U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

EDWARD A. SLAVIN, JR. , **ARB CASE NO. 00-081**

COMPLAINANT, **ALJ CASE NO. 2000-ERA-26**

v. **DATE: February 27, 2003**

PACIFIC NORTHWEST NATIONAL LABORATORY, BATTELLE MEMORIAL INSTITUTE, U.S. DEPARTMENT OF ENERGY, UNIVERSITY OF ILLINOIS AT CHAMPAGNE-URBANA,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward A. Slavin, Jr., Esq., *pro se, St. Augustine, Florida*

For the Respondents:
David A. Maestas, Esq., *Battelle Memorial Institute and Pacific Northwest National Laboratory, Richland, Washington*

Lisa M. Huson, Esq., Asst. University Counsel, *University of Illinois at Urbana-Champaign, Urbana, Illinois*

Paul R. Davis, Esq., *U.S. Department of Energy, Richland, Washington*

FINAL DECISION AND ORDER OF DISMISSAL

This case is before us pursuant to the Administrative Law Judge's (ALJ's) Recommended Decision and Order Dismissing Complaint and Denying Motions (R. D. & O.), which was issued on September 8, 2000. We affirm the dismissal of the complaint.

PROCEDURAL AND FACTUAL BACKGROUND

I. The Complaint

On April 19, 2000, Complainant, Edward A. Slavin, Jr., filed his complaint with the Occupational Safety and Health Administration (OSHA) as "an attorney and employee representative who represents environmental and nuclear whistleblowers and other victims of discrimination by the Department of Energy and its contractors" pursuant to the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851 (2000), the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 (2000), the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971 (2000), the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i) (2000), the Clean Air Act (CAA), 42 U.S.C. § 7622 (2000), and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 (2000). Complaint at 1.

Complainant alleged that in retaliation for his postings regarding the Department of Energy's (DOE's) activities, Respondents Jim Dukelow, DOE's Pacific Northwest National Laboratory, and Northwest's operator, Battelle Memorial Institute, instituted a "moderation" against him on April 18, 2000, on its "listserv" chat room known as "RISKANAL" ("Risk Analysis"), whereby each of Complainant's future postings would be subjected to individual approval. Approval standards included whether the proposed message contained attacks on individuals and broad classes of people, the use of *ad hominem* arguments, and repetition of arguments and assertions previously posted. The "moderation," as quoted in the complaint, stated that "RISKANAL is not a list intended for political invective. Political issues are frequently important in risk management and are legitimate topics for RISKANAL, but the tone and content are important. When you are willing to adhere to the standards of comity that have been mostly characteristic of RISKANAL postings over the years, I will be happy to reconsider." *Id*. at 2-3. [1]

Similarly, Complainant alleged that Respondents Melissa Woo and the University of Illinois at Champagne-Urbana banned and blacklisted him from the "RADSAFE" ("Radiation Safety") listserv in retaliation for his environmental activity on April 8, 2000, after he defended sick workers and residents from abusive postings. *Id*. at 3.

Finally, Complainant alleged that DOE and its contractors combined and conspired to encourage Respondents' censorship and blacklisting after directing attacks against him. *Id*. at 4.

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[1] OSHA's May 26, 2000 dismissal of the complaint noted that during Complainant's conversation with the OSHA investigator, he stated that two days after he sent Pacific Northwest National Laboratory a copy of his complaint, they rescinded their "moderation" restriction on his input into the "RISKANAL" listserver. *Id*. at 2.

II. Proceedings Below

On May 26, 2000, OSHA dismissed the complaint because: (1) the SDWA, CAA, TSCA, and ERA did not extend coverage to an employee representative and (2) while the SWDA and CERCLA did provide protection to an employee representative, Complainant was not retained by any Pacific Northwest National Laboratory, Battelle or DOE employee as their authorized representative in a protected activity under SWDA and CERCLA against these organizations. *Id*. at 1.

On August 11 and 21, 2000, a telephonic hearing was held by an ALJ to gather evidence on the limited and bifurcated issue of Complainant's status or standing to file his complaint. On September 8, 2000, the ALJ issued his R. D. & O. dismissing the complaint.

After dismissing Respondents Woo and Dukelow because they were not "employers" under the relevent statutes, the ALJ held: (1) since Complainant was not an employee of any of the Respondents, he could not claim coverage as an employee under any of whistleblower statutes under which his complaint was brought; (2) because the SDWA, CAA, TSCA, and ERA did not cover employee representatives, he could not claim standing to bring his complaint in that capacity under those statutes; and (3) while the SWDA and CERCLA do cover employee representatives, Complainant was not an "authorized" employee representative under those statutes, because his listserv activity was not undertaken on behalf of any employee of any named Respondent. R. D. & O. at 6-8. The ALJ also denied Complainant's motion for remand to OSHA for further investigation and motions to preserve evidence and for full discovery/disclosure. *Id*. at 8.

ISSUES PRESENTED

Whether Complainant had standing to file his complaint as a protected individual under the environmental whistleblower statutes.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to decide appeals from recommended decisions under the statutes at issue. 29 C.F.R. § 24.8 (2002); Sec. Ord. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Under the Administrative Procedure Act, the Board has plenary power to review an ALJ's factual and legal conclusions. *See* 5 U.S.C. § 557(b) (2000). Accordingly, we are not bound by the findings and conclusions of the ALJ, but retain the freedom to review factual and legal determinations *de novo*. *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 5 (ARB Nov. 13, 2002); *Duncan v. Sacramento Metropolitan Air Quality Management District*, ARB No. 99-011, ALJ No. 97-CAA-12, slip op. at 2 (ARB Sept. 19, 2001); *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 99-WPC-3, slip op. at 4 (ARB Aug. 28, 2001).

DISCUSSION

We affirm the ALJ's dismissal of the complaint because of Complainant's lack of whistleblower protection either as an employee or as an authorized employee representative. We also agree with the ALJ's denial of Complainant's motions for the reasons stated. R. D. & O. at 6-8 (incorporating July 28, 2000 ALJ order denying remand and scheduling hearing) (copies attached).

However, we offer further clarification of Complainant's lack of standing to bring this action as an authorized employee representative. *See Bourland v. Burns International Security Services*, ARB No. 99-124, ALJ No. 98-ERA-32, slip op. at 5 (ARB April 30, 2002) (affirming ALJ's ruling and providing further clarification of legal issue). We agree with the ALJ that the SWDA at 42 U.S.C. § 6971(a)[2] and CERCLA at 42 U.S.C. § 9610[3] specifically protect "any authorized representative of employees." R. D. & O. at 6.

The ALJ's interpretation of the term "authorized representative of employees" under the SWDA and CERCLA was based on his analysis of the "plain meaning" of the words. R. D. &

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[2] The SWDA provides:

> No person shall fire, or in any way discriminate against, or cause to be fired or discriminated against, any employee *or any authorized representative of employees* by reason of the fact that such employee *or representative* has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

42 U.S.C. § 6971(a) (emphasis added).

[3] The CERCLA provides:

> No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee *or any authorized representative of employees* by reason of the fact that such employee *or representative* has provided information to a State or the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

42 U.S.C. § 9610(a) (emphasis added).

O. at 7. However, the term was given further clarification in the Board's then recent decision in *Anderson v. Metro Wastewater Reclamation District*, ARB No. 98-087, ALJ No. 97-SDW-7 (ARB Mar. 30, 2000). [4]

After ruling that its analysis of the term "authorized employee representative" should extend beyond plain meaning to consider legislative history, the statute's structure and the canons of statutory construction, the Board held that

> without deciding the exact breadth appropriately accorded the phrase "authorized representative," we do conclude that it encompasses any person *requested by any employee or group of employees to speak or act for the employee or group of employees* in matters within the coverage of the environmental whistleblower statutes which prohibit retaliation against "authorized representatives."

Anderson at 7-8 (emphasis added) (footnote omitted).

Again, while it is not necessary to describe the precise parameters of the term, Complainant must prove that his alleged protected activity, *i.e*. his use of listservs, was in furtherance of a specific client-statutory employee's alleged protected activity, rather than in furtherance of Complainant's own personal concerns as a member of the public, albeit an attorney who has represented employees under the whistleblower statutes. As the ALJ correctly held, Complainant failed to prove that his use of the listservs was undertaken on behalf of a specific client or clients, rather than for his own benefit.

> [T]he instant record does not establish that the Complainant was "authorized" by any employee of any named Respondent to participate in "listerserv" activity . . . . The record does not establish how, if at all, the "listserv" activities may have inured to the benefit of any employee represented by Complainant. Furthermore, he admits that he did not file the instant complaint on behalf of any employee for whom he acts as a representative. Instead, Complainant relies upon his present and previous representations of employees as a basis for his standing to file. I conclude from the foregoing that Complainant has failed to provide evidentiary support for his assertion that he was an authorized representative while engaged in participation of "listserv" activities.

R. D. & O. at 7 (footnote omitted). *See* T. 6-8, 9, 11, 12-13, 16-17, 19, 22, 24. (Complainant's testimony); R. D. & O. at 4-5.

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[4] The ALJ cited the February 19, 1998 ALJ decision in *Anderson*. R. D. & O. at 2, 7.

Finally, we note that dismissal of the complaint is consistent with the Department of Labor's procedural regulations at 29 C.F.R. Part 24 (2002) for the handling of complaints under the whistleblowing statutes at issue. With regard to persons who may file a complaint, 29 C.F.R. § 24.3(a) provides:

> An employee who believes that he or she has been discriminated against by an employer in violation of any of the statutes listed in § 24.1(a) may file, *or have another person file on his or her behalf*, a complaint alleging such discrimination.

(Emphasis added). Although this regulation does not specifically address complaints filed by authorized employee representatives with regard to actions taken against them, the focus of § 24.3(a) indicates that the challenged actions must relate to representation of specific employees. Complainant has not established such a nexus.

In light of our disposition of this case, it is unnecessary to decide whether authorized employee representatives are protected under the SDWA, CAA, TSCA and ERA, and we decline to do so.

The complaint is **DISMISSED.**

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge