U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 18 December 2019

CASE NO.: 2019-STA-00017

In the Matter of

GARY VAUGHT,
Complainant,

v.

PROTECH MINERALS, LLC,
Respondent.

DECISION AND ORDER DISMISSING CASE

This matter arises under the employee protection ("whistleblower") provision in the Surface Transportation Assistance Act ("Act"), 49 U.S.C. § 31105, and its implementing regulations at 29 C.F.R. Part 1978. Complainant alleges that Protech Minerals, LLC terminated his employment in violation of the Act. Complainant has failed to take any substantive action to prosecute his case and be ready for the scheduled hearing. He has failed repeatedly to comply with orders aimed at moving the case toward a hearing at which the parties would be prepared. I have concluded that, under the circumstances, Complainant stymied all progress in the litigation through the date of the scheduled hearing (which had to be vacated). I therefore dismiss the case.

Litigation History

On April 15, 2019, I issued a Notice of Hearing and Pre-Trial Order. I set the hearing in Long Beach, California for September 16, 2019. In the Pre-Trial Order, I reiterated the requirement in the regulations the parties make initial disclosures as required in 29 C.F.R. § 18.50(c)(1).[1] The Order notified the parties that they must conduct discovery "according to 29 C.F.R. Part 18 unless the Act, its implementing regulations, or this order imposes a different requirement," citing generally 29 C.F.R. §§ 18.50-18.57. The Order required the parties to file and serve a detailed prehearing statement no fewer than 30 days before the hearing. It warned the parties that, if they failed to comply with the requirements of the Pre-Trial Order, sanctions might be imposed, citing 29 C.F.R. §§ 18.12(b), 18.35(c), 18.50(d)(2)-(3), 18.52, and 18.87.

About two weeks later, on April 30, 2019, Complainant purported to file a letter, updating his address and telephone number. He asked that the hearing be moved to San Bernardino County because it would be more convenient for him. He also asked to have a settlement judge

[1] As the Pre-Trial order stated: "In every case, including cases where a party does not have an attorney, the disclosures required by 29 C.F.R. § 18.50(c) must be made."

assigned. He did not include a certificate of service or indicate (such as in a "cc:") that he had sent a copy of his letter to Respondent.

I denied the letter motions because Complainant did not serve them on Respondent.[2] *See* 29 C.F.R. §§ 18.30(a)(3) (requiring service). In the order, I explained the service requirement (including the requirement to file a certificate of service). I denied the motions without prejudice to Complainant's refiling them. I explained the regulatory provisions applicable to each of Complainant's two motions so that, if Complainant refiled, he could address those provisions. With this, Complainant should have been able to correct, refile, and serve his motions if he believed there was a good faith basis for them. Complainant did not refile either motion.

On the contrary, he essentially stopped litigating and over the next four months did nothing to prepare for the hearing that was scheduled to begin in September 2019. He failed to make the initial disclosures required in the regulations, 29 C.F.R. § 18.50(c)(1). He propounded no discovery. He filed no motions. He also failed to file a pre-hearing statement.

Under the Pre-Trial Order, the parties were required to file a pre-hearing statement on or before August 16, 2019. In the statement, they were to provide, among other information, a witness list (with specific information about the evidence to which the witness was expected to testify); an exhibit list (with a statement of what each exhibit would prove); a discussion of the facts in dispute and not in dispute and the relevant law; and an estimate of the time the party needed to present his or its case.

The information in the pre-hearing statements provides the ALJ a snapshot of what evidence to expect, the legal issues, how many witnesses will testify, other logistical matters, and how long the hearing will take. It allows the ALJ to conduct a useful pre-hearing conference, at which the issues for hearing may be narrowed, duplicative testimony or exhibits can be avoided, the legal principles discussed, and the chances for settlement increased. The parties must also serve on one another at the time they file the pre-hearing statement a copy of each exhibit the party will offer at the hearing. That allows each party to prepare evidentiary objections in advance, some of which may be resolved by motion *in limine* or at the pre-hearing conference. Without the pre-hearing statements, the ALJ and the parties cannot prepare for a hearing that will be as complete and efficient as possible; in some cases, it might mean that crucial evidence will not be provided to the ALJ.[3]

When neither party filed a pre-hearing statement by August 30, 2019 (*i.e.*, two weeks after the deadline), I asked my legal assistant to arrange a telephonic status conference with the parties. My legal assistant emailed both parties to arrange the conference. Two of Respondent's

[2] "Order Striking without Prejudice Complainant's Request to Change Location of Hearing and His Request for a Settlement Judge" (May 3, 2019).

[3] For example, many self-represented complainants in whistleblower cases neglect their obligation to prove up the remedy to which they are entitled. Their pre-hearing statements would reveal this, and the ALJ could address it at a pre-hearing conference in time for the parties to prepare adequately to address damages at the hearing.

managers provided dates they were available and stated they would appear on behalf of Respondent.[4] Complainant, however, did not reply to the email.

Having heard nothing from Complainant, my legal assistant attempted to reach him by telephone, rather than email. She used the updated telephone number Complainant supplied four months earlier, in April 2019. When Complainant did not answer, my legal assistant left a detailed message. Again, Complainant did not respond.

Because Complainant was unresponsive, I vacated the hearing and issued a written notice of a telephonic conference at a specified time on September 18, 2019. The notice of the phone conference states that if any party has a scheduling conflict, the party must contact my legal assistant or law clerk and ask to reschedule. The order stated that, if any party would not be available for the call at the telephone number on record with this Office, they must contact my legal assistant no later than 3:00 p.m. on the day before the conference and provide a number where they could be reached for the conference.

The mandatory nature of pre-hearing conferences is established by regulation. *See* 29 C.F.R. § 18.44(c) ("All parties must participate in prehearing conferences as directed by the judge."). Consistent with this, the order notified the parties that, assuming the date and time for the call was not rescheduled, if either party failed to appear for the conference, I would construe that as a waiver of their right to be present. I would hold the conference without them and might make important rulings without having heard from them.

Also in the order setting the conference, I again (as I had in the Pre-Trial Order) warned the parties that, if they failed to comply with requirements of litigation, including the ALJ's orders, sanctions could be imposed. I stated that, if a failure was sufficiently serious, a complainant's case might be dismissed or a respondent might be held liable without a hearing. I added that a complainant has the burden of moving the case forward with evidence, and I outlined the legal elements of the claims as well as the available defenses.

On the scheduled date and time for the telephone conference, Respondent's representatives appeared. Complainant, however, did not. He had not asked to have the call rescheduled, and he had not provided an alternate telephone number. As I'd warned the parties, I took Complainant's failure to be available as a waiver of his right to attend, and I went forward with the conference without him. The only action I took was to approve the non-attorneys as representatives of Respondent.[5]

Complainant never contacted this Office about the conference or his failure to attend. He did not call, fax, or email later that day or at all.

[4] Essentially, these managers were requesting to be approved as non-attorney representatives for Respondent. *See* 29 C.F.R. § 18.22(b)(2) (non-attorneys may represent parties with the permission of the ALJ).

[5] As part of the approval, I described for the Respondent's non-attorney representatives what the litigation would require and asked if they felt able to perform those responsibilities and were committed to doing so.

On September 19, 2019, I issued an order to show cause. Complainant had taken few or no steps to comply with his litigation obligations. He had not served initial disclosures, discovery, or a pre-hearing statement; he had failed to attend the mandatory status conference; and he had failed to communicate with Respondent or with the ALJ about any of it. I was becoming increasingly concerned that Complainant might have abandoned his case.

I therefore explained in the order to show cause that a complainant has the burden of going forward with evidence at the hearing and is responsible to prosecute his case. I stated that, if Complainant wanted to continue the litigation, he must show cause why I should not deny his claim because of his failure to prosecute. I stated that he should explain why he failed to comply with orders of the ALJ that required him to make initial disclosures, file and serve a pre-hearing statement, respond to requests from this Office to schedule a pre-hearing conference, and appear at the mandatory telephone conference.

I required Complainant to file and serve a written answer to the order to show cause on or before October 10, 2019. At the least, in the answer, he was required to:

> (1) state that he has decided to withdraw his request for a hearing and allow the OSHA dismissal to become the final order of the Secretary of Labor, or (2) state why he should be allowed to continue to litigate his claim before the administrative law judge and has not abandoned his claim or failed to prosecute it.

Order to Show Cause, at 3 (September 19, 2019).

I stated that, if Complainant needed an extension of time to answer the order to show cause, he must request the extension *in writing* and explain why he needs it. I stated that any request for an extension of time had to be *on file at this Office and served on Respondent on or before October 10, 2019, i.e.* the due date for his submission. Finally, I warned Complainant that, if he failed to file a timely answer to the order to show cause, I would likely dismiss his claim for failure to prosecute, failure to comply with orders of the administrative law judge, or both. As I had done repeatedly in earlier orders, I again advised Complainant that he had a right to retain counsel, and he might want to do that.

The deadline of October 10, 2019 came and went. Complainant filed nothing. He did not move for an extension of time by the deadline. Instead, on the following day, October 11, 2019, he left a voicemail with my legal assistant. He again updated his address and telephone number, and he asked for more time to answer the order to show cause.

This request was untimely. It did not meet the order's requirement that it be in writing. Given the nature of a voicemail message, the request was an *ex parte* application; there is no indication that Complainant notified Respondent that he would be asking for additional time for his answer to the order to show cause. I had previously advised Complainant that he could not file motions without serving Respondent.[6] Nonetheless, I tried to accommodate Complainant yet again.

[6] Generally, *ex parte* motions are impermissible. *See* 29 C.F.R. § 18.14 ("The parties, their representatives, or other interested persons must not engage in ex parte communications on the merits of a case with the judge.").

At my request, my law clerk called Complainant at the phone number Complainant gave in his message. When voicemail answered, my clerk asked Complainant to return the call. Complainant did not return the call. My law clerk called again, got voicemail, and this time left a detailed message. He explained that, if Complainant wanted more time to answer the order to show cause, he must file with this Office a written request (such as in a letter) and must mail a copy to Respondent.

Complainant never filed a written request for more time. He never filed an answer to the order to show cause. He never again communicated with this Office.

Discussion

"If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." FED. R. CIV. P. 41(b).[7] "The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' 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 v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962).

Like the courts, ALJs "must necessarily manage their dockets in an effort to 'achieve the orderly and expeditious disposition of cases.'" *Dorman v. Chinook Charter Servs.*, ARB No. 08-011, ALJ No. 2007-STA-28, PDF at 2 (ARB Feb. 19, 2009) (quoting *Link*, 370 U.S. at 630-31). "Dismissal as a sanction for failure to prosecute is a matter within the sound discretion of the administrative law judge." *Sparks v. Rich Wilson Blacktop Paving Co.*, ARB No. 09-095, ALJ No. 2009-STA-21, PDF at 3 (ARB June 30, 2009). "ALJs must exercise this power discreetly . . . . Because dismissal is perhaps the severest sanction and because it sounds '"the death knell of the lawsuit," [the ALJ] must reserve such strong medicine for instances where . . . misconduct is correspondingly egregious.'" *James v. Suburban Disposal, Inc.*, ARB No. 10-037, 2009-STA-71, PDF at 5 (ARB Mar. 12, 2010) (citation omitted).

A dismissal is also within a judge's discretion when a complainant fails to obey an administrative law judge's orders and fails to show good cause for the failure. *Anderson v. Greyhound Trash Removal, Inc.*, ARB No. 07-115, ALJ 2007-STA-24, PDF at 3-4 (ARB Feb. 27, 2009) (Surface Transportation Assistance Act); *Matthews v. LaBarge, Inc.*, ARB No. 08-038, ALJ No. 2007-SOX-56, PDF at 3 (ARB Nov. 26, 2008) (Sarbanes-Oxley Act); *Zahara v. SLM Corp.*, ARB No. 08-020, ALJ No. 2006-SOX-130, PDF at 3 (ARB Mar. 7, 2008) (Sarbanes-Oxley Act); *Carciero v. Sodexho Alliance*, ALJ No. 2008-SOX-00013 (Mar. 17, 2009) (Geraghty, ALJ); *see also*, 29 C.F.R. § 18.57(b)(1)(v), (c) (failure to comply with discovery-related orders such as orders requiring initial disclosures).

Indeed, under the applicable procedures, absent a sufficient explanation from Claimant, his failure to appear at the pre-hearing conference, standing alone, is an adequate reason to dismiss. As the regulation provides:

[7] As this Office's Rules of Practice and Procedure are silent about failure to prosecute, I apply the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 18.10.

> When a party has not waived the right to participate in a hearing, conference or proceeding but fails to appear at a scheduled hearing or conference, the judge may, after notice and an opportunity to be heard, dismiss the proceeding or enter a decision and order without further proceedings if the party fails to establish good cause for its failure to appear.

29 C.F.R. § 18.21(c).

In this case, Complainant has done nothing substantive to prosecute his case since the letter motions he sent but did not serve at the beginning of the litigation on April 30, 2019. A number of his failures to act were also failures to comply with requirements stated in the applicable regulations and in the ALJ's orders.

Examples of lacking prosecution or of failure to comply with the regulations and the ALJ's orders include: Despite my informing Complainant how to correct the letter motions he purported to file at the beginning of the case, he did not refile the motions. He failed to comply with the initial disclosure requirement stated in the regulations, 29 C.F.R. § 18.50(c), and specifically required in the Pre-Trial Order. He did not make any discovery requests. He failed to file the required pre-hearing statement. That means that, as the hearing date approached, he failed to make required disclosures of the witnesses he planned to call, the evidence that he expected those witnesses to give, the exhibits he planned to offer, and the facts and issues in dispute. He failed to disclose and serve on Respondent copies of the exhibits he planned to offer at the hearing. He did not respond to repeated contacts from this Office to arrange a telephonic pre-hearing conference. He failed to appear for the formally noticed mandatory telephone conference. He failed to answer—timely or at all—the order to show cause concerning his failure to attend the mandatory telephone conference. He failed to answer timely or at all an order to show cause, requiring him to show why his case should not be dismissed for failure to prosecute and failure to comply with orders of the ALJ and applicable regulations.

Dismissal. In deciding whether to dismiss a case for failure to prosecute or for failure to comply with a court order, a court must weigh five factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the availability of less drastic sanctions; and (5) the public policy favoring disposition of cases on their merits." *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992)). "It is not necessary for a district court to make explicit findings to show that it has considered these factors." *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir. 1987) (citation omitted) (considering application of FED R. CIV. P. 16(f), 37(b)(2), and 41(b)).

Public interest. In the statutory scheme, Congress indicates that the Department of Labor must decide cases under the Surface Transportation Assistance Act expeditiously. *See* 49 U.S.C. § 31105(c) (allowing *de novo* litigation in the district court at a complainant's request if case handling at DOL is not concluded within 210 days). Consistent with this, the Secretary's regulations require that cases under the Act be expedited. *See* 29 C.F.R. § 1978.107(b). This manifests the public's interest in addressing safety and security risks to workers and to the public

in the trucking industry. The public interest favors dismissal, as it is Complainant's obligation to prosecute his case with sufficient dispatch to meet the Congressional and regulatory policy of expeditious case handling. Complainant offered no explanation for his failures.

Dockets. The administrative law judge has devoted considerable time to this case. This included time to educate Complainant about the procedural requirements Complainant had to meet. These included requirements necessary to provide due process, such as the requirement that Complainant serve filings on Respondent and not engage in *ex parte* communications to the ALJ. It included orders that were designed to make more certain that the parties would be well-prepared for a meaningful and efficient hearing. There is nothing to suggest that further orders or ALJ efforts to manage the litigation would result in a meaningful hearing within a reasonable time and without unjustifiable demands on this Office's limited resources—resources needed to address the disputes of others whistleblowers and other litigants.

Prejudice to Respondent. Respondent has been deprived of the disclosures to which it is entitled under the applicable rules and the orders of the ALJ. If required to try the case without these disclosures, Respondent would be exposed to the kind of trial by ambush that our rules reject, as have the rules long-adopted in the federal and state courts. Complainant's complaint exposes Respondent to damage assessments, including punitive damages. *See* 49 U.S.C. § 31105(b)(3). Respondent cannot be placed in jeopardy of this kind without appropriate procedural safeguards necessary for due process.

Public policy favoring disposition on the merits. This is the concern that led to the repeated efforts I made to have Complainant prepare for a hearing, make necessary disclosures to Respondent, and keep me informed so that I could fashion a meaningful, expeditious, and efficient hearing. Because Complainant is self-represented, I took the time and effort to educate him on the required procedures and on the applicable legal principles. I told him in detail what exactly was required of him and when. I urged him to get legal representation. From the initial disclosures onward, Complainant never complied with any of these requirements. The order to show cause was his opportunity to explain his many failings. He never filed an answer to that order.

When a complainant—self-represented or not—obstructs the process toward a disposition on the merits despite being told what is required, being given more than ample time to comply, and being given warnings about not complying, and when he fails to offer any explanation for his failures, the policy favoring disposition on the merits has been addressed.

Lesser sanctions. Under these circumstances, no sanction less than a dismissal is adequate. Given Complainant's failure make or supplement his initial disclosures, failure to provide a witness list, and failure to provide an exhibit list, an evidentiary preclusion would have to exclude all evidence he would offer. As Complainant has the burden going forward, an exclusion of his evidence would result in a denial of his claim.

Unlike many civil cases, this matter has only one cause of action. Were I to strike the complaint or otherwise decide against Complainant even one element of his single claim that, too would

result in a decision on the merits adverse to Complainant; there is no available denial of the claim "in part."

Conclusion. As the Administrative Review Board has held:

> The Board is cognizant of Complainant's pro se status in this matter, but notes that "a pro se litigant 'cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance.'" *Pik v. Credit Suisse AG*, ARB No. 11 - 034, ALJ No. 2011-SOX-6, slip op. at 4-5 (ARB May 31, 2012) (quoting *Ray's Lawn & Cleaning Svcs*., ARB No. 06-112, slip op. at 7-8 (ARB Aug. 29, 2008)). "Thus, although an ALJ has some duty to assist pro se litigants, a judge also has a duty of impartiality and must refrain from becoming an advocate for the pro se litigant. In the end, pro se litigants have the same burdens of proving the necessary elements of their cases as litigants represented by counsel." *Id*. at 5 (internal citations omitted).

Witbeck v. CH2M Hill, et al., ARB No. 15-077, OALJ Nos. 2013-SOX-00001, 2014-SOX-00040, slip op. at 6 (Mar. 5, 2017).

Given all of Complainant's failures to prosecute his case and to comply with the regulations and the ALJ's orders, I expressly warned Complainant in the order to show cause that a failure to answer would likely result in the dismissal of this case. Dismissal is the only appropriate sanction under these circumstances. *See* 29 C.F.R. § 18.12(b)(7) (an ALJ has authority to "[t]erminate proceedings through dismissal or remand when not inconsistent with statute, regulation, or executive order.").

Order

The matter is DISMISSED with prejudice. Complainant's claim is DENIED. He shall taking nothing by reason of his complaint.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative

Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(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, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy

only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).