U.S. Department of Labor

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

In The Matter of:

PAULA ROBERTS,

COMPLAINANT,

v.

RIVAS ENVIRONMENTAL CONSULTANTS, INC.,

RESPONDENT.

ARB CASE NO. 97-026

ALJ CASE NO. 96-CER-00001

DATE: September 17, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER OF DISMISSAL

The Administrative Law Judge (ALJ) submitted a Recommended Decision and Order (R. D. and O.) in this case under the employee protection provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9610 (1994), recommending that the complaint be dismissed. R. D. and O. at 27-28. The ALJ held that the Complainant, Paula Roberts (Roberts), had filed a timely administrative complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA), *id.* at 24-25, but had not demonstrated by a preponderance of the evidence that her alleged protected activities expressed environmental concerns subject to CERCLA protection because they involved employee occupational safety and health matters, *id.* at 25-26.[1/] The ALJ also ruled

---

[1/] The ALJ found as follows:

> In this case, the Court notes that Complainant failed to prove that her complaints were other than general safety concerns. The only mention of environmental concerns occurred with her alleged conversation with Mr. Rivas which he denied and her conversation with Ms. Rivas. Complainant also alleged she spoke to Mr. McNamara about the danger with leakage from the drum crusher, but Mr. McNamara testified that he discussed with Complainant some of the initial complaints she voiced to Ms. Bradley. The complaints voiced to Ms. Bradley and Ms. Nardizzi did not contain complaints

(continued...)

that Roberts had not produced evidence that the Respondent, Rivas Environmental Consultants, Inc. (REC), was aware of any of her alleged protected activities, and, in fact, REC established that Roberts' termination was predicated on excessive absenteeism. *Id.* at 27.

Upon a full review of the record, we conclude that this case must be dismissed because Roberts did not file an administrative complaint cognizable under CERCLA. Such a complaint is necessary for a CERCLA matter to proceed through the agency investigatory process and administrative adjudication procedure contained in CERCLA and implementing regulations at 29 C.F.R. Part 24 (1995). Thus, we shall not rule on the merits of her case.[2/]

BACKGROUND

REC was awarded a Superfund contract by the Environmental Protection Agency (EPA) to perform drum cleaning and industrial and hazardous waste removal at the Odessa Drum Company site in Odessa, Texas, from January, 1995 through December, 1995. EPA provided an on-site coordinator, Greg Fife, to oversee the project, and a technical assistance team, Ecology and Environment, Inc., contracted to EPA, to assist in overseeing the work. T. 147-48, 435-36. Roberts was hired as a data technician on February 21, 1995. Her duties included answering the telephone, making copies and recording drum crushing activities in drum logs. T. 352. She assumed other clerical duties, such as obtaining various supplies, maintaining employee medical files and accident reports, printing twenty-four hour on-site certificates,

---

[1/](...continued)

> which were connected to the whistleblower provision invoked in this case. Accordingly, the Court finds that Complainant has not met her burden of [proving] protected activity under the statute.

Id. at 26. Although credibility determinations appear implicit in these brief findings, our review would have benefitted from more expansive findings of fact, including specific credibility determinations. Pages 2-22 of the R. D. and O. do not provide such findings because they merely summarize the testimony of the various witnesses.

[2/] Roberts' discharge is also the subject of her pending complaint to OSHA under the employee retaliation provision of the Occupational Safety and Health Act (OSHA statute), 29 U.S.C. §660(c) (1994). Under the OSHA statute, employee protection actions are brought by the Secretary of Labor in United States district court. *Kozar v. AT & T*, 923 F.Supp. 67, 69 and cases cited (D. N. J. 1996). Roberts testified: "The only thing else that I have to say is the reason why both cases are still open. I talked to Mr. Auslander [phonetic] from -- the solicitor from OSHA and I asked him -- before this one ever came to trial, I asked him if the other one would be over with so we wouldn't have to deal with this. And he said that he was waiting for the outcome of this trial before they pursued the other one any further, because if the outcome of this trial was what was needed, then they would cancel the other trial." T. 57 (bracket in original). Copies of this decision will be sent to OSHA attorneys in the national and Texas regional office of the Solicitor of Labor for their deliberations in deciding whether to proceed in Roberts' separate complaint under the OSHA statute.

scheduling safety and health meetings, and obtaining price quotations, as other REC employees left the project. T. 353-56.

On August 15, 1995, Roberts filed a written complaint with OSHA Area Director Patricia Bradley in Lubbock, Texas "to insure the safety of all on the job site." CX 1 at 1. On September 5-7, 1995, an OSHA investigator conducted an inspection at the site pursuant to Roberts' complaint, during which Roberts and other employees were interviewed. T. 369-74, 456-62. On December 4, 1995, Area Director Bradley informed Roberts that OSHA's investigation of her "complaint concerning safety and/or health hazards" found that REC was in compliance with respect to thirteen of her fifteen allegations. CX 3.[3/]

In early September, Greg Fife informed REC's owner and president Charles Rivas (Rivas) that the possibility of an imminent Government shutdown for lack of Congressional funding necessitated the completion of the project as quickly as possible. T. 451. Rivas informed Keith Wright, REC's site supervisor, that the work should be expedited and, accordingly, absences would not be tolerated. T. 284-85, 452. On September 5, Wright convened an employee meeting, during which Rivas explained the federal appropriations quandary and the resulting need to control absenteeism. T. 452-53. Although Roberts testified that she did not attend this general meeting, T. 382, Rivas testified that on that same day he had told Roberts and quality assistance manager Don White in the office trailer that "I was on a deadline and that I would not tolerate any absenteeism from any individuals." T. 456. Roberts did not recall receiving this warning. T. 414.

Rivas testified that on September 25, he decided to terminate Roberts because she had been absent several times already that month, was absent again for most of that day, and he had just reviewed her written request for additional leave for the coming month. T. 469-70. On September 27, Rivas informed Roberts that she was being terminated for excessive absenteeism. T. 378-79, 470-71.

DISCUSSION

Under CERCLA, there can be no adjudication on the merits if an alleged discriminatee has failed to submit a complaint alleging CERCLA employee protection violations to the Department of Labor for investigation within the prescribed time period. 42 U.S.C. §9610(b) (1994) and 29 C.F.R. §24.3(c) (1995). Roberts has not satisfied this jurisdictional requirement. Accordingly, we are precluded from further review of this matter. *OFCCP v. Cambridge Wire, Inc.*, Case No. 94-OFC-12, ARB Ord. Decl. Rev. for Lack of Jurisd., Nov.26, 1996, slip op. at 2-3; *OFCCP v. Yellow Freight System, Inc.*, Case No. 79-OFCCP-7, Spec. Asst. to Asst. Sec. Dec. and Ord. of Rem., Aug. 24, 1992, slip op. at 6-8.

[3/] OSHA issued citations to REC for failure to provide employees with potable water (proposed penalty $0.00) and decontamination showers (proposed penalty $875.00). CX 3; T. 411.

Roberts' complaint, CX 2, a September 27, 1995 OSHA memorandum from Investigator Rossana Nardizzi to Supervisory Investigator Gerald T. Foster summarizing Roberts' phone call to Nardizzi challenging Roberts' termination (faxed to Roberts for revision or amendment),[4/] does not refer to CERCLA or specify any CERCLA protected activities as the basis for her discharge. To the contrary, it asserts that her discharge was predicated on her initiation of an OSHA employee health and safety inspection at the site: "She thinks that she was terminated because OSHA showed up and she was suspected [of initiating the inspection by her complaint of OSHA violations]." CX 2 at 1. As we emphasized in a recent CERCLA decision:

> The distinction between complaints about violations of environmental requirements and complaints about violations of occupational safety and health requirements is not a frivolous one. Worker protection for whistleblowing activities related to occupational safety and health issues is governed by Section 11 of the Occupational and Safety and Health Act. . . . [T]he environmental whistleblower provisions are intended to apply to environmental, and not other types of concerns.

Tucker v. Morrison & Knudson, ARB Case No. 96-043, ALJ Case No. 94-CER-1, ARB Fin. Dec. and Ord., Feb. 28, 1997, slip op. at 5 (citations omitted); R. D. and O. at 25. Roberts' case must fail because her complaint does not allege that her termination was the result of engaging in activities protected under CERCLA,[5/] a condition precedent to litigation of her case on the merits.

The non-environmental nature of Roberts' concerns is also reflected in her supplementary letter to OSHA Supervisory Investigator Foster, received on December 4, 1995,[6/] which states, in full:

[4/] *See* R. D. and O. at 5, 25.

[5/] Similarly, the ALJ found that Roberts' September 27 complaint did not link her discharge to CERCLA protected activities ("The complaints voiced to Ms. Bradley [involving alleged OSHA employee health and safety violations] and Ms. Nardizzi [September 27 OSHA memorandum, CX 2] did not contain complaints which were connected to the whistleblower provision invoked in this case." R. D, and O. at 26). However, the ALJ nevertheless decided the case on the merits. *Id.* at 25-28.

[6/] This letter may have been requested by OSHA to perfect Roberts' September 27 complaint on the mistaken assumption that a written submission from Roberts herself, rather than an OSHA memorandum of her telephoned allegations, was required. *See* T. 51-55. It was submitted beyond the thirty-day CERCLA complaint limitations period. However, as the ALJ explained, under *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Dec. and Fin. Ord., Apr. 25, 1983, slip op. at 5-6, *aff'g* ALJ Dec. Den. Mot. to Dism., Jan. 29, 1982, slip op. at 4-5, Roberts' "oral statement to Ms. Nardizzi from OSHA and the subsequent preparation of an internal memorandum by Ms. Nardizzi . . . would satisfy the time limitation and the 'in writing' requirements [42 U.S.C. §9610(b), 29 C.F.R. §24.3]." R. D. and O. at 25.

> On September 27, 1995, Mr. Charlie Rivas, Jr. terminated my employment with Rivas Environmental Consultants, Inc. At the time of termination, the reason given was excessive absentes [sic] and that he needed someone in the office to answer the phone. I believe that this was a very convenient way of getting rid of me. My reasoning for this is justified as I have indicated to you in the initial interview with Ms. Nardizzi. I also feel that Mr. Rivas should be held accountable for his actions. *The safety and well being of the workers on the job site was my initial concern. If Mr. Rivas would have been in compliance, he wouldn't have had anything to worry about. It is my opinion, Mr. Rivas terminated me unjustly and for the sole reason that I turned him in to the proper officials.*

RX 1 at 1 (emphasis added). This letter repeats her September 27 charge that her termination was based on her expression of employee health and safety concerns to OSHA under the OSHA statute, which, as explained above, are not within the purview of CERCLA protection. Similarly, her prehearing statement further repeats these employee health and safety matters as the basis of her discharge: "Ms. Roberts was terminated in violation of CERCLA 110(a) in retaliation for her having reported unsafe jobsite practices to Ms. Pat Bradley on August 15, 1995, which resulted in an investigation September 5-7, 1995." *Id*. at 1.[7/]

[7/] It appears that Roberts and OSHA mistakenly treated her September 27 charges as a CERCLA complaint as well as an OSHA complaint simply because she worked at a CERCLA Superfund site. *See* T. 48-53, 56-60, 384; n.2. Roberts testified that OSHA "just told me that it was a whistle-blower's act -- a whistleblower case, and they would file it under either/or, whichever one -- actually she said whichever one would get you the most money, is what Ms. Nardizzi said." T. 59. *See Billings v. TVA*, Case No. 91-ERA-12, Sec. Fin. Dec. and Ord. of Dism., Jun. 26, 1996, slip op. at 13-14 (no whistleblower cause of action under Energy Reorganization Act, 42 U.S.C. §5851 (1988), in matter exclusively within purview of Federal Employees' Compensation Act, 5 U.S.C. §§8116(c), 8128(b) (1988), and previously denied thereunder). At the hearing, the ALJ reminded Roberts that her case required proof that CERCLA concerns were involved in her discharge. T. 393, 397, 403, 406, 408, 507.

ORDER

Since Roberts never submitted a complaint alleging that her discharge involved CERCLA protected activities, this case is **DISMISSED.**

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member