U.S. Department of Labor

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

In the Matter of:

DELBERT LYNN COX **ARB CASE NO. 99-040**
and
LINDA JAYNE COX, **ALJ CASE NO. 97-ERA-17**

COMPLAINANTS, **DATE: March 30, 2001**

v.

LOCKHEED MARTIN ENERGY SYSTEMS INC.,
LOCKHEED MARTIN CORPORATION,
OAK RIDGE OPERATIONS OFFICE,
and
U.S. DEPARTMENT OF ENERGY,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:
For the Complainants:
Edward A. Slavin, Jr., Esq., *St. Augustine, Florida*; Lori A. Tetreault, Esq., *Lawrence & Tetreault, P.A., Gainesville, Florida;* John Thompson Harding, Esq., *Goodlettsville, Tennessee*

For Respondents Lockheed-Martin Energy Systems, Inc. and Lockheed Martin Corporation:
Patricia L. McNutt, Esq., Robert M. Stivers, Esq., *Lockheed Martin Energy Systems, Oak Ridge, Tennessee;* E.H. Rayson, Esq., John C. Burgin, Jr., Esq., *Kramer, Rayson, Leake, Rodgers & Morgan, LLP, Knoxville, Tennessee*

For Respondents Oak Ridge Operations Office and United States Department of Energy:
Robert E. James, Esq., Don F. Thress, Jr., *Oak Ridge Operations Office, Oak Ridge, Tennessee*

FINAL DECISION AND ORDER

This case arises under the employee protection ("whistleblower") provisions of the Energy Reorganization Act ("ERA"), as amended, 42 U.S.C.A. §5851 (West 1995), and five environmental

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[1/] This appeal 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).

statutes[2/] (collectively, the "Environmental Acts"). The core issue presented in this appeal is whether Complainants Delbert Lynn Cox and Linda Jayne Cox were terminated from their jobs unlawfully in retaliation for engaging in activity protected by the Environmental Acts and the ERA. In addition, in their appeal the Complainants offer a variety of procedural challenges to the proceeding below. For the reasons discussed in this Decision, we conclude that they were not terminated from their jobs for unlawful reasons, and that their other challenges lack merit. We therefore dismiss their complaint.

I. BACKGROUND

Complainants Delbert Lynn Cox and Linda Jayne Cox, a married couple, were formerly employed by Respondent Lockheed Martin Energy Systems, Inc. ("LMES").[3/] Delbert Lynn Cox was an administrative captain in Respondent's Protective Services Organization. Linda Jayne Cox was employed as a facility operator specialist in LMES' Maintenance Division. During their employment with LMES, the Coxes worked at a government-owned site known as K-25 in Oak Ridge, Tennessee. The site was managed and operated by LMES and, until 1985, it was used as a gaseous diffusion plant which enriched Uranium 238 to Uranium 235 for use in nuclear weapons and nuclear fuel.

In or around 1995, Linda Cox, along with other LMES employees, began experiencing flu-like symptoms which she attributed to cyanide exposure. Once LMES became aware of the employees' concerns, it began testing over a thousand samples of the air, water, and soil at the K-25 site. These tests ultimately established that cyanide levels at the site were under the permissible exposure limits established by the Occupational Safety and Health Administration; these test results were confirmed by a subsequent investigation conducted by the National Institute of Occupational Safety and Health ("NIOSH"). LMES informed its employees of its test results in a meeting held in July 1996. However, the Coxes were unpersuaded that the test results were accurate and convened a public meeting on August 15, 1996, to allow local residents to voice their concerns regarding possible environmental contamination at the K-25 site.

During the same period that LMES was addressing the cyanide exposure issue, it also was grappling with budget reductions imposed by its contracting agency, Respondent Department of Energy ("DOE"). To meet the spending limits in the FY 1997 budget, LMES determined that it would need to reduce its workforce. LMES identified the positions that were to be eliminated using established reduction-in-force ("RIF") guidelines. *See Cox v. Lockheed Martin Energy Sys., Inc.*, ALJ No. 1997-ERA-17 (ALJ Feb. 9, 1998), Recommended Decision and Order Dismissing the Complaint ("RD&O"), slip op. at 9-13 (describing procedures used to determine that Linda Cox's

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[2/] In addition to the ERA charge, the Complainants allege violations of the Clean Air Act ("CAA"), 42 U.S.C.A. §7622 (West 1995), the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C.A. §9610 (West 1995), the Toxic Substances Control Act ("TSCA"), 15 U.S.C.A. §2622 (West 1998), the Safe Drinking Water Act ("SDWA"), 42 U.S.C.A. §300j-9(i) (West 1991), the Solid Waste Disposal Act, ("SWDA") 42 U.S.C.A. §6971 (West 1995).

[3/] LMES is a wholly owned subsidiary of Lockheed Martin Corporation ("LMC"). It is not clear why the Coxes named LMC, the Oak Ridge Operations Office and the Department of Energy as respondents in this case.

position would be eliminated); slip op. at 46-50 (describing procedures used to determine that Delbert Cox's position would be eliminated). On August 26, 1996, LMES notified the Coxes that they were being terminated through the RIF procedures.

Following their RIF, the Coxes filed a complaint with the Department of Labor's Wage and Hour Division[4/] alleging that LMES violated the employee protection provisions of the ERA and the environmental acts by terminating them for "raising concerns regarding environmental exposures." The Wage and Hour Division investigated and found no merit to the complaint. The Coxes objected to that determination and the matter was referred to an Administrative Law Judge ("ALJ") for disposition.

The gravamen of the Coxes' whistleblower complaint is that they engaged in protected activity when they alleged that they were victims of cyanide exposure at the K-25 site, and they unlawfully were targeted for separation by LMES because of their alleged protected activity. After a lengthy hearing, the ALJ issued the RD&O recommending dismissal of the complaint.

In reaching this recommended result, the ALJ first concluded that the Coxes' complaints about possible cyanide exposure did not constitute protected activity under "the environmental whistleblower laws."[5/] The ALJ reasoned that an occupational exposure to cyanide is not related to nuclear safety and, therefore, such complaints are not protected under the ERA, citing *DeCresci v. Lukens Steel Co.*, No. 87-ERA-13 (Sec'y Dec. 16, 1993) (mere fact that a company holds an NRC license is insufficient to make all safety complaints covered under the ERA; safety complaints must relate to nuclear safety). The ALJ also observed that even if the complaint of occupational cyanide exposure could be viewed as protected activity under the ERA, the complaint would only be protected if the employee can demonstrate a *reasonably* perceived violation of the underlying statute or its regulations. Citing *Wilson v. Bechtel Constr., Inc.*, No. 86-ERA-34 (Sec'y Feb. 9, 1988), the ALJ concluded that once LMES conducted environmental testing and explained to the Coxes that cyanide levels at the K-25 site were under the permissible exposure limits defined by the Occupational Safety and Health Administration, it was not objectively reasonable for Complainants to perceive that their illnesses were caused by occupational exposure at K-25. Because their complaint became unreasonable, it would not enjoy ERA protection. RD&O at 83.

In addition to concluding that the Coxes did not engage in protected activity, the ALJ went on to state that, even if the Coxes could establish that they had a reasonably perceived violation of the environmental acts or regulations, LMES presented credible evidence and testimony to show that the motive for the RIF and the manner in which it was effected were both nondiscriminatory. *Id.* at 84-87. This appeal followed.

[4/] At the time the Coxes were terminated from their jobs at Oak Ridge in 1996, the Labor Department's Wage and Hour Division received and investigated whistleblower complaints under the Environmental Acts and the ERA. This function later was transferred to the Department's Occupational Safety and Health Administration. *See* 62 Fed. Reg. 111 (Jan. 2, 1997), *corrected* 62 Fed. Reg. 8085 (Feb. 21, 1997).

[5/] In his analysis, the ALJ first appears to sweep together the ERA and the Environmental Acts; however, his decision then focuses only on the ERA aspects of the complaint. *See* RD&O at 81, 87.

II. JURISDICTION

We have jurisdiction pursuant to the employee protection provisions of the ERA and the Environmental Acts (*supra*, n. 1), as well as 29 C.F.R. §24.8 (2000).

III. STANDARD OF REVIEW

Under the Administrative Procedure Act, the Board has plenary power to review an ALJ's factual and legal conclusions. *See* 5 U.S.C.A. §557(b) (West 1996). As a result, the Board is not bound by the conclusion of the ALJ, but retains complete freedom to review factual and legal findings *de novo*. *See Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000).

IV. DISCUSSION

In their appeal to this Board, the Coxes claim that the ALJ committed various procedural errors that require that the recommended decision dismissing their complaints be rejected and reversed. The Coxes also claim that the ALJ was biased against them. However, the Coxes do not challenge in any meaningful way the ALJ's merits determinations that (a) they did not engage in protected activity, and that (b) LMES's decision to eliminate their positions was not discriminatory. We consider first the Coxes' arguments concerning alleged procedural error and bias, and then review briefly the ALJ's findings on the merits of the complaints.

A. The ALJ's procedural decisions.

The Coxes argue that the Board should decline to adopt the recommendation because the ALJ refused to enforce their discovery rights and admit documents into evidence. We review allegations of procedural errors by the ALJ under the abuse of discretion standard. *See generally Khandelwal v. Southern California Edison,* ARB No., 98-159, ALJ No. 97-ERA-6 (ARB Nov. 30, 2000), *supra; Malpass v. General Elec. Co.,* Case Nos. 85-ERA-38, -39, slip op. at 5-6 (Sec'y Mar. 1, 1994) (discussing ALJ's authority to conduct trial hearings under 5 U.S.C. §556(c)).

At trial, the Coxes filed a motion that LMES be compelled to produce certain documents; the ALJ denied the motion. Although the Coxes clearly express disagreement with the ALJ's ruling in their brief to this Board, they simply do not offer any argument in support of their position, but instead merely shower invective on the ALJ.[6/] Absent a clearly-articulated argument as to why the

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[6/] In an Order striking an attorney's brief in *Pickett v. TVA*, ARB No. 00-076, ALJ Nos. 99-CAA-25, 00-CAA-9 (ARB Nov. 2, 2000), we noted our concern that vitriolic attacks on administrative law judges are inconsistent with a lawyer's ethical obligations, and in any event cannot substitute for sound legal argument:

> While counsel . . . has the right to criticize rulings of the ALJ with which his client disagrees, he has no right to engage in disrespectful and offensive

(continued...)

Coxes were entitled to the particular documents in question and why the ALJ's decision was erroneous, we see no basis upon which to conclude that the ALJ abused his discretion by denying the motion. For this reason alone, we would leave the ALJ's ruling undisturbed.

As to the ALJ's refusal to admit evidence, the Coxes state that the ALJ rejected the evidence in the RD&O without explanation. Although the Coxes' brief is less than clear on this point, we assume that they are referring to that portion of the RD&O which sets forth the ALJ's ruling on Complainant's Motion to Supplement the Record. RD&O at 87. Contrary to the Coxes' view, the ALJ does give a reason for denying that motion. According to the ALJ, the motion was denied because it was "offered late and without good cause." We see no error in the ALJ's determination, nor do the Coxes point out any.

Furthermore, it is clear from the Coxes' own brief to this Board that the documents in question have little to do with this case. The charge that we are adjudicating here is that the Coxes were terminated in retaliation for engaging in protected activity. However, the documents that they seek to introduce are unrelated to the circumstances of their termination, but appear to be an effort to demonstrate a broad conspiracy on the part of LMES to cover up environmental contamination at the Oak Ridge site. While environmental contamination in general is a matter of significant public concern, the Coxes have chosen an inappropriate vehicle for raising any such broader issues. The Labor Department's jurisdiction under the ERA and the Environmental Acts is to enforce the employee protection provisions of these statutes; the documents cited by the Coxes simply have little bearing on the underlying question in this case, *i.e.*, whether they were chosen for layoff in retaliation for their alleged protected activity.

B. Allegation of ALJ bias.

The Coxes assert that the ALJ was biased against them. As proof of the ALJ's bias, the Coxes cite numerous instances which, in their view, demonstrate that the ALJ was rude, overbearing, impatient, insensitive, unfocused, and cognitively dissonant. However, the Coxes' cannot prevail

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[6/](...continued)

> personal attacks upon the ability and integrity of the ALJ; such attacks violate counsel's "professional obligation to demonstrate respect for the courts." [*Williams v. Lockheed Martin Corp.*, ARB Nos. 99-054/064, ALJ Nos. 98-ERA-40/42, (ARB Sept. 29, 2000)] at 6. *Accord* ABA Model Rules of Professional Conduct, Preamble, Rules 3.5 and 8.2 (1999).
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> The requirement that counsel refrain from immaterial, offensive excoriation of the ALJs before whom he appears, does not conflict with the counsel's ethical duty to represent his clients "with zeal and fidelity within the rules." Rhesa Hawkins Barkdale, *The Role of Civility in Appellate Advocacy*, 50 South Carolina Law Review, 573, 577 (1999). Quite to the contrary, "the use of odiums, sarcasm, and vituperative remarks have no place in a brief and are wholly unwarranted. Frankly, resort to the use of such statements is an indication of a lack of confidence in the law and the facts to support the position of the one using them." *State ex rel. Dyer v. Union Electric Co.*, 312 S.W.2d 151, 154 (Mo. Ct. App. 1958). A brief containing such invective ordinarily should be stricken. *Accord Dranow v. United States*, 307 F.2d 545, 549 (8th Cir. 1962).

on such a claim of bias unless they can first overcome a presumption of honesty and integrity that accompanies administrative adjudicators. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1376 (9th Cir. 1978), *cert. denied* 439 U.S. 982; *High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-075, ALJ No. 96-CAA-8 (ARB Mar. 13, 2001). Here, the Coxes have alleged no more than a dissatisfaction with the ALJ's attitude and the manner in which he conducted the proceedings. These allegations, standing alone, are insufficient to establish bias.

C. The ALJ's finding that LMES' decision to terminate the Coxes' employment was not motivated by unlawful retaliation for engaging in protected activity.

Finally, we review briefly the ALJ's merits determination. To prevail in a whistleblower case, complainants must prove by a preponderance of the evidence that they engaged in protected conduct and that the respondent took adverse action against them because of that protected conduct. Under all of the whistleblower statutes, the complainant has the burden of proving by a preponderance of the evidence that retaliatory motive played at least some role in the employer's decision to take an adverse action. However, even if the complainant can meet that burden, the complainant will not prevail if the respondent can show that it would have taken the same action in the absence of the protected activity.[7/]

In this case, the ALJ found that Respondent presented credible evidence and testimony to show that the motive for the RIF and the manner in which it was effected were nondiscriminatory. Although the Coxes challenge that finding, they offer no discernible argument in support of their position.

After reviewing the record, we find that LMES has proved by clear and convincing evidence that it would have RIFed the Coxes even if they had not engaged in the alleged protected activity. Thus, we agree with the ALJ that the Coxes have failed to establish liability on the part of any of the Respondents under either the ERA or the Environmental Acts.[8/] Accordingly, we concur with the ALJ that the complaint should be **DISMISSED.**[9/]

[7/] In an environmental case, the employer must meet that burden by a preponderance of the evidence, while in an ERA case, the burden must be met by clear and convincing evidence. *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474 (3d Cir. 1993); 42 U.S.C. §5851(b)(3)(C), (D).

[8/] The Coxes assert, in a conclusory manner, that the ALJ erred in finding that they did not engage in protected activity. Because we conclude that the Coxes' termination by LMES was not unlawful, it is unnecessary for us to review the ALJ's findings that the Coxes did not engage in protected activity. RD&O at 82-83. Accordingly, we express no opinion on these findings, neither adopting nor reversing them.

[9/] The Coxes have also filed with the Board a number of objections to the RD&O. For example, they assert that the ALJ erred by 1) "refusing to grant the Coxes' motion for default judgment . . . making scattered factual findings on witness testimony, witness-by-witness, rather than by topic, failing to resolve witness conflicts or making proper credibility findings or discussing the contents of most exhibits . . . making superficial exculpatory legal conclusions not supported by substantial evidence, failing to organize any of his conclusions by paragraph numbers . . ."; and 2) "failing to find there was no evidence that Captain Cox was not physically qualified to carry a weapon . . . ignoring the fact that Captain Cox's PPR ratings by his (continued...)

SO ORDERED.

PAUL GREENBERG
Chair

RICHARD A. BEVERLY
Alternate Member

[9/](...continued)
supervisor, Commander Williams, were reduced by respondent's management . . . erred on layoff decision dates, attempting to confuse tentative contingency plans with a layoff decision . . . "). The Coxes have also filed a number of motions including a Motion for Oral Argument; Motion to Grant Unopposed Motion for Summary Reversal; and Motion to Issue Show Cause Order regarding Disqualification of Counsel for Lockheed Martin. We have reviewed all the Coxes' motions and objections; we find them to be without merit, and therefore deny them. They do not warrant a separate discussion in this opinion.