or proceeding" for any

reason that justifies such relief. *See* FRCP 60(b). Among the reasons cited in the FRCP as justifying such relief are mistake, newly discovered evidence, and "fraud, misrepresentation, or misconduct by an opposing party." *See id.*

Discussion

I will first address the status of Complainant's *Extension of Time Request* and *First Motion*. As Complainant and counsel for the Department have correctly noted, I have not ruled on either request for relief. Because neither document was filed in a timely manner, I concluded that the Order at issue had already become final. As to the substantive matters raised, Complainant had simply restated arguments or variations thereof that I had already reviewed and considered in the course of making the decision underlying the Order at issue. *See generally Pinney v. Nokia, Inc.,* 402 F.3d 430, 453 (4th Cir. 2005) (noting that reconsideration is appropriate when there is an intervening change in the law, newly discovered evidence, or it is necessary to correct a clear error or to prevent manifest injustices). Moreover, Complainant had already filed a Petition for Review with the Administrative Review Board as to the substantive issues in the case, and judicial economy militated in favor of adjudicating Complainant's request as part of the appellate process for the underlying Order dismissing his complaint. Now that the Court of Appeals has dismissed that petition, it is appropriate for me to consider the issues raised by Complainant concerning his sanctions.

Extension of Time Request and First Motion

As noted above, Complainant's *Extension of Time Request* was filed after the time had already expired to file a motion for reconsideration concerning the Sanctions Order; any motion requesting reconsideration had to be filed no later April 19, 2018, and Complainant's request was filed on May 4, 2018 . To excuse his tardy filing, Complainant makes two primary arguments: (1) he was traveling at the time that I issued the Sanctions Order, and was therefore unable to timely respond, and (2) I should have served the Order on Complainant by electronic mail as he had previously requested. Regarding his first argument, Complainant did not make his declaration concerning his absence under penalty of perjury or in an affidavit, as required by 29 C.F.R. § 18.33(a)(4). As such, there is no actual evidence before me concerning his purported absence. Complainant has also failed to provide any evidence that his purported unavailability was unplanned or unexpected. Indeed, it is significant for present purposes that Complainant apparently gave notice of his intended absence to "Respondents," *Second Motion* at 11, but there is no assertion, filing, or other record of similar notice by the Complainant to the undersigned. And while Complainant is representing himself in this matter, and consideration of that fact is appropriately

considered when exercising judicial discretion about procedural matters, it is also uncontroverted that Complainant is a licensed attorney and very experienced in administrative adjudication, which is relevant to my determination as to whether the tardy filing is excusable. Regarding his second argument, the fact that Complainant had previously requested email service of orders does not affect my analysis in this matter, as I did not grant the request and, in any event, the request had not been renewed in the course of the litigation.[4] Under these circumstances, I conclude that Complainant has failed to establish that his neglect in filing the *Extension of Time Request* was excusable, as required by 29 C.F.R. § 18.32(b)(2). Accordingly, the Request is hereby **DENIED**, and subsequent untimely filings requesting reconsideration of the Sanctions Order will not be considered.[5]

Second Motion

There remains the matter of Complainant's *Second Motion* filed with the undersigned after the issuance of the mandate from the Court of Appeals. As a threshold matter, it is not at all clear that I have jurisdiction to consider this particular request for relief. I retained jurisdiction over the *Extension of Time Request and the First Motion* by operation of 29 C.F.R. § 18.90(c) and for the limited purposes—stated in the Dismissal Order—of determining whether to impose sanctions upon Complainant and award partial attorney's fees and costs to the original respondents. Those matters have been resolved, and my jurisdiction over this complaint is at an end.

[4] Complainant's earlier attempts to communicate with the undersigned via email necessitated the issuance of an "Administrative Order Prohibiting Filing by Electronic Means" on February 22, 2018. In that Order was stated the following: "To be clear: no party in this matter with the undersigned or the Office of Administrative Law Judges by electronic means, including email or facsimile."

[5] But even if I were to consider the substance of Complainant's *First Motion*, the outcome would be the same. The bases of his reconsideration request were summarized above and are largely, as previously noted, variations on the same unpersuasive themes raised by Complainant in opposition to the Sanctions Order before its issuance. Before issuing the Sanctions Order I gave Complainant notice and an opportunity to be heard. In the Sanctions Order I deliberated on the matters submitted and the relevant facts before exercising my discretion to impose sanctions upon Complainant, and explained my findings and conclusions. Complainant does not point to any new evidence or change in the law, except to the extent that he argues that my refusal to reconsider the award of attorneys' fees in this matter "would constitute evidence of a scheme to defraud" on the part of the undersigned along with one or more of the original Respondents. *First Motion* at i. Complainant has identified no issue on which I misunderstood the parties, no decision made outside the scope of the issues presented for adjudication, and no change in the law or facts that would warrant reconsideration. As such, I would deny Complainant's *First Motion* even if it had been timely filed. In an abundance of caution, I also note for the record that, even if I had reconsidered the Sanctions Order as requested by Complainant, there is no evidence therein of either legal or factual error, and no basis for disturbing the imposition of sanctions upon Complainant. I would, and hereby do, ratify the original Sanctions Order.

As an administrative law judge, I am not a "judge of the United States" appointed by the President with general jurisdiction over cases and controversies arising within a designated geographical or subject-matter jurisdiction. *See* 28 U.S.C. § 451. To the contrary, I have been appointed by the Secretary of Labor to conduct specialized proceedings under the Administrative Procedure Act and perform other duties not inconsistent with my judicial responsibilities. *See* 5 U.S.C. § 3105. And while I have the theoretical authority in certain circumstances to grant relief upon motion under FRCP 60(b) to "a party or its legal representative from a final judgment, order, or proceeding," this authority is not an independent grant of jurisdiction and must be applied in light of the jurisdictional limitations of my appointment and the applicable *Rules of Practice and Procedure*.

When viewed from this perspective, Complainant's *Second Motion* must also fail. While styled as a request for relief arising under FRCP 60(b), the *Second Motion* is actually just an augmentation of Complainant's earlier argument that there is a conspiracy among the original Respondents to defraud Complainant in some way relating to the withholding of two electronic mails in other litigation in which Complainant served as a representative. As such, it is the practical equivalent of a motion for reconsideration, for which there are specific limitations in the *Rules of Practice and Procedure.* Complainant had 10 days to file a motion for reconsideration of the Sanctions Order and did not do so; changing the heading on an untimely motion and refiling it seven months later does not change that unavoidable fact. To conclude otherwise would be to allow the exception, a gap-filler in the FRCP, to swallow up the plain rule lawfully promulgated by the Department at 29 C.F.R. § 18.90(c) and expand the limited jurisdiction of an administrative law judge to allow modification of final judgments well after the regulatory deadline for doing so had passed.

But even if taken on its own terms, the *Second Motion* does not warrant relief. Complainant specifically alleges that the OALJ staff has made fraudulent misrepresentations in the course of other litigation under the Freedom of Information Act that purportedly "establish that the OALJ is determined to collude with [DynCorp] to conceal evidence and defraud claimants in multiple DOL proceedings. The evidence indicates that for [certain named individuals] no falsehood or fraud is too blatant or absurd to be beneath them if it helps them conceal evidence of their crimes. For the foregoing reasons, the Award should be rescinded." *Second Motion* at 13. When viewed in a light most favorable to Complainant, he appears to be simply reiterating his overall theory of liability against the original Respondents, i.e., actions by counsel and judges during ongoing litigation can create individual liability under the Act, to be adjudicated in new litigation rather than be challenged through direct or interlocutory appeal as provided by law and regulation, and adding the OALJ staff as "unindicted co-

conspirators." As such, he implicitly argues, his original complaint was not frivolous, and sanctions and costs should not have been imposed. That being noted, I concluded that such an argument was frivolous in the Sanctions Order, and I am unpersuaded that determination should be changed, whether evaluated under 29 C.F.R. Part 18 or FRCP 60(b). Accordingly, Complainant's *Second Motion* is hereby **DENIED**.[6]

SO ORDERED.

WILLIAM T. BARTO
Administrative Law Judge

[6] In the Sanctions Order I noted the serial and aggregative nature of Complainant's litigation strategy. In the event that Complainant should ask me to reconsider one or all of these decisions, I would note that it is improper to use a "motion to reconsider to ask the Court to rethink what the Court had already thought through—rightly or wrongly." *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.,* 99 F.R.D. 99, 101 (E.D. Va. 1983). "The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare." *Id.* "Once a court has issued its ruling, unless one of the specific grounds noted above can be shown, that should end the matter, at least until appeal. Were it otherwise, then there would be no conclusion to motions practice, each motion becoming nothing more than the latest installment in a potentially endless serial that would exhaust the resources of the parties and the court." *Potter v. Potter*, 199 F.R.D. 550, 553 (D. Md. 2001).

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Issue Date: 09 April 2018

CASE No.: 2017-SOX-00055

In the Matter of:

JACK JORDAN,
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DYNCORP INTERNATIONAL, LLC., et al.[1]
Respondents.

ORDER IMPOSING SANCTIONS AND ATTORNEYS' FEES

This case arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (hereinafter "the Act"), P.L. No. 107-204, as codified as 18 U.S.C. § 1514A, and implemented at 29 C.F.R. Part 1980. On February 15, 2018, I dismissed the complaint in this matter and ordered Complainant to show cause why his conduct has not violated 29 C.F.R. § 18.35(b). I also invited any respondent seeking reasonable attorney fees to file a fee petition with appropriate supporting documentation. I expressly retained jurisdiction over these matters in the decretal language of my Order.

On March 6, 2018, Complainant filed his response to my Order and offers several reasons that I should not impose sanctions or award fees in this case.[2] In sum,

[1] Complainant also identifies the following law firms, attorneys, and administrative law judges as respondents in his request for hearing: Littler Mendelson, P.C.; Ethan Balsam; Jason Branciforte; Edward T. Ellis; Vorys, Sater, Seymour, and Pease LLP; Pamela A. Bresnahan; Honorable Larry Merck; and Honorable Paul Almanza.

[2] On February 26, 2018, Complainant also sent a letter to the Chief Administrative Law Judge, Office of Administrative Law Judges, U.S. Department of Labor, in which Complainant alleged, *inter alia*, that the undersigned had "knowingly and willfully engaged in misconduct prejudicial to the effective and expeditious administration of the business of the U.S. Department of Labor OALJ" by using the term "spouse" to describe a person who was and may still be his spouse in my Order dismissing the Complaint. Complainant also alleges that said conduct violates the "ABA Model Code of Judicial Conduct." Complainant also protested that I allowed counsel for Respondent DynCorp International to make the same reference in filings without correction. Complainant avers that he gave me an opportunity to explain my word choice "repeatedly" but that I declined to do so. Complainant apparently informed me

Complainant asserts that sanctions are inappropriate because I have "failed to provide a rational explanation" for my previous Order, "obstructed the production of evidence and abused official notice," clearly erred in my analysis of the propriety of sanctions in this matter, and my Order to Show Cause was "clearly illegal."

On March 15, 2018, Respondent DynCorp International (hereinafter DI) filed a *Petition for Attorneys' Fees* and a *Reply to Complainant's Response to Second Order to Show Cause.* Respondent DI contends that sanctions are appropriate for the reasons stated in my Order dismissing the Complaint and further requests that the undersigned designate Complainant a vexatious litigant and prohibit him from filing another case under the Act against Respondent DI. Finally, counsel for Respondent DI also requests a sanction of $1,000.00 in attorneys' fees be imposed on Complainant. On March 22, 2018, Complainant filed an *Opposition to LM's March 15 Filings.*

BACKGROUND

As a threshold matter, I incorporate the findings of fact and conclusions of law in my order dated February 15, 2018. In the interest of clarity, I will now summarize the most relevant findings and conclusions. Complainant is an attorney licensed to practice in the State of New York and is representing himself in this matter. The basis of his Complaint was, in sum, that the Respondent Attorneys and Respondent Judges had violated the Act on behalf of Respondent DI International by their actions during previous litigation. Because it appeared that Complainant was making a collateral attack upon the actions of opposing counsel and the adverse rulings of the presiding judges in ongoing litigation through the initiation of new litigation rather than through direct or interlocutory appeal, I ordered Complainant to show cause as to why the instant complaint should not be dismissed for failure to state a claim on which relief may be granted. I also ordered Complainant to include in his response to this order any supporting papers such as affidavits, declarations, or other proof necessary to establish any particular facts not already in evidence in the previous cases that tend to support the collusion and culpable agency by respondents that has been alleged.

In his untimely response, Complainant asserted that the undersigned was without authority to issue a show cause order under these circumstances, and, that by doing so,

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of this opportunity to explain my word choice in a series of electronic mailings that he sent to my official email account. I deleted the emails without reading them and issued an Administrative Order informing the Parties of the receipt of the emails and their deletion, and directed that no further electronic submissions were to be made by either Party. I have considered whether to recuse myself in light of Complainant's allegation of professional misconduct against me, but decline to do so. I have not acted in any manner that might tend to disqualify me in this manner or create any appearance of impropriety by my continued adjudication of this matter.

was displaying "bias" and discriminating against him in violation of the Act and the Administrative Procedure Act. See *Complainant's Response* at 9, 11, 15, and 25-29. Notwithstanding specific direction in the Show Cause Order, Complainant did not include in his Response any supporting papers such as affidavits, declarations, or other proof necessary to establish any particular facts not already in evidence in the previous litigation that tended to support the collusion and culpable agency by Respondents that had been alleged.

I was not persuaded by Complainant's assertions and dismissed the Complaint. In most relevant part, I concluded that the Respondent Judges were absolutely immune from suit based upon long-standing precedent not addressed by Complainant, and the Act does not empower an aggrieved complainant to mount a collateral attack upon actions of opposing counsel and the adverse rulings of a presiding judge during ongoing litigation through the initiation of new litigation rather than through direct or interlocutory appeal as provided by law and regulation.

DISCUSSION

The first question for resolution is whether Complainant's conduct in this matter has violated 29 C.F.R. § 18.35(b), which states as follows, in relevant part:

> By presenting to the judge a written motion or other paper—whether by signing, filing, submitting, or later advocating it—the representative or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> > (1) It is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceedings;
> >
> > (2) The claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law[.]

29 C.F.R. § 18.35(b). Moreover, I "may order a representative, law firm, or party to show cause why conduct specifically described in the order has not violated paragraph (b) of this section." *Id.* § 18.35(c)(3). If I impose a sanction, I must describe the sanctioned conduct and explain the basis for the sanction. *Id.* § 18.35(c)(5).

As noted above, Complainant first asserts that I have failed to provide a "rational explanation" for my Order to show cause. I disagree. I explained that Respondent DI has alleged that the Complaint in this matter is frivolous. I explained that administrative law judges have long been held to be absolutely immune from suit consistent with the principles governing immunity for other judges, at least for the last 40 years since the United States Supreme Court issued its decision on the issue in *Butz v. Economou*, 438 U.S. 480, 511-13 (1978). To the extent that Complainant put forth an argument that Respondent Judges "were acting entirely outside their roles as ALJs" by denying him access to certain evidence at issue, and should therefore be subject to suit and damages, I explained that Complainant's position has been unsupported by legal precedent concerning judicial immunity at least since 1871. I explained that advocacy efforts by counsel concerning the discoverability of certain pieces of electronic mail and the decisions made by judges consequent to those efforts may have an adverse effect upon Complainant's litigation posture in a particular case, but they do not, without more, constitute discriminatory conduct against Complainant "in the terms and conditions of employment." I reminded Complainant that at least one court had rejected his personal arguments on this point in the recent past. *Cf. Jordan v. Sprint Nextel Corporation*, 3 F. Supp. 3d 917, 931-32 (D. Kan. 2014) (dismissing SOX appeal filed by Complainant because statements by Sprint's counsel to the SEC were not adverse employment actions). I also explained that, as an attorney, Complainant has an obligation to put forth only those "claims and other legal contentions that are either warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." 29 C.F.R. § 18.35(b)(2). I also noted that the serial nature of the litigation under consideration, in which "offending" counsel and judges in each case are simply added to the caption of the next lawsuit, is evidence that Complainant is filing complaints merely to harass counsel and judges who rule against him and needlessly increase the cost of the proceedings. In terms of quantity, I made 14 conclusions of law explaining the basis for my Order. As such, Complainant's assertion that the Order was not explained is groundless.

Complainant further asserts that I have "obstructed the production of evidence and abused official notice" by dismissing the Complaint and issuing the Show Cause Order. *Complainant's Response to Second Show Cause Order*, at 3. As a threshold matter, I note that this assertion is not strictly responsive to the question posed in my Order, namely, whether Complainant should be sanctioned. That being noted, Complainant seems to assert that by dismissing the Complaint because it fails, as a matter of law, to state a complaint on which relief may be granted, I have improperly denied him the opportunity to conduct discovery and engage in further litigation concerning certain evidence denied him in the two previous adjudications. Specifically, Complainant faults the undersigned for declining to resolve an evidentiary matter before

dismissing the complaint. But his argument proves too much: carried to its logical conclusion, application of his argument would mean that no judge could ever dismiss a complaint before discovery had been completed and all prehearing motions resolved. In making this argument, Complainant has assumed that his complaint is not frivolous, but the issue being resolved is, among others, whether his complaint was frivolous *ab initio*. Complainant has not cited or otherwise argued in reliance on any authority for the notion that there is a generic "right" to conduct discovery notwithstanding, for example, a failure to state a claim upon which relief can be granted or a lack subject-matter jurisdiction. As such, his assertion that I improperly obstructed the production of evidence by dismissing the Complaint is without merit.

Complainant also argues that official notice of certain facts was inappropriate under the circumstances of this case. On my own motion, I may take official notice "of any adjudicative fact or other matter subject to judicial notice." 29 C.F.R. 18.84. In my Order dismissing the Complaint, I took notice of 12 facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. I allowed any party to file evidence or other documentation to show the contrary of any matter noticed within 14 days of the date of issuance of my Order dismissing the Complaint, but no objection or contrary evidence was properly filed during that interval. The noticed facts included the identity and employers of the judges and counsel of record in the 2 previous lawsuits filed by Complainant. This information is publicly available from the website of the Office of Administrative Law Judges at https://www.oalj.dol.gov/. I also noticed that Complainant is an attorney licensed to practice in the State of New York and is representing himself in this matter. I also noticed that Complainant timely filed his request for hearing in this matter, but filed his reply to my original Order to Show Cause 23 days after the date of issuance of the order.

Complainant "especially objects" that I also took official notice of the fact that both Respondent Judges have made rulings in their capacities as presiding judges in their respective cases regulating the conduct of discovery and have denied Complainant access to certain emails at issue. In response to this notice, Complainant vigorously contests that either judge actually made any rulings in their respective cases:

> In this case, the statements and contentions by ALJs Merck and Almanza in different cases are merely statements and contentions. They are not rulings, and they cannot have any legal effect as rulings. They are not precedent, nor do the doctrines of collateral estoppel or *res judicata* apply.

Complainant's Response to Second Show Cause Order, at 5. Regardless of the jurisprudential validity or lack thereof in Complainant's assertions, I would simply note that I did not take notice of the substance of these judicial "actions"—whatever one decides to call them—except to the extent that I noted that they were adverse to the Complainant, and I did not take notice or make any conclusion as to their underlying legal validity.[3] In any event, Complainant has not filed any evidence or other documentation to show the contrary of any matter noticed. As such, Complainant's untimely objection is overruled.

Complainant finally argues that I am "clearly (and deliberately) abusing threats of sanctions to intimidate and harass a complainant." *Complainant's Response to Second Show Cause Order*, at 7. Complainant then makes a series of assertions in support of this allegation: only Respondents can seek sanctions; it is inappropriate to pursue sanctions after a case has been dismissed; I erred in dismissing the Complaint; and I lack jurisdiction to adjudicate the imposition of sanctions. Complainant asserts that he had identified "controlling and dispositive" language in the Act, its implementing regulations, and applicable precedent. He also reiterates his complaint of "egregious misconduct" in the previous (and instant) litigation. I disagree.

- Complainant has not identified any statutory or regulatory provision relating to the Act that would operate to limit my authority to investigate and determine whether the instant Complaint was frivolous or filed in bad faith, and to impose sanctions, if appropriate. *Cf.* 29 C.F.R. § 18.35(c)(3) (authorizing judge to order cause be shown why complaint is not frivolous or brought in bad faith). Moreover, Respondent DI referred to the frivolous nature of the Complaint in its response to the original Order to Show Cause, and has requested sanctions against Complainant in its *Reply of DynCorp International LLC to Complainant Jack Jordan's Response to Second Order to Show Cause*, at 1. This satisfies the apparent requirement in 29 C.F.R. § 1980.109(d)(2) that a respondent request a finding and award.

- Complainant's contention that sanctions after dismissal are inappropriate fails to consider the instant situation in which the reason that the Complaint was dismissed was ultimately because it was frivolous or filed in bad faith or both. To impose sanctions before dismissal is required by neither law nor logic. And none of the putative authority cited restricts the ability of the undersigned to adjudicate the issue of sanctions, especially since I expressly retained the jurisdiction to do so in my Order dismissing the Complaint.

[3] Indeed, if these judicial "actions" were not adverse to Complainant, it would be unclear as to why complainant would have added them as Party-Opponents to this Complaint.

- Complainant's argument that I should not impose sanctions because my underlying decision to dismiss the Complaint was in error is the functional equivalent of a request that I reconsider my earlier decision. I decline to do so.

- Complainant's jurisdictional argument similarly lacks any authority, in that the Administrative Review Board has neither accepted the case for review nor issued a stay to the undersigned in connection with the matters still pending.

Having considered all matters submitted by the Parties on this issue, I make the following **Findings of Fact** in relation to the issue under consideration:

1. Complainant named the Respondent Judges in the instant Complaint under the Act based upon actions they took in the performance of their official duties as administrative law judges, notwithstanding the fact that administrative law judges have been immune from suit for actions taken in the performance of their duties since 1978.

2. When given an opportunity to provide a nonfrivolous argument for extending, modifying, or reversing existing law concerning judicial immunity or for establishing new law in response to the first Show Cause Order in this matter, Complainant did not do so. Complainant's filings do not expressly address the issue of judicial immunity.

3. Complainant named the Respondent Attorneys in the instant Complaint under the Act based upon actions they took as counsel for Respondent DI in previous litigation, notwithstanding the absence of support for counsel liability under these circumstances in the text of the Act or implementing regulations.

4. When given an opportunity to provide a nonfrivolous argument for extending, modifying, or reversing existing law concerning counsel as covered persons under the Act or for establishing new law in response to the first Show Cause Order in this matter, Complainant did not do so.

5. Complainant is an active attorney in good standing in the state of New York who is representing himself in this matter.

6. Complainant was last employed by Respondent DI in 2012, but does not allege in the instant Complaint any retaliatory discrimination or adverse employment action arising from that term of employment.

In light of these facts, I have reached the following **Conclusions of Law**:

1. By filing the instant complaint and his response to the Order to Show Cause, Complainant has certified that to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the following points *inter alia* are true:

   1.1. The legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; and

   1.2. The filing is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceedings.

   29 C.F.R. § 18.35(b).

2. Complainant's legal contentions are not warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. A reasonable attorney in like circumstances could not have believed his actions to be legally justified, especially concerning the liability of judges and opposing counsel to suit for litigation-related actions, and I conclude that the Complaint is therefore frivolous.

3. The serial, aggregative nature of the litigation at issue provides substantial evidence that Complainant filed this action merely to harass counsel and judges who have ruled or worked against him during litigation and to needlessly increase the cost of the proceedings. That being noted, the nature of Complainant's submissions, the reasoning displayed therein, and his characterizations of the actions of judges and opposing counsel lead me to conclude that the Complaint in this matter was not effected with the intent to deceive that is characteristic of bad faith; to the contrary, I conclude that Complainant actually believes his mistaken interpretations of law to be correct, even when binding precedent to the contrary is offered for his consideration.

SANCTIONS

In that I have concluded that this Complaint was frivolous in violation of § 18.35(b), I must now determine whether sanctions are appropriate under the provisions of § 18.35(c)(4) and, if applicable, 29 C.F.R. § 1980.109(d)(2). The nature of the Respondents in this matter weighs heavily in this analysis. At best, Complainant frivolously targeted two judges who have ruled against him in other litigation—with no

hope of obtaining punitive damages from either due to the limited remedies available under the Act—in a quixotic effort to challenge their decisions outside of the normal appeals process. In response, I would observe that there is great public interest in having impartial judges who are "at liberty to exercise their functions with independence and without fear of consequences," especially in the form of law suits from disgruntled litigants. *See Pierson v. Ray,* 386 U.S. 547, 554 (1967) (citations omitted). This is particularly true when considering the situation of administrative law judges, who do not have the tenure protections afforded judges appointed under Article III of the Constitution, and may have to procure their own representation against such suits.[4] In a similar vein, the integrity of the adjudicative process is strengthened when counsel may zealously and competently defend a client's interest in court without being distracted by the possibility of being individually sued outside of the ordinary appellate process. Another factor that must be considered was well described by counsel for Respondent DI in the *Reply to Complainant's Response to Second Order to Show Cause*: "[Complainant's] response to the Order to Show Cause offers no defense for his action, but rather attacks ALJ Barto just as he has previously attacked ALJs who were handling other cases he had brought." Instead of using the "safe harbor" period afforded by each of my Orders to reflect upon his actions and reconsider the nature of his filings, Complainant instead "accuses ALJ Barto of bias, corruption, and criminal acts." *Reply,* at 1. Sanctions appear to be necessary in order to bring the message home to Complainant that frivolous complaints such as this one—his third suit mounting collateral attacks on opposing counsel—have no place in the practice of law.[5]

ORDER

1. For the reasons stated above, Complainant is hereby **ADMONISHED** against making legal contentions that are unwarranted by either existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, in violation of 29 C.F.R. § 18.35(b)(2).

[4] Counsel for the Solicitor intervened in this matter to defend the decision below rather than to represent the two Respondent Judges. I conditioned their intervention on provision of the departmental position concerning judicial immunity for the Respondent Judges. In the document styled *Solicitor of Labor's Reply to Response to Order to Show Cause*, filed on January 5, 2018, counsel felt it necessary to include as footnote one the following: "The Solicitor does not represent ALJs Merck or Almanza in their individual capacities but provides this response to answer the questions posed in the Court's November 2, 2017 order." Whatever the reasoning behind this approach, it does not serve the public interest in having judges free from distraction and expense stemming from frivolous law suits.

[5] In the absence of any formal argument from Complainant on the subject of sanctions, I will consider the following in extenuation and mitigation: the apparent absence of any evidence of other misconduct; his apparent good standing with his licensing authority; and his zealous pursuit of what he perceives as corruption within the industries regulated by the Act.

2. Within 21 days of the date of issuance of this Order, Complainant will **PAY** to Respondent DI the sum of $1,000.00, as reasonable attorneys' fees, based upon the credible and sufficient description of completed legal work in excess of $1,000.00 provided in the *Declaration of Edward T. Ellis in Support of Respondent DI's Petition for Attorneys' Fees,* and as authorized by 29 C.F.R. § 1980.109(d)(2).

SO ORDERED.

WILLIAM T. BARTO
Administrative Law Judge