U.S. Department of Labor

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

In the Matter of:

JOHN N. PANTANIZOPOULOS,

COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

ARB CASE NO. 97-023

ALJ CASE NO. 96-ERA-15

DATE: October 20, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. §5851 (1988 and Supp. V 1993). Complainant, John Pantanizopoulos, alleged that Respondent, the Tennessee Valley Authority (TVA), violated the ERA when it lowered the rating on his fiscal year 1994 performance evaluation, which in turn caused him not to receive a monetary performance award for that year. The TVA filed a motion for summary decision, which the Administrative Law Judge (ALJ) granted in a Recommended Decision and Order (R. D. and O.). We accept the ALJ's recommendation to grant summary decision and dismiss the complaint on one of the two grounds on which the ALJ relied.

BACKGROUND[1/]

Pantanizopoulos worked at the TVA's Watts Bar Nuclear Plant as a quality assurance (QA) engineer whose duties included reporting safety issues and construction deficiencies. R. D. and O. at 2. Pantanizopoulos accepted an early retirement incentive offer, retired as of October 16, 1994, and does not contend that his retirement was discriminatory.

TVA employees routinely receive quarterly performance evaluations that are cumulated into a fiscal year (FY) evaluation shortly after the end of the fiscal year on September 30. Dep.

[1/] Because the recommendation to dismiss the case was made on summary grounds and determination of factual issues is not necessary to render this decision, we do not make any factual findings.

at 15, 22.[2/] Yearly evaluations that are sufficiently high lead to monetary performance awards that usually are distributed in December or January.

Pantanizopoulos recalls discussing his performance with his immediate supervisor, Daryl Armentrout, for the first, third, and fourth quarters of FY 1994. Dep. at 14-15. On the basis of the supervisor's evaluation for those quarters, Pantanizopoulos' performance rating averaged more than 3.0 (on a numerical scale in which 4.0 was the highest rating possible). *Id.*; Dep. Ex. 2. At the time of his retirement in October 1994, Pantanizopoulos had not received written copies of the performance evaluations for the third and fourth quarters of FY 1994.

Armentrout sent the quarterly performance ratings of Pantanizopoulos to his superior, David Kehoe, for approval. Kehoe was the QA manager at the Watts Bar nuclear plant. Kehoe signed a FY 1994 yearly performance appraisal of Pantanizopoulos on July 7, 1995, in which he rated Pantanizopoulos' performance numerically as 2.1 for the year. Dep. Ex. 3. Kehoe did not obtain Pantanizopoulos' signature on the evaluation, but rather noted that Pantanizopoulos was "not available." *Id.* Kehoe did not send a copy of the evaluation to Pantanizopoulos at that time.

During a March 1996 get together with other Watts Bar retirees, Pantanizopoulos realized that he had not received either a performance award for FY 1994 or a copy of some of the quarterly evaluations and the final evaluation for that year. Complaint at 1. Pantanizopoulos asked TVA to provide copies of the evaluations to him. *Id.* In response, he received on March 26, 1996 a copy of the last two quarterly evaluations and his final FY 1994 performance evaluation. *Id.*

Although the average of Armentrout's numerical ratings would have qualified Pantanizopoulos to receive a monetary performance award, the numerical rating given by Kehoe did not. Complaint at 2. Pantanizopoulos filed this complaint on April 4, 1996, alleging that TVA violated the ERA when it lowered the grade on his yearly performance evaluation. He seeks payment of a performance award of approximately $4,000.00.

TVA moved for summary decision on the ground that the complaint was not timely and, in the alternative, that Pantanizopoulos cannot establish a *prima facie* violation of the employee protection provision. The ALJ granted the motion on both grounds.

[2/] Reference is to the deposition of Pantanizopoulos, submitted with TVA's motion for summary decision.

DISCUSSION

Timeliness

The ERA prohibits an employer from discriminating against, or discharging, any employee because the employee has engaged in certain protected activities. 42 U.S.C. §5851(a)(1). A person who believes that he has been discriminated against in violation of that prohibition "may, within 180 days after such violation occurs, file . . . a complaint with the Secretary of Labor. . . ." 42 U.S.C. §5851(b)(1).

The ALJ found that the complaint was not filed timely:

> [Pantanizopoulos] should have been aware as early as December 1994 that he had not received a performance award and that some wrongful act may have occurred. * * * [Pantanizopoulos] should have been expecting a performance award in December 1994 or January 1995. At this point he would have had constructive knowledge of the alleged discrimination when he did not receive a performance award for FY 94. Complainant should have known that something was amiss even prior to creation of the evaluation report in July 1995. Complainant also could have obtained a copy of the report in July. However, taking the facts in the light most favorable to Complainant, the limitations period begins running on July 7, 1995, when the evaluation report was dated and the ratings were officially changed from the ratings given by [Pantanizopoulos's] immediate supervisor. This date is almost nine months before complainant filed his claim on April 4, 1996 and not within the 180 days mandated by the Act.

R. D. and O. at 3-4.

We disagree with the ALJ's timeliness analysis. The Secretary long has held that the ERA's limitation period begins running on the date that the employee is informed of the challenged employment decision. *Rainey v. Wayne State Univ.*, Case No. 89-ERA-8, Sec. Final Dec. and Ord, May 9, 1991, slip op. at 2 and *Ray v. Tennessee Valley Authority*, Case No. 88-ERA-14, Sec. Final Dec. and Ord, Jan. 25, 1991, slip op. at 7. As the Seventh Circuit explained in a case under the Age Discrimination in Employment Act, *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991):

> Accrual [of a claim] is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date -- often the same, but sometimes later -- on which the plaintiff discovers that he has been injured. The rule that postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured is the "discovery rule" of federal common law, which is read into

> statutes of limitations in federal-question cases (even when those statutes of limitations are borrowed from state law) in the absence of a contrary directive from Congress. [Citations omitted].

The Secretary has held that the ERA limitations period begins to run "when the facts which would support the discrimination complaint were apparent or should have been apparent to a person with a reasonably prudent regard for his rights [and] similarly situated to Complainant." *McGough v. United States Navy*, Case No. 86-ERA-18, Sec. Rem. Dec. and Ord., June 30, 1988, slip op. at 10. The ALJ faulted Pantanizopoulos for not realizing in December 1994 or January 1995 that he had not received a monetary performance award and promptly discovering why. At that time, TVA had not even prepared his FY 1994 performance evaluation, and therefore even a very diligent person could not have known about the injury at issue.

The ALJ next seized upon the date the performance evaluation was signed, July 7, 1995, as the date when Pantanizopoulos should have known about the alleged violation, the lowering of the numerical rating on his yearly evaluation. However, the record shows indisputably that TVA did not provide the evaluation to Pantanizopoulos until he inquired about it in 1996. There is no reason to fault Pantanizopoulos for not divining that TVA had prepared a FY 1994 evaluation some nine months after the end of that fiscal year. Pantaniozpolous could have reasonably concluded that the delay in receiving his evalulation and any bonus to which he was entitled was due to a processing error or oversight, particularly in light of his retirement. The delay in itself was insufficient to put him on notice that the award was wrongly being denied him.

Applying the discovery rule to the facts of this case, Pantanizopoulos's claim accrued on March 26, 1996, when he received a copy of the FY 1994 performance appraisal and discovered that he had been injured. Since Pantanizopoulos filed this complaint only nine days later, on April 4, 1996, we find that the complaint was timely filed.

The Merits

The ALJ also granted summary decision to TVA on the merits, finding that Pantanizopoulos has not provided any evidence that he engaged in an activity protected under the ERA or that TVA violated the act in denying him a performance award. R. D. and O. at 4-5. The ALJ correctly stated the standard for granting summary decision and noted that Pantanizopoulos did not provide any evidence to counter the affidavit and evidence submitted by TVA. The ALJ noted that "Complainant acknowledged that he was unaware of any concern he had raised which would cause his rating to be lowered." R. D. and O. at 2-3, citing Dep. 41-42. The ALJ held that:

> Complainant has not provided any evidence that Respondent has violated the act in denying him a performance award. He relies only on his sense that the actions

of Respondent are unfair in some way. Such a showing is not the affirmative evidence necessary to defeat a motion for summary judgment.

R. D. and O. at 5.

We adopt the ALJ's discussion and findings on the merits. R. D. and O. at 4-5. Accordingly, we DISMISS the complaint.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member