U.S. Department of Labor

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

In the Matter of:

DAVID MARSHALL HIGH,

COMPLAINANT,

v.

LOCKHEED MARTIN ENERGY SYSTEMS, INC., LOCKHEED MARTIN CORPORATION, OAK RIDGE OPERATIONS OFFICE, and U.S. DEPARTMENT OF ENERGY,

RESPONDENTS.

ARB CASE NO. 97-109

ALJ CASE NO. 97-CAA-3

DATE: November 13, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection ("whistleblower") provisions of several federal statutes.[1/] Complainant, David Marshall High (High), alleged that Respondents, Lockheed Martin Energy Systems, Inc. (Energy Systems), Lockheed Martin Corporation (Lockheed Martin), Oak Ridge Operations Office (ORO), and the United States Department of Energy (DOE), violated the whistleblower provisions when Energy Systems made a settlement offer to High concerning an earlier whistleblower complaint. In a Recommended Order of Dismissal (R. O. D.), the Administrative Law Judge (ALJ) found that the complaint did not comply with the applicable pleading requirements and did not state a claim upon which relief may be granted. We dismiss the complaint on the second ground, for failure to state a claim under the whistleblower provisions.

[1/] Mr. High complained under the whistleblower provisions of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. §5851; the Clean Air Act, 42 U.S.C. §7622, the Toxic Substances Control Act, 15 U.S.C. §2622, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9610, the Solid Waste Disposal Act, 42 U.S.C. §6971 (SWDA), and the Safe Drinking Water Act, 42 U.S.C. §300j-9(i) (all 1988). High also cited the Resource Conservation and Recovery Act (RCRA) in his complaint, but that is simply the formal name for the SWDA.

PROCEDURAL HISTORY

High I

High is employed by LMES and serves as the physical fitness coordinator for all of the DOE facilities at Oak Ridge, Tennessee that are managed by LMES. In December 1995, High filed a whistleblower complaint with the Department of Labor alleging that he engaged in protected activity by identifying fraudulent or wasteful practices within the physical fitness department and as a consequence was the victim of an adverse employment action. While the complaint was pending investigation by the Department's Wage and Hour Division, High made a settlement offer including, among other provisions, that LMES pay $5000 in attorney's fees. LMES counteroffered that in exchange for dismissal of the complaint, it would reimburse High's attorney for incurred fees and expenses up to $5000. High declined the counteroffer. The Wage and Hour Administrator made a finding that High had not engaged in any activity protected under the whistleblower provisions and High sought a hearing before an ALJ, where the complaint is pending in Case No. 96-CAA-8.

This Complaint (High II)

On September 26, 1996, High filed this complaint (No. 97-CAA-3), which states:

Re: Class Action re: Improper "offers" of Coercive Fees-Only Settlements

[List of statutes under which complaint is brought omitted.]

> This complaint is on behalf of Mr. David M. High, et al. We request that DOL issue a class action certification of the issue. DOE lawyers have given permission and encouragement to LMES to offer unethical fees-only settlements to Oak Ridge whistleblowers, which "settlements" unlawfully seek to bribe plaintiff lawyers, undermine client confidence, and elicit whistleblowers to give up their rights to compensatory damages under whistleblower statutes, in violation of the ERA and the environmental whistleblower laws. LMES' discriminatory fees-only offer was made in this case and when Mr. High refused to accept it, DOL refused to investigate. DOE, LMES and DOL all showed contempt for Mr. High's basic human rights. See, e.g., Connecticut Light & Power Co. v. Secretary of Labor, No. 95-4094 (2nd Cir. May 31, 1996) (available on WWW and at 1996 U.S. App. LEXIS 12583), re: hardball employer anti-whistleblower coercion and litigation tactics (e.g., finding a whistleblower violation tolling statute of limitations in the employer's proposing a settlement agreement with an illegal "gag order" designed to violate rights). Mr. High requests an independent investigation of this practice and certification of a class action by DOL.

The Assistant District Director of the Wage and Hour Division issued a finding that the Department could not undertake a class action investigation or certification. October 30, 1996 letter from Carol Merchant to Edward A. Slavin, Jr. The Assistant Director also stated that "we have already issued a decision that Mr. High had not engaged in activities protected under the statutes so there is no discriminatory action against him to investigate." *Id.* Accordingly, the Wage and Hour Division did not conduct an investigation into the *High II* complaint.

High requested a hearing before an ALJ and simultaneously submitted to each of the Respondents interrogatories and a request for production of documents. The Chief ALJ ordered the parties to show cause why the hearing request in *High II* should not be consolidated with the request in *High I*. The Lockheed Martin respondents indicated that consolidation was premature and asked that the *High II* complaint be assigned to the same ALJ. The Chief ALJ assigned *High II* to the ALJ who was handling *High I*. Jan. 7, 1997 Order.

The Lockheed Martin Respondents moved to dismiss Lockheed Martin Corporation as a respondent, to dismiss the entire complaint for failure to state a cause of action, and in the alternative, to deny certification of a class action. DOE asked the ALJ to dismiss it as a respondent "because DOE is not Complainant's employer and the amount of a settlement offer is not a proper basis for filing a whistleblower complaint. . . ." Jan. 24, 1997 letter from Robert James to ALJ. The ALJ ordered High to show cause why the complaint should not be dismissed for the reasons stated in the two motions "and for failure to comply with 29 C.F.R. Part 24." Mar. 11, 1997 Order.

High submitted a response, to which DOE in turn submitted a response. High moved to strike DOE's response as contrary to the applicable rules. The Lockheed Martin Respondents sought leave to file a reply to High's response and tendered a reply.

The ALJ accepted both responses, found that the complaint does not comply with the basic pleading requirements of 29 C.F.R. §24.3, and that "[t]he monetary amount of a settlement offer is not a proper basis for the filing of a complaint under any of the listed whistleblower statutes." R. O. D. at 2. Accordingly, the ALJ recommended dismissing the complaint.

DISCUSSION

One basis for the ALJ's dismissal was that the complaint failed to state a cause of action under the whistleblower statutes. None of the whistleblower provisions specifically provides for dismissal of a complaint for failure to state a claim upon which relief may be granted. Consequently, we look to the Federal Rules, specifically to Fed. R. Civ. P. 12(b)(6). *Tyndall v. U.S. Environmental Protection Agency*, Case Nos. 93-CAA-6 and 95-CAA-5, ARB Dec. and Rem. Ord., June 15, 1996, slip op. at 3. *See* 18 C.F.R. §18.1(a) (1997) ("The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by [the rules of practice for proceedings before ALJs], or by any statute, executive order or regulation.").

In considering dismissal for failure to state a claim, "all reasonable inferences are made in favor of the non-moving party." *Estelle v. Gamble,* 429 U.S. 97 (1976); *accord, Tyndall*, slip op. at 3; *Studer v. Flowers Baking Co. of Tennessee, Inc.*, Case No. 93-CAA-00011, Sec. Dec. and Remand Ord., June 19, 1995, slip op. at 2. We "must accept all factual allegations as true, *Collins v. Nable*, 892 F.2d 489, 493 (6th Cir. 1989)," but "need not accept legal conclusions or unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). "The claim should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Windsor v. The Tennessean,* 719 F.2d 155, 158 (6th Cir. 1983)*; accord, Helmstetter v. Pacific Gas & Elec. Co.*, Case No. 91-TSC-1, Sec. Dec. and Rem. Ord., Jan. 13, 1993, slip op. at 4.

Assuming that the factual allegations of High's complaint are true, DOE lawyers encouraged and gave permission to lawyers for Energy Systems to offer to High and other, unnamed whistleblowers, a settlement under which the complainants' attorneys would receive payment of legal fees and the whistleblowers themselves would not receive any other relief available under the whistleblower provisions.

The remainder of the statements in High's complaint are legal conclusions: that offering such a settlement is "unethical," constitutes a "bribe of plaintiff lawyers," "undermine[s] client confidence," shows "contempt for . . . basic human rights," and "elicit[s] whistleblowers to give up their rights to compensatory damages under whistleblower statutes, in violation of the ERA and the environmental whistleblower laws."

A complaint "must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434 (6th Cir. 1988), *quoting Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984). High's complaint does not contain either a direct or an inferential allegation concerning a material element of a whistleblower complaint: that the Respondents discriminated against High with respect to the compensation, terms, conditions, or privileges of employment. For example, under the Clean Air Act's whistleblower provision, a respondent violates that Act if it:

> discharge[s] *or otherwise discriminate[s] against any employee with respect to his compensation, terms, conditions, or privileges of employment* because the employee . . .
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under [the Clean Air Act] or a proceeding for the administration or enforcement of any requirement imposed under [the Clean Air Act] or under any applicable implementation plan,
>
> (2) testified or is about to testify in any such proceeding, or

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding to carry out the purposes of [the Clean Air Act].

42 U.S.C. §7622(a) (emphasis added). The other whistleblower provisions are substantially similar, although two contain the word "fire" in lieu of "discharge." *See* 42 U.S.C. §9610(a) (CERCLA); 42 U.S.C. §6971(a) (SWDA).

On one occasion, in a case that must be construed narrowly, the Secretary found an ERA violation in specific "gag" provisions of a settlement offer. In *Delcore v. W.J. Barney Corp.*, et al., Case No. 89-ERA-38, Sec. Final Dec. and Ord., Apr. 19, 1995, *aff'd sub nom. Connecticut Light & Power Co. v. Reich*, 85 F.3d 89 (2d Cir. 1996), a respondent offered the complainant a monetary settlement of a court action in exchange for his agreement to restrict his participation in future regulatory and judicial proceedings. The Second Circuit framed the question: "whether proffering a settlement agreement, whereby an employer attempts to restrict an employee's ability to cooperate with administrative and judicial bodies, violates Section 210 of the ERA," 85 F.3d at 94, and found an ERA violation.[2/] As the court explained, *id.* at 95: "[a]lthough the act of inducing an employee to relinquish his rights as provided by the ERA through means of a settlement agreement is less obvious than a more direct action, such as termination, it is certainly aimed at the same objective: keeping an employee quiet."

There is no allegation that the settlement offer at issue here contained a gag provision aimed at keeping High quiet. Absent an allegation that a settlement term insisted upon by the Respondents would curtail High's rights under the whistleblower provisions such that the Respondents discriminated against him with respect to the compensation, terms, conditions, or privileges of his employment, High's complaint does not allege a material element of a whistleblower violation. Accordingly, dismissal for failure to state a claim is proper. In light of our finding that dismissal was correct on one ground, we make no finding on the additional ground on which the ALJ relied, that the complaint did not comply with the basic pleading requirements of 29 C.F.R. §24.3.[3/]

[2/] After Delcore filed his complaint, Section 210 was amended in ways not material to the case and renumbered as Section 211. Comprehensive National Environmental Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992).

[3/] The regulation provides that "No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation." 29 C.F.R. §24.3(c).

The complaint is **DISMISSED** with prejudice.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member