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Issue Date: 06 May 2014

CASE NO. 2013-CER-00001

In the Matter of

LELAND PEDERSEN,
Complainant,

v.

ASRC ENERGY SERVICES, INC.,
Respondent.

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

Respondent moves for reconsideration of a portion of the Order denying its motion for summary decision and of the Order under 29 C.F.R. § 24.115 resolving conflicting regulations concerning the application of formal rules of evidence at the hearing. For the reasons stated below, having reconsidered, I deny the motion as to both issues.

Introduction and Procedural History

The parties do not dispute that Complainant's administrative complaint, filed with the Occupational Safety & Health Administration on December 20, 2012, concerned two adverse actions, both allegedly causally linked to his protected activity under the Pipeline Safety Improvement Act and five other environmental whistleblower statutes.[1] The two alleged retaliatory adverse actions were: (1) Respondent's controversion of his workers' compensation claim; and (2) Respondent's termination of the employment.

Respondent moved for summary decision. On April 21, 2014, I denied the motion. In the Order, I also revisited the question of whether formal rules of evidence would apply at the hearing. As I will discuss in more detail below, I ordered that formal rules would not apply and that I would apply the less formal rules that the Pipeline Safety Improvement Act's implementing regulations establish for the admissibility of evidence, 29 C.F.R. § 1981.107(d), to the entire action. At a pre-trial conference on April 28, 2014, I modified the

[1] Complainant alleges that in addition to violating the Pipeline Safety Improvement Act, 49 U.S.C. § 60129; Respondent also violated the Safe Drinking Water Act, 72 U.S.C. § 300j-9(i); the Solid Waste Disposal Act, 42, U.S.C. § 6971; the Federal Water Pollution Control Act, 33 U.S.C. § 1367; the Toxic Substances Control Act, 15 U.S.C. § 2622; and the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9610.

order in one respect: I provided that formal rules would apply to evidence offered solely for the purpose of establishing or refuting Complainant's entitlement to exemplary damages under the Safe Drinking Water Act or the Toxic Substances Control Act.

On May 2, 2014, Respondent timely moved for reconsideration. It did not request reconsideration of the denial of summary decision as to the termination of Complainant's employment. The motion for reconsideration is directed to: (1) the denial of summary decision as to Respondent's allegedly retaliatory controversion of Complainant's workers' compensation claim; and (2) the Order that formal rules of evidence will not apply, except as to exemplary damages. I have considered Respondent's arguments and reject them.

Discussion

I. Denial of Summary Decision As to Controversion of Complainant's Workers' Compensation Claim.

Respondent argues – correctly – that, when denying its motion for summary decision, I did not expressly address its controversion of Complainant's workers' compensation claim. Respondent argued on summary decision that exclusive jurisdiction for this claim is under the Alaska Workers' Compensation Act and that Complainant's complaint concerning the controversion was untimely filed more than 30 days after Respondent mailed the notice of the controversion to Complainant.

As to jurisdiction, Respondent offers nothing to refute that Congress authorized the Secretary to decide whistleblower claims under the six relevant statutes or that the Secretary delegated that authority for purposes relevant here to this Office.[2] Rather, Respondent appears to argue that the Alaska state legislature's enactment of a workers' compensation statute somehow preempts federal jurisdiction to decide federal statutory claims. Respondent offers no authority for this proposition, and I reject it.[3] I therefore turn to the question of the timeliness of Complainant's filing of an administrative complaint with the Occupational Safety & Health Administration.

There is no dispute that Complainant filed his administrative complaint on December 20, 2012. Respondent offered undisputed evidence in its motion for summary decision that it mailed the notice of controversion of the workers' compensation claim to Complainant on August 8, 2012. *See* Aff. of Saade, Ex. C, at 4-5. Respondent offered no evidence as to when Complainant received the notice of controversion or any other notice that Respondent was controverting his workers' compensation claim.

[2] *See, e.g.*, 49 U.S.C. § 60129(b); 29 C.F.R. § 1981, Subpart B (Pipeline Safety Improvement Act). The other statutes and implementing regulations have similar provisions.

[3] Generally, federal law is supreme; a state cannot preempt statutes of Congress issued within its constitutional authority. *See* U.S. Const., Art. 6, § 2. In addition, Complainant is not seeking a remedy for events within the scope of Alaska's workers' compensation statute. His complaint is based on his right to report unlawful activity to certain government and corporate officials without retaliation; it is not based on a general right to compensation for workplace injuries.

Under the Pipeline Safety Improvement Act, the administrative complaint must be filed with the Occupational Safety & Health Administration "within 180 days after an alleged violation of the Act . . . (*i.e.*, when the discriminatory decision has been both made and communicated to the complainant)." 49 U.S.C. § 60129(b)(1); 29 C.F.R. § 1981.103(d). Complainant filed the administrative complaint 134 days after Respondent mailed the notice of controversion. Thus, even if Complainant received the notice of controversion on the same day as Respondent mailed it (a fact not established on the record), Complainant's filing of the administrative complaint with OSHA was timely under the Pipeline Safety Improvement Act.

As to the remaining environmental whistleblower statutes, the applicable filing requirement is 30 days. *See* 29 C.F.R. § 24.103(d)(1). Respondent, however, offered no evidence of the date on which Complainant received the notice of controversion. It therefore failed to show when the decision was communicated to Complainant. Respondent could have sent the notice via a delivery service that would provide proof of delivery; it could have asked Complainant at a deposition or in interrogatories when he received the notice. On a motion for summary decision, I must draw all inferences in favor of the non-moving party. As there is no direct evidence of when Complainant received the notice, I decline to infer on summary decision that he must have received it reasonably soon after it was mailed. Respondent did not establish for purposes of the motion that Complainant received the notice of controversion more than 30 days before he filed the administrative complaint.[4]

II. Waiver of Formal Rules of Evidence Except As to Exemplary Damages.

As I have repeatedly recited, the Pipeline Safety Improvement Act's implementing regulations expressly reject the application of formal rules of evidence at the hearing and instead provide that "the administrative law judge may exclude evidence that is immaterial, irrelevant, or unduly repetitious." *See* 29 C.R.F. § 1981.107(d). The Secretary rejected the application of formal rules of evidence "in order to assist in obtaining the full development of the facts in whistleblower proceedings." 70 Fed. Reg. 17889, 17892. The implementing regulations for the five other environmental whistleblower statutes at issue here require

[4] The question about the timeliness of the claims related to the workers' compensation controversion was discussed at a pre-hearing telephone conference a week after I denied the motion for summary decision (April 28, 2014). As I described in an Order following that conference (April 29, 2014), Complainant stated at the conference that he did not dispute that his administrative complaint (related to the workers' compensation controversion) was untimely. Rather, he explained that he did not file at that time because he was assured by managers at BP that his employment was secure and that Respondent would pay his wages and provide his needed medical care. Complainant thus felt reassured that he would get the same (or better) remedies voluntarily than he would have had through Alaska state workers' compensation.

To the extent that Complainant's concession about timeliness might relate to the Pipeline Safety Improvement Act, I reject it as the undisputed facts demonstrate that the administrative complaint was timely filed. As to the remaining environmental whistleblower statutes, the applicable regulation expressly provides for equitable tolling. *See* 29 C.F.R. § 24.103(d)(1) ("The time for filing a complaint may be tolled for reasons warranted by applicable case law."). To the extent that the discussion at the pre-hearing conference could be construed as some sort of motion for reconsideration of the motion for summary decision, I find that Complainant's concession that the administrative complaint was untimely is insufficient for summary decision: There is a genuine issue as to whether the limitations period was equitably tolled if managers lulled Complainant into believing that he would not be refused the same benefits to which he would otherwise be entitled under the Alaska workers' compensation. That issue remains open for decision following the hearing.

application of the same formal rules of evidence that the Pipeline Act rejects. *See* 29 C.F.R. §24.107(a).

Because this particular complainant happens to allege that the same conduct that constituted violations of the Pipeline Act also violated the five other environmental whistleblower statutes, the two applicable regulations present a conflict about whether formal rules of evidence should apply. To comply with both regulations, I would have to entertain objections under the two different standards of admissibility, rule on each standard, and often admit evidence on the Pipeline Safety Improvement Act while rejecting it for purposes of the other statutes.

Need to select a single framework for questions of admissibility of evidence. In my view, simultaneously applying two different sets of rules for admission of the same evidence at the hearing would be unwieldy and unworkable. I do not believe that the Secretary contemplated a conflict such as this when he adopted the two relevant regulations. As I explained previously, I am not aware of any court in the United States that applies two sets of evidentiary standards to the same evidence at the same time. Respondent offers no examples of when such a regime has been applied in any court or administrative agency.

I decided to address the conflict by relying on the applicable regulatory provisions that authorize an administrative law judge to waive any rule or issue any order that justice or the administration of the statutes requires. *See* 29 C.F.R. §§ 24.115; 1981.114. I therefore ordered that formal rules of evidence would not apply, but rather that the regulation controlling the admissibility of evidence in the Pipeline Safety Improvement Act, 29 C.F.R. § 1981.107(d), would apply.

Respondent argues that the regulations permitting an administrative law judge to waive any rule or issue any order that justice or the administration of the statute requires must be applied only on motion of a party. This, Respondent argues, assures the parties an opportunity to be heard before the waiver is put in place. The relevant regulations do contain the words: "The administrative law judge . . . may, upon application, after three days notice to all parties, waive any rule . . . ." 29 C.F.R. §§ 24.115; 1981.114. But even assuming, *arguendo*, that Respondent is correct, Respondent's current motion for reconsideration has given it the opportunity to present its arguments and be heard before the waiver is put in place at the hearing.

Respondent also misplaces its reliance on a provision that allows evidence to be admitted for a limited purpose, such as a hearsay statement admitted other than for the truth of the matter asserted, or evidence admitted as to one party but not another. *See, e.g.*, 29 C.F.R. § 18.105. That rule differs significantly from what Respondent advocates here. The admission of evidence for a limited purpose occurs through the application of a single framework of evidentiary rules applicable to all of the evidence. What Respondent advocates is applying two different sets of evidentiary rules simultaneously to the same evidence being offered for the same purpose against the same respondent. That would require two separate rulings on admissibility for each item of evidence offered. Indeed, Respondent concedes that this approach is unwieldy, and it offers no precedent at any court or administrative agency.

I therefore conclude that a waiver is necessary to address the conflict between the regulations at 29 C.F.R. § 24.107(a) (applicable to the five environmental statutes) and at 29 C.R.F. § 1981.107(d) (applicable to the Pipeline Safety Improvement Act). *See* 29 C.F.R. §§ 24.115; 1981.114.

The informal regime in the Pipeline Safety Improvement Act should apply rather than formal rules of evidence. From the two available evidentiary frameworks, I find the less formal regime under the Pipeline Safety Improvement Act more appropriate for several reasons.

First, when adopting regulations for the Pipeline Act, the Secretary complied with Congress' mandate in the Administrative Procedures Act that "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d). The exclusion of irrelevant, immaterial, and unduly repetitious evidence is precisely the standard that the Secretary adopted in the regulations for the Pipeline Safety Improvement Act. *See* 29 C.R.F. § 1981.107(d).

The second reason has due process implications. The relevant statutes place differing burdens on the parties. Under the Pipeline Act, Complainant must show that his protected activity "contributed" to the adverse action. Under the remaining statutes, he must show that his protected activity "caused" or was a "motivating factor in the adverse action." *Compare* 29 C.F.R. § 1981.109(a) and 29 C.F.R. § 24.109(b)(2). The contributing factor standard in the Pipeline Act requires less from a complainant than does the motivating factor standard in the other statutes. *See Lopez v. Serbaco, Inc.*, ARB No. 04-158, slip op. at 5 n.6 (Nov. 29, 2006); *Vander Meer v. Western Kentucky Univ.*, ARB No. 97-078, slip op. at 3 n.4 (Apr. 20, 1998). Congress wrote the Pipeline Act more favorably to complainants, and the Secretary's implementing regulations are similarly more favorable to complainants. This means that if Complainant prevails under any of the statutes, he very likely will prevail at the least on his claim under the Pipeline Safety Improvement Act.

If Complainant meets his burden, Respondent may avoid relief under the Pipeline Act if it shows "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior." 29 C.F.R. § 1981.109(a). But under the other five statutes, Respondent may avoid relief by meeting a less demanding standard; it need only make its showing by a preponderance of the evidence that it would have taken the same unfavorable action absent any protected behavior. *See* 29 C.F.R. § 24.109(b)(2). Again, Congress and the Secretary were more favorable to complainants in the Pipeline Act, making Complainant more likely to succeed under that statute.

With the exception of exemplary damages, the remedies under all of the statutes are the same. That means that to avoid these remedies, Respondent must prevail on all six statutes; if it fails on any one statute, the same remedies will be awarded. As Respondent must prevail on all six claims to avoid an order requiring it to provide these remedies, it must prevail on the claim on which Complainant is most likely to prevail: the claim under the Pipeline Safety Improvement Act. It would arguably infringe on Complainant's due process rights to

apply more rigorous evidentiary standards to that statute because it would reduce his likelihood of success where Congress intended that it be at its highest. At the least, this demands that, if one set of rules for the admissibility of evidence is going to be applied to all evidence offered at the hearing, it must be the rules mandated in the implementing regulations for the Pipeline Act, not the other statutes.

And rejecting formal rules would not unduly burden Respondent. As Complainant need prevail on only one statute to get the remedies he seeks, he can lose on all five of statutes on which formal rules of evidence are to be applied and still get the same remedy under the Pipeline Safety Improvement Act, where formal rules do not apply.

Third, in more recently adopted regulations for newer whistleblower statutes, the Secretary has favored the less formal standard under the Pipeline Safety Improvement Act. *See, e.g.* the interim final regulations for retaliation complaints under section 1558 of the Affordable Care Act, 20 C.F.R. § 1984.107(d). There, the Secretary states: "Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied." 78 Fed. Reg. 13222, 13228 & 13234.

Fourth, I have addressed the one area where the absence of formal rules could actually disadvantage Respondent: exemplary damages. These damages are available only under the Safe Drinking Water Act and the Toxic Substances Control Act; the other four statutes (including the Pipeline Act) do not allow exemplary damages. Because the implementing regulations for the two statutes that allow exemplary damages require the application of formal rules of evidence, *see* 29 C.F.R. § 24.107(a), I provided in a previous Order that formal rules of evidence must apply to evidence offered solely for the purpose of establishing or refuting exemplary damages.

Respondent argues that it would make better sense to apply formal rules to the entire case because five of the regulatory schemes require them and only one rejects them. Actually, there are only two regulations at issue, 29 C.R.F. § 24.107(a), and 29 C.R.F. § 1981.107(d). One calls for formal rules, and the other does not. But I find no reason to resolve the conflict as if through a majority "vote" of affected regulations. Rather, I look to the due process and general policy considerations discussed in the text above.

Respondent's other argument to prefer formal rules over the regime in the Pipeline Act, curiously, is that Complainant is representing himself. It argues that with a *pro per* complainant, the hearing will take longer and that, to deprive Respondent of its right to formal rules of evidence "would be unduly prejudicial and only cause it further expense and burden."[5]

On the contrary, either applying two separate sets of evidentiary rules or applying formal rules to all six statutes would, more likely than not, increase the duration and complexity of the hearing. There will be far more objections, and Complainant will have to try different

[5] Respondent also argues that, at the least, formal rules of evidence should apply to the punitive damages issues. This neglects that I have already ruled that formal rules of evidence will apply to those issues.

ways to get his evidence admitted until he finds one that comports with the formal rules or gives up. In reaching my conclusions in this Order, I have not considered that Complainant is proceeding in *pro per*, but were I to accept Respondent's invitation to do so, I would conclude that, with him representing himself, the hearing will move more expeditiously and effectively without formal rules of evidence.[6]

[6] Respondent argues that I should have applied formal rules of evidence to its motion for summary decision and that I decided that motion so quickly that it did not have time to file its objections. These arguments are without merit.

First, I did not reach the issue of whether to apply formal rules of evidence on the motion for summary decision because neither party objected to any of the evidence that the other party offered.

Second, Respondent had time to file objections and did not. The timing on the motion for summary decision was entirely in Respondent's hands. Respondent was the moving party. I issued the notice of hearing and a pre-trial order on October 31, 2013. It set the hearing for May 12, 2014. That gave Respondent nearly seven months before the hearing to file any motion it chose to file. The pre-trial order required that any motion for summary decision be filed no less than 40 days before the hearing, which ran on April 2, 2014. Documents are not deemed filed until received by this Office. *See* 29 C.F.R. § 18.4(c). Respondent did not file its motion until April 4, 2014. Arguably the motion was untimely, unless saved by the provision by which five days are added when documents are filed by mail. *See id.* But there is no question that Respondent waited until literally the last moment to file its motion.

In a telephone conference on April 2, 2014, Respondent advised that it had mailed a motion for summary decision on April 1, 2014. With time for mailing, Complainant's opposition was not due until April 21, 2014. Given the short time between then and the hearing date on May 12, 2014, Respondent inquired whether I would have time to decide the motion prior to the hearing. I advised that I planned to act quickly to get the parties a ruling in advance of the hearing. That way, if I granted the motion, the parties could avoid unnecessarily expending resources to prepare for a hearing that was not going to happen. I added that I might not have time to write a full decision on the motion before May 12, 2014, and might instead issue a short order granting or denying the motion to be followed by a complete written decision later. But my answer was unequivocal that my plan was to give the parties a ruling sufficiently before the hearing to allow them to avoid unnecessary expense in the event that the motion was granted.

Complainant served his opposition by mail on April 14, 2014. The opposition arrived in San Francisco and was filed on the following day, April 15, 2014. I conclude that, since the opposition papers arrived in San Francisco the next day, Respondent's counsel, who is located much closer to Complainant, also had the papers on that day. I did not issue the order denying summary decision until April 21, 2014, six days later.

Respondent understood that I planned to get the parties a ruling as soon as possible on the motion. Respondent had six days after receipt of the opposition papers to file any evidentiary objections. It argues that it planned to file the objections with its pre-trial filings. But it did not do that either. It mailed to this Office and served its pre-trial filings on April 21, 2014. It is apparent in those papers that Respondent's counsel mailed them before receiving the order denying summary decision. If she was going to file objections to Complainant's evidence on summary decision along with the pre-trial filings, she should have done so; there is no reason she would not. But she included no objections.

Finally, Respondent remarkably even now has not filed any objections to Complainant's evidence on summary decision. It filed no objections with its motion for reconsideration mailed for filing on May 2, 2014, some 17 days after it received Complainant's opposition papers. Respondent has waived any evidentiary objections on Complainant's opposition to summary decision.

Conclusion

Accordingly, having considered Respondent's arguments on its motion for reconsideration, the motion is DENIED.

This Order will be served on Respondent's counsel and on Complainant by email and by U.S. mail. All other service will be by U.S. mail.

SO ORDERED.

Digitally signed by STEVEN BERLIN
DN: CN=STEVEN BERLIN, OU=ADMIN LAW JUDGE, O=Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

STEVEN B. BERLIN
Administrative Law Judge