U.S. Department of Labor

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

In the Matter of:

BRIAN L. HOLTZCLAW,

COMPLAINANT,

v.

COMMONWEALTH OF KENTUCKY NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET,

RESPONDENT.

ARB CASE NO. 96-090

ALJ CASE NO. 95-CAA-7

DATE: February 13, 1997

BEFORE: THE ADMINISTRATIVE BOARD

FINAL DECISION AND ORDER

The Administrative Law Judge submitted a Recommended Decision and Order (R. D. & O.) in this case arising under the employee protection provisions of the Clean Air Act, 42 U.S.C. § 7622 (1988), the Safe Drinking Water Act, 42 U.S.C. § 300j-9 (1988), the Solid Waste Disposal Act, 42 U.S.C. § 6971 (1988), the Water Pollution Control Act, 33 U.S.C. § 1367 (1988), the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610 (1988), and the Toxic Substances Control Act, 15 U.S.C. § 2622 (1988) (the Acts), finding that Complainant Brian L. Holtzclaw failed to prove that Respondent Commonwealth of Kentucky Natural Resources and Environmental Cabinet (Kentucky) discriminated against him in violation of the Acts and recommending that the complaint be dismissed. R. D. & O. at 23. For the reasons discussed below, we adopt the ALJ's recommendation and the complaint in this case will be denied. 29 C.F.R. § 24.6(b)(4) (1996).

Background

Complainant, an employee of the United States Environmental Protection Agency (EPA), worked for Kentucky from December 1992 to December 1994 under an Intergovernmental Personnel Act agreement (IPA), an arrangement under which federal and state employees can be "loaned" between agencies. R. D. & O. at 4. Kentucky assigned Complainant to work as the

coordinator of two "geographic initiatives," partnerships among federal, state and local agencies and private industry and local citizens, for the study of the impact of industry on the environment and public health in two geographic areas of the state. *Id.* at 3.

In the course of his coordination duties, Complainant sought the assistance of a particular scientist at EPA, Dr. John Stockwell, but believed that EPA unreasonably thwarted those attempts. Complainant prepared a detailed summary of the events and the comments, statements, thoughts and beliefs of those involved in this incident, which he entitled "The Stockwell Brief." *See* R. D. & O. at 5-11. Complainant asserts that his preparation of this document and his providing a copy of it to Dr. Stockwell, with the understanding that it would be provided to the Inspector General of EPA, constituted one protected activity that motivated certain adverse actions against him by Kentucky.

Another alleged protected activity involved a letter Complainant wrote to EPA requesting that he become "formally involved" in EPA's enforcement of the Emergency Planning and Community Right to Know Act (the EPCRA letter), C-45 (April 21, 1994 letter from Complainant to EPA Region IV, Atlanta) against Ashland Oil Company for environmental violations in Ohio and West Virginia. Complainant also claims that he was retaliated against because he threatened to challenge certain restrictions placed on his duties (C-51, May 13, 1994 memo from Complainant's supervisor Russell Barnett to Complainant) after the Stockwell brief and EPCRA letter incidents, C-55 (May 28, 1994 memorandum from Holtzclaw to Barnett)[1/]; because he contacted a public interest law firm, the Government Accountability Project; and because he wrote a memorandum to his supervisor requesting specific "orders" with respect to his attempts to obtain the services of Dr. Stockwell. C-39 (February 17, 1994 memorandum from Holtzclaw to Barnett).

Complainant claims that Kentucky took adverse action against him in retaliation for these protected activities by failing in November 1994 to renew his IPA agreement for an additional two years,[2/] by sending him the May 1994 memorandum highly critical of his performance and placing restrictions on his work activities, by denying his request in July 1994 for additional computer equipment, and by refusing in July 1994 to permit him to hire a summer employee. We find that, with the exception of the notice of failure to renew Complainant's IPA, his complaint about the other alleged incidents of retaliation is untimely.

Each of the environmental whistleblower Acts invoked in this case requires that a complaint of unlawful retaliation be filed within 30 days of the date of the alleged violation. *See* 42 U.S.C. § 7622(b)(1) (Clean Air Act); 42 U.S.C. § 300j-9(i)(2)(A) (Safe Drinking Water Act); 42 U.S.C. § 6971(b) (Solid Waste Disposal Act); 33 U.S.C. § 1367(b) (Water Pollution Control

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[1/] Complainant's brief also refers to a May 29, 1994 memorandum, but there is no document in the record with that date.

[2/] Complainant's IPA expired in December 1994, but he was notified on November 18, 1994 by EPA that it would not be renewed.

Act); 42 U.S.C. § 9610(b) (the Comprehensive Environmental Response, Compensation and Liability Act); 15 U.S.C. § 2622(b) (Toxic Substances Control Act). Each of the alleged acts of retaliation, except the notice of failure to renew the IPA, occurred more than 30 days before Complainant filed his complaint on November 30, 1994.

We also find that none of these acts can be considered part of a "continuing violation" that would make them actionable if one of them fell within the statutory period. The Secretary adopted the standards in *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983), for assessing whether acts are sufficiently related to constitute a course of continuing discriminatory conduct. The court held there that the following questions should be answered to determine if a continuing violation has occurred:

> Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? * * * * Are the alleged acts recurring (*e.g.*, a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? * * * * Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

For example, the Secretary has held that a conditional denial of a promotion with the possibility after further training of award of the promotion did not have the degree of permanence that should have triggered the filing of a complaint. *Thomas v. Arizona Public Service Co.*, Case No. 89-ERA-19, Sec'y. Dec. Sep. 17, 1993, slip p. at 12-13. The Secretary also held in *Thomas v. Arizona Public Service* that a series of acts, denial of a promotion, reassignment, and suspension of a certification, which involved a common subject matter, lack of required training, met the test in *Berry* of involving the same type of discrimination. *Thomas v. Arizona Public Service*, slip op. at 13. In the same case, however, the Secretary found another act of alleged discrimination untimely because it did not share the common thread of lack of a specific type of training. *Id.* at 13-14. In addition, in *Varnadore v. Oak Ridge Nat'l. Lab.*, Case Nos. 92-CAA-2, 5 and 93-CAA-1, Sec'y. Dec. Jan. 26, 1996, slip op. at 61-62, the Secretary held that a complaint of a hostile work environment was untimely under the continuing violation theory because no allegedly harassing incidents occurred within the 30 day filing period.

Each of the alleged acts creating a hostile working environment in this case did not involve the same type of discrimination and was an isolated employment decision lacking a common subject matter. In addition, even if the first three acts of reprisal were viewed as a continuing course of harassment, for reasons discussed below the failure to renew Complainant's IPA cannot reasonably be characterized as harassment. No alleged acts of harassment in this case occurred during November 1994, the 30 day period prior to filing of the complaint. Each of the acts allegedly creating a hostile work environment (the May 13 letter, the denial of a summer employee, and the denial of a new computer) occurred in the spring and summer of 1994. Therefore, Holtzclaw's complaint is untimely as to all alleged retaliatory acts except the failure to renew the IPA.

In order to present a *prima facie* case of retaliation under the Acts, complainants must show that they engaged in protected activity, that the respondent subjected them to adverse action, and that the respondent was aware of the protected activity when it took the adverse action. Complainants must also present sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action. *Gallian v. City of Sullivan*, Case No. 93-WPC-14, Sec'y. Dec. Mar. 28, 1994, slip op. at 2. To show that an adverse action occurred in cases of failure to hire or failure to rehire, complainants must show that they were qualified for the position, that they applied for it or that the employer was otherwise obligated to consider them, and that the employer hired another individual not protected by the Acts or the position remained vacant after the application was rejected. *Loyd v. Phillips Bros.,* 25 F.3d 518, 523 (7th Cir. 1994) (plaintiff must show both that she was qualified and that she applied for the position); *Konowitz v. Schnadig Corp.*, 965 F.2d 230, 234 (7th Cir. 1992) (demoted employee failed to raise inference of discrimination in failure to promote or consider him for another position because he never applied for any jobs or informed company of his interest); *Wanger v. G.A. Gray Co.*, 872 F.2d 142, 145 (6th Cir. 1989) (plaintiff failed to show adverse action where he failed to show he applied for position); *Box v. A & P Tea Co.*, 772 F.2d 1372, 1377 (7th Cir. 1985), *cert. denied,* 478 U.S. 1010 (1986) (plaintiff failed to show anything other than general interest in another job).

Complainant in this case has not asserted, nor has he directed our attention to any part of the record that shows he ever applied for or requested renewal of his IPA with Kentucky. The IPA Assignment Agreement provides that it is for the period from December 21, 1992 to December 21, 1994, C-3, Section 20, but is silent on renewal. Holtzclaw testified that at a meeting with Barnett, Complainant's supervisor at Kentucky, on November 10, 1994, Barnett made a statement about a transition from Holtzclaw to another project manager and that was the first time Holtzclaw had been told his IPA would not be extended. T. 758. But Holtzclaw did not state that he had requested an extension. Holtzclaw also testified that the first time he learned from EPA that his IPA would not be extended was on November 18, 1994 at a meeting at the Atlanta Regional Office of EPA. T. 764. Holtzclaw did not state that he ever made a request to EPA for an extension. In contrast, Barnett testified that he himself first began work for Kentucky as an EPA employee under an IPA agreement, T. 59, and that his IPA was extended three times and each time he made a formal request for an extension. T. 60-61. We hold that Complainant has failed to carry his burden of proof on the final alleged act of discrimination, failure to renew his IPA at Kentucky, because he has not proven an essential element of the claim, that he requested or applied for renewal or that Kentucky was otherwise obligated to consider him for renewal.

Assuming Kentucky did have an obligation to consider Complainant for renewal of his IPA, and assuming further that Complainant carried his burden of showing that the refusal to renew was motivated in part by his protected activities, we find that Kentucky has shown that it would not have renewed the IPA even if Complainant had not engaged in any protected activity. *Passaic Valley Sewerage Com'rs v. Department of Labor,* 992 F.2d 474, 481 (3rd Cir. 1993). We agree with the ALJ that Kentucky had legitimate reasons for failing to renew the IPA and that Complainant has not shown these reasons were pretextual. These reasons include

sending a copy of the "Stockwell Brief" to Dr. Stockwell with the knowledge that it would be given to the EPA Inspector General because it wrongfully gives the clear impression that it represents the official position of Kentucky; spending an inordinate amount of time involving himself in an internal EPA personnel matter, the Dr. Stockwell controversy; sending the EPCRA letter which wrongfully gave the impression that Kentucky sought "formal involvement" in a matter on which Kentucky had taken no position; preparing and making available to a citizens' advisory committee and the press a report that gave the impression, contrary to fact, that the State of West Virginia and an interstate steering committee had decided to request EPA to undertake various studies required by the National Environmental Policy Act in connection with proposed construction of a chemical plant in West Virginia; and Kentucky's decision to hire a full-time state employee to carry out the duties, among other things, of the geographic initiative coordinator, as part of a larger reorganization of the Cabinet for Natural Resources and Environmental Protection. We agree with the ALJ that, even if Complainant was engaged in protected activity in connection with some or all of these actions,[3/] Kentucky could legitimately consider the manner he chose to raise his health and safety complaints. *See* R. D. & O. at 15 and cases discussed therein; *see also Lockert v. Pullman Power Co.*, 867 F.2d 513, 518 (9th Cir. 1989) (violating reasonable employer rule to engage in otherwise protected activity not protected).

Accordingly, the complaint in this case is **DENIED**.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[3/] We note that we have serious doubts whether Complainant's actions in connection with his attempts to obtain the assistance of Dr. Stockwell, including the Stockwell Brief, are protected activities. Absent a showing that Dr. Stockwell possessed some truly unique abilities or insights without which the geographic initiatives would have been significantly impaired, fighting a personnel battle over the assignment of a specific employee to a particular project is probably too remote from protection of the environment to be protected under the Acts. *See, e.g., Crosby v. Hughes Aircraft Co.,* Case No. 85-TSC-2, Sec'y. Dec. Aug. 17, 1993, slip op. at 28-30 (complaints not based on reasonable perception of violation or potential violation of environmental acts not protected). In view of our disposition of this case on other grounds, it is not necessary for us to decide this question.