U.S. Department of Labor

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

In the Matter of:

JOSEPH J. MACKTAL, JR.,

COMPLAINANT,

v.

BROWN AND ROOT, INC.,

RESPONDENT.

ARB CASE NO. 98-112
98-112A

ALJ CASE NO. 86-ERA-23

DATE: January 9, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:
For the Complainant:
Stephen M. Kohn, Esq., Michael D. Kohn, Esq., David K. Colapinto, Esq.,
Kohn, Kohn & Colapinto, P.C. Washington, DC

For the Respondent:
Richard K. Walker, Esq., Thomas D. Arn, Esq., *Streich Lang, Phoenix, AZ*

DECISION AND ORDER ON RECONSIDERATION

This case has a long and tortured history, including numerous decisions by Department of Labor Administrative Law Judges, several Secretarial and Administrative Review Board (ARB) decisions, and two decisions of the United States Court of Appeals for the Fifth Circuit. We now finally decide the last remaining issue: whether Complainant Joseph J. Macktal, Jr. is entitled to attorneys fees and costs for proceedings before the Department of Labor and the Court of Appeals related to his successful challenge to a settlement agreement to which he had previously agreed. In light of intervening precedent we conclude that Macktal is not entitled to such fees and costs.

[1/] This case has been assigned to a panel of two Board Members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

BACKGROUND

In 1986 Macktal filed a complaint with the Secretary of Labor alleging that his employer, Brown & Root, had discharged him in violation of the employee whistleblower protection provision of the Energy Reorganization Act of 1974. 42 U.S.C.A. §5851 (West 1983). Thereafter, Macktal and Brown & Root entered into an agreement purporting to settle Macktal's complaint. Pursuant to that agreement Brown & Root paid Macktal $35,000. However, when the Secretary sought to review the settlement pursuant to §5851(b)(2)(A) of the ERA, Macktal, with new legal representation, disavowed it and requested that the case be remanded to the ALJ for a hearing "to determine whether fraud and duress render the settlement void." In the event that a new settlement could not be reached, Macktal requested a hearing on merits.

The Secretary: 1) ruled that Macktal could not repudiate his settlement because of alleged fraud or duress by his own attorneys; 2) determined that one paragraph of the agreement was contrary to public policy; and 3) severed that paragraph, approved the settlement in other respects, and dismissed the case. *Macktal v. Brown & Root, Inc.*, Case No. 86-ERA-23, Sec. Ord., Nov. 14, 1989.[2/] Macktal appealed and argued to the Fifth Circuit that the Secretary did not have the authority to eliminate a material term of the agreement and force Macktal and Brown & Root to accept the rewritten settlement. The Fifth Circuit agreed, holding that "the Secretary cannot take the negotiated settlement, strike terms she does not like, and then impose it on the parties" *Macktal v. Secretary of Labor*, 923 F.2d 1150,1155 (5th Cir. 1991). However, the Court rejected Macktal's argument that the settlement was void. "Macktal and Brown & Root have drafted and agreed to a settlement. . . . [T]he Secretary may either enter into the settlement by approving it, or refuse to enter into it by rejecting it." *Id.* at 1158. The Court vacated the Secretary's order and remanded the case for further proceedings.

[2/] The offending paragraph provided:

> Mr. Macktal's representatives in the above-captioned action . . . hereby agree that they will not call Mr. Macktal as a witness or join Mr. Macktal as a party in any administrative or judicial proceeding in which [Macktal's attorneys] are now, or in the future may be, counsel or parties opposing any of the Comanche Peak companies, organizations, programs or individuals as defined above; nor will [Macktal's attorneys] do anything to suggest or otherwise to induce any other attorney, party, or administrative agency, or administrative or judicial tribunal to call Mr. Macktal as a witness or to join Mr. Macktal as a party in such a proceeding. Further, Mr. Macktal hereby agrees that he will not voluntarily appear as a witness or a party in any such proceeding; and Mr. Macktal further agrees that if served with compulsory process seeking to compel his appearance or joinder in such a proceeding, he will immediately notify the undersigned representative of Brown & Root, or his successor, in writing and thereafter take all reasonable steps, including any such reasonable steps as may be suggested by the representatives of Brown & Root, to resist such compulsory process.

On remand the Secretary disapproved the settlement, stating that the Fifth Circuit's "view of the narrow scope of my authority to review settlements under the ERA leaves me no choice but to disapprove any settlement containing terms I find repugnant to law or public policy." Ord. Disapproving Settlement and Remanding Case, Oct 13, 1993, slip op. at 6. The Secretary remanded the case to the ALJ for further proceedings. Following further appeals and a hearing on the merits, on November 25, 1996, the ALJ issued a Recommended Decision and Order Dismissing Complaint (RD&O), in which he found that Macktal had not engaged in activity protected by the ERA.

On review, Macktal urged the Administrative Review Board[3/] to reject the ALJ's recommended decision, and, in his brief before the Board, Macktal sought an award of attorney's fees and costs for "substantially prevailing on his claim that the settlement agreement in this case violated the ERA." Complainant's Brief in Opposition to Recommended Decision and Order Dismissing Complaint, May 5, 1997 at 49. The Board agreed with the ALJ on the merits and dismissed the complaint on the ground that Macktal's internal safety complaints were not protected activities under the Fifth Circuit's interpretation of the ERA in *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (1984).[4/] Final Dec. and Ord., Jan. 6, 1998. The Board also found, however, that Macktal was entitled to attorney's fees for time spent on successful litigation of the issue whether the restrictive term in Macktal's settlement agreement violated the ERA and was contrary to public policy. The Board remanded the case to the ALJ to consider a petition for attorney's fees and costs.

On March 30, 1998, the ALJ issued his Initial Decision and Order Granting Attorney's Fees (ID&O).[5/] Both Macktal and Brown & Root appealed that decision. However, Brown & Root's brief to the **Administrative** Review Board was mistakenly delivered to the Labor Department's **Benefits** Review Board and was not received by the ARB. Under the impression that Brown & Root had abandoned its appeal, the ARB issued an order adopting the ALJ's recommended decision. Brown & Root immediately moved for reconsideration. In light of the fact that Brown & Root had filed a brief with the Department, albeit with the wrong review board, the Board granted reconsideration and gave the parties an opportunity to file reply briefs.

DISCUSSION

Brown & Root argues that the Board has no authority to award attorney's fees because Macktal's complaint was dismissed on the merits, and the ERA only provides for award of attorney's fees where a

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[3/] In April 1996, the Secretary delegated authority to issue final agency decisions under the ERA and similar statutes to this Board. Sec. Ord. 2-96, 61 Fed.Reg. 19,978.

[4/] Prior to its amendment in 1992 the ERA did not explicitly include internal complaints among the actions which were protected. *See*, 42 U.S.C. 5851(a) (1988). In *Brown & Root v. Donovan*, *supra*, the Fifth Circuit ruled that the ERA did not protect such complaints.

[5/] The ALJ expressed significant doubt as to whether attorneys fees could be awarded in the circumstances of this case, but ruled that he was bound by the Board's remand order. ID&O at 3 n.1

violation has been found and affirmative relief has been ordered. *See* 42 U.S.C. § 5851(b)(2)(B).[6/] We conclude that the Board's authority to award attorney's fees and costs in this case is controlled by our decision in *Harris v. Tennessee Valley Authority*, ARB Case No. 99-004, ALJ Case Nos. 97-ERA-26, 97-ERA-50, Ord. Vacating Orders and Remanding Case, Nov. 29, 2000. The reasoning in *Harris* precludes an award of attorney's fees in this case.

Prior to its amendment in 1992, Section 210 of the ERA, 42 U.S.C.A. §5851 (West 1983) provided in relevant part:

> (a) Discrimination against employee
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> No employer . . . may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee [engaged in specified protected activity].
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> * * * * *
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> (b) Complaint, filing and notification
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> (1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file . . . a complaint with the Secretary of Labor . . . alleging such discharge or discrimination . . . .
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> (2)(A) * * * Within ninety days of the receipt of [an ERA whistleblower] complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. . . .
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> * * * * *

[6/] Brown & Root also asserts that Macktal is not entitled to attorney's fees because he has not proven that he "incurred" a liability for payment of fees as required by the ERA, and that, if the Board finds that attorney's fees are due, the amount recommended by the ALJ should be reduced by $35,000, the sum paid Macktal under the settlement agreement which he abrogated and which he has not repaid. In light of the result reached in this Decision, it is unnecessary to address these arguments.

> (B) If, in response to a complaint filed under paragraph 1, the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. **If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.**

Emphasis added. In *Harris* the parties entered into a no-fault settlement agreement, which provided that TVA would be responsible for attorney's fees in an amount to be determined by the ALJ. The parties presented the agreement to the ALJ and moved to dismiss the case. The ALJ approved the settlement, dismissed the case, and called for briefing on the amount of attorney's fees Harris was due. TVA then opposed Harris' request for fees on the ground, among others, that the ERA did not provide for the award of fees where there had been no determination that "a violation" of the ERA has occurred and where there is no "person against whom the order is issued. . . ." We agreed. We ruled that a statutory fee shifting provision such as that contained in the ERA must be read in light of the "American Rule" that absent express statutory authorization each party in a law suit must bear its own attorney's fees. *Alyeska Pipeline Serv. Co. v. The Wilderness Soc'y*, 421 U.S. 240, 247 (1975). We determined that the ERA's attorney's fees section is not a typical "prevailing party" attorney's fees provision. Instead, we concluded that the ordinary, common meaning of this provision is that attorney's fees shall be awarded where there has been a determination that "respondent has violated the ERA anti-retaliation provision," and where an order has been issued "against" that respondent. *Harris*, slip op. at 7. We emphasized that Congress "knows how to enact a 'prevailing party' attorneys' fees provision when it has that in mind . . . ," and pointed to statutes in which Congress had provided for attorney's fees awards to "prevailing parties" in one section while using the more restrictive language contained in the ERA in the statute's whistleblower protection provision. *Id.* at 9.

Under *Harris* it is irrelevant whether Macktal was the "prevailing party" with respect to his challenge to the original settlement agreement.[7/] Unless Macktal can meet the ERA's preconditions to a

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[7/] We note that the "law of the case" doctrine does not preclude us from revisiting the attorney's fees issue where there has been an intervening change in the law. The doctrine is a prudential rather than a jurisdictional restriction on a court's authority to reconsider an issue. *See Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739 (1912). "When intervening legal authority makes clear that a prior decision bears (continued...)

fee award, such an award cannot be made. First, the complainant must have filed a complaint alleging discrimination. 42 U.S.C.A. §5851(b)(1). Although Macktal filed a complaint, it related to his alleged discriminatory discharge; he did not file a complaint regarding the restrictive terms of the settlement agreement. Second, the Secretary must have issued "an order . . . providing the relief prescribed by subparagraph (B) . . . ." 42 U.S.C.A. §5851(b)(2)(A). The Secretary has not issued such an order. Third, the order "shall be made on the record after notice and opportunity for public hearing." *Id.* There has been no notice or opportunity for public hearing on the issue whether Brown & Root discriminated against Macktal by proposing restrictive settlement terms. Fourth, attorney's fees may only be assessed: (1) "at the request of the complainant;" (2) "against the person against whom the order is issued;" and (3) "incurred . . . by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued." 42 U.S.C.A. §5851((b)(2)(B). Although Macktal succeeded in having the settlement into which he entered disapproved by the Secretary, there was no "complaint upon which the order was issued," no "notice and opportunity for public hearing," and no order issued "against" Brown & Root within the meaning of the ERA.

It is these distinctions which make inapposite the case upon which Macktal relies: *Connecticut Light & Power Co. v. Secretary of Labor*, 85 F.3d 89 (2d Cir. 1996) (*CL&P*). In *CL&P*, complainant Delcore filed a complaint with the Secretary of Labor alleging that the respondent had violated the ERA by offering him a settlement agreement which contained illegal "gag provisions." The Secretary determined that "regardless of whether Respondents violated ERA Section 210 by making the settlement offer, they clearly discriminated against Delcore in violation of the Act by breaking off settlement negotiations because he refused to relinquish his Section 210(a) participation rights." *Delcore v. W.J. Barney Corp.*, Case No. 89-ERA-38 @ 6-7 (Apr. 19, 1995).[8/] The Court of Appeals affirmed on slightly different grounds, holding that "proffering a settlement agreement, whereby an employer attempts to restrict an employee's ability to cooperate with administrative and judicial bodies, violates Section 210 of the ERA." *CL&P*, 85 F.3d at 94. Thus, *CL&P* stands for the proposition that proposing a settlement agreement that contains certain types of restrictive language may violate the ERA whistleblower provision, and may therefore be the basis for a whistleblower complaint. What we decide today is that because Macktal did not file a complaint regarding the restrictive provision, the Secretary did not determine that Brown & Root had discriminated against him when proffering the settlement agreement, and did not issue an order after notice and opportunity for public hearing providing relief. Therefore, there is no occasion for us to apply *CL&P* in this case.

No one disputes that the later proceedings on the merits of Macktal's complaint ultimately resulted in a determination that Brown & Root had not discriminated against Macktal in violation of the ERA

(...continued)
qualification, that decision must yield." *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990). *See also, Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735,738-741 (D.C. Cir. 1995).

[8/] References to ALJ Recommended Decisions and Orders are to opinions as published on the Department of Labor's World Wide Web site www.oalj.dol.gov. We use the OALJ citation format set forth at www.oalj.dol.gov/cite.htm.

whistleblower provision when it discharged him. Under these circumstances no award of attorneys fees is appropriate.

CONCLUSION

For the foregoing reasons we deny the petition for attorneys fees and costs.

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member