U.S. Department of Labor

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Issue Date: 15 April 2010

CASE NO. 2009-SOX-00059

In the Matter of:

SANDRA GOODELL,
Complainant,

vs.

RED CEDAR GATHERING COMPANY and
KINDER MORGAN,
Respondents.

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the employee protection, or whistleblower, provisions of the Corporate and Criminal Fraud Accountability Act of 2002, also known as Section 806 of the Sarbanes-Oxley Act ("the Act", "SOX"), Public Law 107-204, codified at 18 U.S.C. § 1514A.

On November 26, 2007, Complainant, Sandra Goodell, filed a complaint with the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) alleging that Respondent Red Cedar had retaliated against her in violation of the SOX whistleblower provisions. She amended the complaint on April 29, 2008, to add Kinder Morgan as a respondent. OSHA reported its findings by letter dated June 25, 2009, concluding that Complainant's complaint should be dismissed (OSHA Findings). OSHA concluded that while Respondents were employers covered by the Act, there was no reasonable cause to believe that they had violated the SOX whistleblower provision.

Respondents Kinder Morgan and Red Cedar Gathering Company filed objections and requests for hearing on July 24, 2009 and July 28, 2009, respectively (Red Cedar Hrng. Req., Kinder M. Hrng. Req.). Both Kinder Morgan and Red Cedar objected to OSHA's determination that they are employers covered by SOX. Kinder M. Hrng. Req., p. 1; Red Cedar Hrng. Req., p. 1. Kinder Morgan also objected to OSHA's conclusion that Complainant timely amended her complaint to add Kinder Morgan as a Respondent. Kinder Morgan Hrng. Req., p. 2. Not surprisingly, neither Respondent objects to OSHA's finding that there is no reasonable cause to believe that they violated the SOX whistleblower protections. Kinder M. Hrng. Req., p. 2; Red Cedar Hrng. Req., p. 2.

This case was assigned to me on July 30, 2009. By order dated August 10, 2009, I directed the parties to participate in an initial pre-trial conference.

By letter dated August 13, 2009, Complainant's counsel advised this office that Complainant "has decided not to participate in any further proceedings regarding her Sarbanes-Oxley complaint against [Respondents]. As such, she takes no position regarding the objections filed by Respondents in this proceeding." The letter continues that Complainant has not authorized her counsel to represent her and neither Complainant nor her counsel will participate in further proceedings in this matter, including the pre-trial conference.

On August 18, 2009, I held a pre-trial conference with counsel for Kinder Morgan and Red Cedar. Neither Complainant nor her counsel participated. The parties agreed that no hearing is required and that there is only a legal issue in this matter. By letter dated August 19, 2009, Respondents' counsel indicated that they had conferred and would provide the following documents by September 25, 2009:

1. A Joint Statement of Undisputed Facts;

2. Each Respondent will file a Separate Motion to Dismiss and Brief in Support;

3. A Joint Set of Exhibits; and

4. A Proposed Order of Dismissal.

An order issued on August 27, 2009 directing Respondents to provide the above listed documents by September, 25, 2009. It stated that these documents would not be served upon Complainant or her attorney. The Order also stated that if the U.S. Department of Labor files a response to the motions to dismiss, it would be afforded time to file reply briefs.

On September 25, 2009, Respondents each filed motions for summary decision (Kinder M. Motion, Red Cedar Motion). In addition, they jointly filed a statement of undisputed facts, a set of exhibits, and a proposed order of dismissal. The U.S. Department of Labor did not file a reply to Respondents' motions.

SUMMARY OF ORDER

Complainant's complaint is dismissed for failure to prosecute. Complainant has indicated that it will not pursue its complaint any further and has failed to participate in an initial pre-trial conference. The U.S. Department of Labor has not filed a reply to Respondents' motions for summary decision. This case, therefore, is without a party to oppose Respondents and must be dismissed.

DISCUSSION

Courts possess the "inherent power" to dismiss a case on their own initiative for lack of prosecution. *Link v. Wabash R. R. Co.*, 370 U.S. 626, 630 (1962); *Curley v. Grand Rapids Iron*

& Metal Co., ARB No. 00-013, ALJ No. 99-STA-39, slip op. at 2 (ARB Feb. 9, 1999). This power is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630. Like the courts, the Department of Labor's Administrative Law Judges must "manage their dockets in an effort to dispose of their cases in an orderly and expeditious manner." *Rowland v. Nat'l Assoc. of Securities Dealers*, ARB No. 07-098, ALJ No. 2007-SOX-006, slip op. at 6-7 (ARB Sept. 25, 2009) Thus, the Administrative Review Board has explained that it will affirm an ALJ's dismissal on the grounds of abandonment where the facts dictate that a party has failed to prosecute his or her case. *Tucker v. Connecticut Winpump Co.*, ARB No. 02-005, ALJ No. 2001-STA-53, slip op. at 4 (ARB Mar. 15, 2002); *Curley*, slip op. at 2.

Complainant has failed to prosecute her case. In her August 13, 2009 letter, Complainant served notice that neither she nor her attorney would participate in further proceedings in this matter. Consistent with such notice, neither she nor her attorney participated in the August 18, 2009 pre-trial conference. Finally, Complainant has not objected to the August 27, 2009 order which stated that she would not be served with documents that Respondents were to submit in response to the order.

Additionally, none of the instrumentalities of the U.S. Department of Labor who were served with Respondents' motions have elected to assert their interests in this case. Respondents' motions were served on the Associate Solicitor, Division of Fair Labor Standards; the Directorate of Enforcement Programs, the OSHA Regional Administrator in Denver, and the Associate Regional Solicitor in Denver. Kinder M. Motion, p. 24; Red Cedar Motion, p. 12. None have responded to Respondents' motions or otherwise sought to participate in this case.

As a result of Complainant's failure to prosecute and the lack of participation by Department of Labor components, this case now has two respondents and no complainant. Under such circumstances, dismissal for lack of prosecution is an appropriate resolution of this case. *See Miller v. Basic Drilling Co.*, ARB No. 09-055, ALJ No. 2005-STA-20, slip op. at 2 (ARB Feb. 26, 2010) (affirming dismissal when no successor in interest could be found for deceased complainant). Respondents' requests for hearing raised issues that did not go to whether they violated the Act; now Respondents' contentions on those issues are unopposed. To continue to treat this matter as an adversarial adjudication is an inefficient use of judicial resources and interferes with the orderly and expeditious disposal of cases.[1]

[1] Although OSHA concluded that Respondents are covered employers, OSHA's mandate is only to determine whether there is reasonable cause to believe that a respondent has violated the Act. *See* 29 C.F.R. § 1980.105(a). When OSHA's findings elicit objections, ensuing hearings before an administrative law judge are conducted *de novo*. 29 C.F.R. § 1980.107(b). Courts have traditionally defined "*de novo* review" to mean that a court "would start from scratch, as if the proceedings [below] had never occurred." *United States v. Koenig*, 912 F.2d 1190, 1192 (9th Cir.1990); *see also United States v. George*, 971 F.2d 1113, 1118 (4th Cir.1992) ("By definition, de novo review entails consideration of an issue as if it had not been decided previously."); *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir.1991) ("De novo review means we make an independent determination of the issues."); *Railroad Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506, 1513 (Fed Cir.1984) ("De novo review means a totally new fact-finding effort."). *De novo* review means that no special deference is accorded to OSHA's findings on the case at issue or any other case. *See Hanna v. WCI Communities, Inc.*, 348 F.Supp.2d 1322, 1324, 1329 (S.D. Fla. 2004) (explaining that when SOX cases are removed to federal district court, "de novo review" means that "district courts are able to consider the merits of a plaintiff's whistle-blower [administrative] complaint as if it had not been decided previously"). I am unaware of any case where a judge has treated an OSHA finding as having precedential value. *S*

Because I find this case must be dismissed due to Complainant's failure to prosecute, I need not rule on Respondents' motions for summary decision.

ORDER

This case is hereby **DISMISSED**.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).

See Hanna, 348 F.Supp.2d at 1330-31 (holding that OSHA's "preliminary" findings do not have preclusive effect, but suggesting that the result may be different after an ALJ conducts a hearing and issues a ruling). Thus, Respondents are not prejudiced by the dismissal of this case without determination of whether Respondents are covered employers.