U.S. Department of Labor

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

In the Matter of:

LOUEM M. BOSCHUK, **ARB CASE NO. 97-020**

COMPLAINANT, **ALJ CASE NO. 96-ERA-16**

v. **DATE: September 23, 1997**

J & L TESTING, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Before us for review is the Recommended Decision and Order (R. D. and O.) issued on November 27, 1996, by the Administrative Law Judge (ALJ) in this case arising under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1988 and Supp. IV 1992). Complainant Louem M. Boschuk (Boschuk) alleges that Respondent J & L Testing, Inc. (J & L) violated the ERA by terminating his employment for engaging in protected activity. The ALJ held that J & L violated the ERA and that Boschuk is therefore entitled to reinstatement and back pay.

The record in this case has been thoroughly reviewed, and we find that it fully supports the ALJ's findings of fact and conclusions of law.[1/] *Remusat v. Bartlett Nuclear, Inc.*, Case No. 94-ERA-36, Sec. Fin. Dec. and Ord., Feb. 26, 1996, slip op. at 2; *Stockdill v. Catalytic Industrial*

[1/] The ALJ's analysis discusses at length Boschuk's establishment of a *prima facie* case. R. D. and O. at 5-7. Since this case was fully tried on the merits, the ALJ's task was to weigh all the evidence and testimony and decide whether the Boschuk had proven by a preponderance of the evidence that J & L intentionally discriminated against him because of his protected activity. Once J & L presented its rebuttal, the answer to the question whether the Boschuk had presented a *prima facie* case was no longer particularly useful. *James v. Ketchikan Pulp Co.*, Case No. 94-WPC-4, Sec. Fin. Dec. and Ord., Mar. 15, 1996, slip op. at 3; *Cook v. Kidimula International, Inc.*, Case No. 95-STA-44, Sec. Fin. Dec. and Ord. of Dism., Mar. 12, 1996, slip op. at 2, n.3; *Creekmore v. ABB Power Systems Energy Services, Inc.*, Case. No. 93-ERA-24, Dep. Sec. Dec. and Rem. Ord., Feb. 14, 1996, slip op. at 7-8.

Maintenance Co., Inc., Case No. 90-ERA-43, Sec. Fin. Dec. and Ord., Jan. 24, 1996, slip op. at 2; *Miller v. Thermalkem, Inc.*, Case No. 94-SWD-1, Sec. Fin. Dec. and Ord., Nov. 9, 1995, slip op. at 1; *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Fin. Dec. and Ord., July 25, 1995, slip op. at 1-2; *Daugherty v. General Physics Corp.*, Apr. 19, 1995, slip op. at 2.

In its Brief in Opposition to the Recommended Decision and Order at page 5, J & L raises for the first time the argument that Boschuk is not protected by the ERA because he is the natural son of Lourdes M. Boschuk, the president and sole owner of J & L. J & L argues that the word "employee" is not defined in the ERA and the Board must therefore apply the definition contained in the National Labor Relations Act (NLRA), which specifies that "the term employee . . . shall not include . . . any individual employed by his parent or spouse." 29 U.S.C. §152(3). We do not agree. Although the Board has looked to case law interpreting the NLRA for guidance on a number of issues, we are not bound to apply specific legislative exemptions contained in the NLRA to the ERA. We believe that the test set forth in *Community for Creative Non-Violence v. Reid,* 490 U.S. 730 (1989) and *Nationwide Mutual Insurance Company v. Darden*, 112 S. Ct. 1344 (1992) is appropriately applied in this case. *See Coupar v. Federal Correctional Institution, El Reno, Oklahoma*, Case Nos. 90-TSC-0001, 91-TSC-0003, Sec'y. Dec., Feb. 28, 1995 and *Reid v. Methodist Medical Center*, Case No. 93-CAA-4, Sec. Dec., Apr. 3, 1995, slip op., *aff'd*, No. 95-3648 (6th Cir. Dec. 20, 1996). In *Reid* the Supreme Court announced the rule that it would follow in cases where the meaning of "employee" was not defined in the statute containing the term:

> [w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms . . . . In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.

Id. at 739. The exemptions specified in Section 152(3) of the NLRA were imposed under the assumption that the inclusion in bargaining units of employees closely aligned to management might provoke fear of disclosure and retaliation for union activity. *See, e.g., NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 495 (1985) (inclusion of family members "could tend to inhibit free expression of views and threaten the confidentiality of union attitudes and voting."). Such concerns are simply not applicable in the context of an ERA whistleblower case. Additionally, in its November 6, 1996 Proposed Conclusions of Law at paragraph 2, J & L conceded that Boschuk was an employee.

We therefore adopt the ALJ's R. D. and O. (copy attached).

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member