U.S. Department of Labor

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

In the Matter of:

LINDA ROBERTS,

COMPLAINANT,

v.

BATTELLE MEMORIAL INSTITUTE,
ROBERT W. SMITH, JR.; ROBERT E. LINCOLN;
KATHY OLSON; K.C. BROG; AND V.E. CASTLEBERRY,

RESPONDENTS.

ARB CASE NO. 00-015
(Formerly ARB 97-038)

ALJ CASE NO. 96-ERA-24

DATE: April 30, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Linda Roberts, *pro se*, *West Jefferson, Ohio*

For the Respondent:
Adele E. O'Conner, Esq., *Porter, Wright, Morris & Arthur, Columbus, Ohio*

FINAL DECISION AND ORDER

This matter is before this Board for the second time. We dismiss the complaint as untimely filed.

Complainant Linda Roberts was employed by Respondent Battelle Memorial Institute from September 1979 until her termination on July 18, 1994. On January 27, 1995, Roberts sent a letter to the Department of Energy in which she alleged that Battelle had retaliated against her for raising safety issues. The letter was forwarded to the Department of Labor, which treated it as a complaint of retaliation pursuant to the whistleblower provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C.A. §5851 (1995). The Department's Wage and Hour Division

determined that the complaint was not filed within the ERA's 180-day limitations period. 42 U.S.C.A. § 5851(b). Roberts requested a hearing before a departmental ALJ, who dismissed the complaint as untimely filed.

On review before the Administrative Review Board, Roberts asserted that on January 12, 1995 (which would have been within the limitations period), she filed a complaint with the Department of Labor's Office of Federal Contract Compliance Programs, which raised claims cognizable under the ERA. However, she did not produce a copy of that complaint.[1/] The Board dismissed Roberts' complaint on the ground that it was not filed within the limitations period. The Board stated that "[a]lthough it is possible that the complaint included statements that would constitute a cognizable claim under the ERA, since a copy of the complaint has not been produced for review, there is no basis from which the Board can conclude that it did. Therefore, we find that the January 12, 1995 letter did not constitute an ERA complaint." *Roberts v. Battelle Memorial Institute*, ARB No. 97-038, ALJ No. 96-ERA-24, slip op. at 4 (ARB June 4, 1997).

On review the United States Court of Appeals for the Sixth Circuit vacated and remanded the case to the ARB, ruling that the ARB's conclusion that the January 12, 1995 letter did not constitute a complaint under the ERA was not supported by substantial evidence since the letter was not before the Board.[2/] *Roberts v. United States Dep't of Labor*, 149 F.3d 1184 (Table), 1998 WL 381666, *2 (6th Cir. 1998). The Court ruled that the Board's

> characterization of the letter as not constituting a complaint under the Energy Reorganization Act is unsupported in the record. While the Board relied upon the fact that the Department of Labor forwarded the letter of complaint to the EEOC for processing as evidence that the complaint was brought under an Executive Order prohibiting discrimination on the basis of race, color, religion, sex, and national origin, this evidence is unsubstantial under the circumstances of this case. Petitioner denies that she filed the complaint pursuant to the Executive Order prohibiting discrimination on the basis of race, color, religion, sex, and national origin. Although petitioner may have been remiss in not filing the letter of record, it is not clear that plaintiff has a copy of her original letter. Clearly, the letter would be part of the record had the Department of Labor filed it as a complaint under the Energy Reorganization Act. In any event, we conclude that the only evidence of record that supports the Board's determination that the January 12, 1995, letter did not constitute a complaint under the Energy Reorganization Act is not substantial. Under these

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[1/] A detailed description of the procedural history of this case is set out in the ALJ's Recommended Decision and Order Dismissing Complaint (RD&O) at 1-6.

[2/] Roberts submitted a copy of the purported January 12 letter for the first time before the Court of Appeals, but the court granted the government's motion to strike the letter because it was not part of the record before the ARB.

> circumstances, we conclude that a remand is warranted so that the nature of the letter can be more precisely determined.

Id.

Thus, the case was remanded to the Board, which in turn remanded the case to the ALJ for further proceedings consistent with the Sixth Circuit's decision. In an attempt to determine the subject of Roberts' January 12, 1995 filing with the Department of Labor, the ALJ contacted both the OFCCP and the EEOC, each of which sent him copies of the material they had on file relating to Roberts' January 12 documents. The ALJ also held a hearing at which Roberts testified regarding the purported January 12 complaint, a copy of which she submitted for the record. The ALJ then issued the Recommended Decision and Order which is now before us for review.

The ALJ recited the history of this case in great detail. In particular, the ALJ recounted his repeated attempts during the first proceeding before him to obtain from Roberts anything that would indicate that she timely filed a complaint relating to the ERA with any governmental agency. RD&O at 2-3. The ALJ then analyzed the documents which Roberts produced for the first time in the Court of Appeals in order to determine whether they had, in fact, ever been mailed to the Department of Labor. The ALJ found that the materials which the OFCCP and the EEOC received in January 1995 were not the same as the documents produced by Roberts on appeal. Rather, the OFCCP/EEOC documents all related exclusively to a sex discrimination complaint and did not raise issues of retaliation under the ERA. RD&O at 6. The ALJ reasoned that "[t]he evidence indicating that no government office appeared to have received [the January 12, 1995] letter supports the proposition that the letter was never mailed." *Id.* at 7. In any event, the ALJ disbelieved Roberts' testimony that she had mailed the January 12, 1995 letter to the Department of Labor and recommended dismissal of the complaint. *Id*. at 8.

DISCUSSION

Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions. *See* 5 U.S.C.A. §557(b) (West 1996). We agree with the ALJ's findings of fact and concur with his conclusion that Roberts did not file a timely ERA complaint.

Under the regulations applicable to the filing of whistleblower complaints with the Department of Labor, a complaint "shall be deemed filed as of the date of mailing." 29 C.F.R. § 24.3(b) (2000).[3/] The ALJ based his conclusion that the January 12 letter of complaint was never mailed upon the fact that neither the OFCCP nor the EEOC possessed in their files any document bearing a resemblance to Roberts' purported complaint, and on his implicit determination that Roberts was not a credible witness. As the ALJ found, "it is difficult, if not impossible, to believe Complainant's allegation that the purported letter of January 12, 1995 was ever sent to any government agency." RD&O at 7. We agree with the ALJ's assessment of the record and conclude

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[3/] The ALJ apparently assumed, by analogy to the Federal Tort Claims Act, that "there must be evidence of actual receipt" of a complaint. RD&O at 7. On the contrary, pursuant to Rule 24.3(b) the relevant question is whether the complaint was actually **mailed**.

that Roberts' testimony is not credible, that she did not mail the January 12 letter, and therefore did not file a timely complaint under the ERA.

Accordingly, the complaint in this matter is **DISMISSED**.

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member