U.S. Department of Labor

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

In the Matter of:

HARRY L. WILLIAMS,
SHERRIE G. FARVER,

COMPLAINANTS,

v.

LOCKHEED MARTIN CORPORATION,
LOCKHEED MARTIN ENERGY SYSTEMS, INC.,

RESPONDENTS.

ARB CASE NOS. 99-054
99-064

ALJ CASE NOS. 98-ERA-40
98-ERA-42

DATE: September 29, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

For the Respondent:
Charles W. Van Beke, Esq., *Wagner, Myers & Sanger, Knoxville, Tennessee*

FINAL DECISION AND ORDER

These cases were brought under the employee protection provisions of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 (1994); the Clean Air Act, 42 U.S.C. §7622 (1994); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9610 (1994); the Federal Water Pollution Control Act, 33 U.S.C. §1367 (1994); the Safe Drinking Water Act, 42 U.S.C. §300j-9 (1994); the Solid Waste Disposal Act, 42 U.S.C. §6971 (1994); and the Toxic Substances Control Act, 15 U.S.C. §2622 (1994) (collectively, the "whistleblower acts").

Complainants Harry L. Williams and Sherrie G. Farver were employees of Lockheed Martin Energy Systems, Inc. (LMES) at an LMES facility in Oak Ridge, Tennessee. They alleged that LMES and Lockheed Martin Corporation (Lockheed Martin) violated the whistleblower acts by surreptitiously recording the private portion of a public meeting, and that the taping was part of an ongoing campaign of covert surveillance of LMES whistleblowers. The Administrative Law Judge

recommended that we grant Respondents' motion for summary decision. We agree with the ALJ's recommendation and dismiss the complaints.

BACKGROUND

The material facts (which were not disputed by Complainants) are as follows. On March 23, 1998, Williams and Farver attended a public meeting of LMES employees at the Oak Ridge Associated Universities in Oak Ridge, Tennessee. The purpose of the meeting was to allow physicians who had been studying employee health concerns related to possible exposures to toxic materials at the Oak Ridge facilities to discuss their findings. Recommended Decision and Order (R. D. and O.) at 2. The meeting was open to the public, but was followed by an unannounced impromptu session involving only the physicians and LMES employees. An LMES employee who had planned to attend was injured just before the meeting, and an LMES official, in a "spur-of-the-moment reaction to the medical problem," set up a tape recorder in the room so that the injured employee would be able to hear what had transpired. The tape recorder was left running unattended during the private portion of the meeting, and the tapes ultimately were removed not by LMES management but by one of the meeting participants. R. D. and O. at 8-9.

Williams and Farver filed their complaints alleging that LMES' actions relating to the taping of the meeting violated the whistleblower acts. The Occupational Safety and Health Administration (OSHA) investigated the complaints and found no discrimination. Complainants requested a hearing, and the ALJ consolidated the cases. Respondents then filed a Joint Motion for Summary Decision with supporting declarations, deposition transcripts, answers to interrogatories, and documents. Complainants did not file any response to that motion. The ALJ then issued an order recommending that the motion be granted on the grounds that there were no material facts in dispute and Respondents were entitled to summary decision as a matter of law.[1/] The ALJ also concluded that "[t]his case is frivolous in the worst sense of the word[,]" and that "Complainants' factual allegations in this case are outrageous." R. D. and O. at 10. The ALJ therefore suspended Complainants' counsel, Edward A. Slavin, Jr., "from further participation before the Office of Administrative Law Judges in this case." *Id.*

Complainants then filed a Petition for Review with this Board.[2/]

DISCUSSION

Complainants' petition for review and supporting briefs discuss no fewer than 36 substantive and procedural errors allegedly committed by the ALJ while the case was pending before him. Only three of these issues merit our attention. First, citing 29 C.F.R. §24.6(c), Williams and Farver argue

---

[1/] The ALJ also recommended that the complaint against Lockheed Martin be dismissed because Complainants did not allege that Lockheed Martin was their employer. R. D. and O. at 9.

[2/] We have previously denied Complainants' motions for oral argument and summary reversal of the R. D. and O. *See* Order dated April 20, 1999.

that the ALJ improperly ordered that a pre-hearing conference on the scope of discovery be held in Cincinnati, Ohio, instead of at a location within 75 miles of Complainants' residence. The regulatory provision cited, which is included in the "Hearings" section of the Department of Labor procedures for handling whistleblower complaints, provides that "[t]he **hearing** shall, where possible, be held at a place within 75 miles of the complainant's residence." 29 C.F.R. §24.6(c) (emphasis supplied). Complainants' attorney had requested the conference in order to resolve discovery issues, no "hearing" within the meaning of §24.6 was held, and therefore the 75 mile provision was inapplicable. We reject Complainants' argument to the contrary.

Second, Williams and Farver assert that the ALJ erred by "excessively narrowing discovery" and "granting summary decision . . . without allowing adequate discovery." Petition for Review at 1-2. The import of Complainants' argument in this regard is that the ALJ erred in limiting discovery to the events relating to the taping of the March 23 meeting and in prohibiting discovery regarding Complainants' allegations that Respondents engaged in an "overall practice" of surveillance of whistleblowers. *See, e.g.,* Complainants' Opening Brief at 9. We have reviewed Farver's and Williams' complaints and find nothing in them which would justify the type of wide-ranging discovery fishing expedition which Complainants sought.[3/] The ALJ appropriately limited discovery to facts relating to the taping of the March 23 meeting.

Third, giving a generous reading to their petition and briefs, Complainants argue that the ALJ erred in recommending summary decision.[4/] We review the ALJ's recommended summary decision order *de novo*, and our review is governed by the same standard used by the ALJ. *See Harris v. General Motors Corp.*, 201 F.3d 800, 802 (6th Cir. 2000).

The standards applicable to summary decision are rooted in the Office of Administrative Law Judges (OALJ) regulations as well as Board and federal court case law. OALJ Rule 18.40, 29 C.F.R. §18.40, which is modeled on Rule 56 of the Federal Rules of Civil Procedure, permits an ALJ to enter a summary decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." *Id.* Moreover, "[w]hen a motion for summary decision is made and supported as provided in [Section 18.40] a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. §18.40(c). In deciding a motion for summary decision, we view the factual evidence in the light most favorable to the nonmoving party. *Stauffer v. Wal-Mart Stores, Inc.*, ALJ Case No. 99-STA-21, ARB Case No. 99-107, Decision and

---

[3/] Each complaint consists of ten paragraphs. Paragraphs one through six explicitly and exclusively refer to the March 23 meeting. Paragraph seven alleges that "[p]reviously, Respondents gave the impression of surveillance and the reality of both overt and covert surveillance, for example Lockheed Martin Energy Systems' covert surveillance of public protests and overtly taping a July 11, 1996 closeout briefing meeting between workers and residents and NIOSH, in response to employees who filed a confidential request for NIOSH health hazard evaluation." Paragraphs eight and nine both addressed the relief sought. Paragraph ten offers assistance, presumably in the investigation of the complaint. *See* Complaint regarding Harry L. Williams, dated April 8, 1998; Complaint regarding Sherrie G. Farver, dated April 8, 1998.

[4/] For unexplained reasons, Complainants argue that the ALJ erred in dismissing the complaints "for failure to state a claim . . . ." Complainants' Opening Brief (Comp. Br.) at 16.

Order of Remand (Nov. 30, 1999); *See Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 402-03 (6th Cir.1999) (*citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1351 (1986)). However, if the Complainants "fail[] to make a showing sufficient to establish the existence of an element essential to [their] case, and on which [they] will bear the burden of proof at trial," there is no genuine issue of material fact and Respondents are entitled to summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2550 (1986). *See Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42, Secretary's Decision and Remand Order, slip op. at 5-6 (July 4, 1995). As the Supreme Court stated in *Celotex,* summary judgment is mandated

> against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. at 322-323. Applying these standards to the material facts in this case leads us to conclude that there are no genuine issues of material fact in dispute and the Respondents are entitled to summary decision as a matter of law.

In order to prevail in an environmental whistleblower case such as the one before us, the complainants must prove, by a preponderance of the evidence, that they engaged in protected conduct, and that the employer took some adverse action against them because of that protected conduct. *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46, Secretary's Final Decision and Order, slip op. at 11, n.9 (Feb. 15, 1995), *aff'd* 78 F.3d 352 (8th Cir. 1996). We agree with the ALJ that there are no material facts in dispute with regard to these elements of a whistleblower case, in large part because Complainants failed to come forward with **any** facts in response to Respondents' amply supported motion for summary decision. We also agree with the ALJ that Respondents are entitled to summary decision as a matter of law. We do not think that we can improve upon the ALJ's holding in this regard:

> The facts demonstrate that neither was there an adverse action nor was there any action taken in reprisal for the Complainants having attended the meeting of March 23. . . . There is no evidence in this case that Lockheed Martin or any of its agents "surreptitiously" taped the March 23 meeting nor is there evidence that any representative of or agent of Lockheed Martin stated that the March 23 meeting would be private. There is no evidence in this case that the audio taping of the March 23 meeting was anything other than an attempt by the company to accommodate an employee who had fallen ill. There is

> no evidence whatsoever that LMES was "spying" on any sick workers. This record shows that there was no surveillance and, in fact, there was no adverse action initiated against either of the Complainants. Not only is there no discriminatory intent evidenced by the established facts but the actions initiated by the company were an accommodation to one of its employees who happened to be a member of the "affected group." I find none of the established facts, either directly or circumstantially, demonstrate a negative impact on the Complainants' work environment.

R. D. and O. at 8. Williams and Farver made allegations against their employer, which Respondents countered in a well-supported motion for summary decision. Complainants chose, at their peril, not to reply to that motion. We conclude that there are no material facts in dispute, that the taping of the March 23 meeting did not constitute adverse action against the Complainants, and that, in any event, LMES did not tape the meeting with any retaliatory intent. Respondents are entitled to summary decision as a matter of law.

Because we grant Respondents' motion for summary decision and dismiss this case, we need not address the ALJ's order suspending Complainants' counsel, Edward A. Slavin, Jr., from further participation in this case before the Office of Administrative Law Judges.[5/] However, we note our agreement with the ALJ that this case is frivolous. We are also constrained to point out that Mr. Slavin has again engaged in personal and vitriolic attacks on a Department of Labor Administrative Law Judge. *See Johnson v. Oak Ridge Operations Office*, ALJ Case Nos. 1995-CAA-20, 21 and 22, ARB Case No. 97-057, Final Decision and Order, slip op. at14-15 (Sept. 30, 1999).[6/] Counsel's

---

[5/] OALJ Rule 18.36(b), 29 CFR §18.36(b), provides a procedure for challenging an ALJ's order suspending an attorney from further participation in a proceeding before the ALJ, *i.e.*, the suspended attorney may appeal the suspension to the Chief Administrative Law Judge. The record does not indicate whether Mr. Slavin appealed the suspension to the Chief Judge as provided in the regulation.

[6/] We do not even attempt to list all of the personal insults which Mr. Slavin heaps upon the ALJ. However, the following is a partial list of invective contained in Complainants' Opening Brief to this Board:

- "The ALJ allowed his prejudices to run this case." Comp. Br. at 17.
- "The ALJ created a hostile litigation environment . . . ." *Id.*
- "The ALJ tried to make mincemeat of a hostile working environment. . . ." *Id.*
- The Board "should reject, reverse and remand the ALJ's arbitrary, capricious, unconstitutional, arbitrary [sic], capricious [sic], insolent, hostile and irascible actions in this case." *Id.*
- Reference to the "ALJ's kangaroo court" *Id.* at 19 n.17.
- The ALJ is accused of "[h]olding the Prehearing Conference . . . under stressful, ungracious and unfriendly circumstances, with no water for counsel, no welcome, little or no eye contact and no handshake with Complainant or their counsel, with an uncivil demand that Complainant and their counsel identify themselves before being allowed into the OALJ courtroom, while OALJ showed greater courtesy to Lockheed's counsel. . . ." *Id.* at 19 n.17.

(continued...)

characterizations of the ALJ's actions are factually inaccurate and insulting. Attorneys have a professional obligation to demonstrate respect for the courts. *See* ABA Model Rules of Professional Conduct, Preamble, Rules 3.5 and 8.2 (1999); 29 C.F.R. §18.36. Once again Mr. Slavin has exhibited his disregard of that professional obligation.

[6/](...continued)

- The ALJ is charged with "[i]ssuing an insulting, pejorative and half-baked Recommended Decision and Order . . . ." *Id.* at 20 n. 17.
- "The ALJ had a barely hidden agenda: narrowing the law to hurt whistleblowers." *Id.* at 21.
- "The ALJ was overtly hostile. The ALJ's one-way 'reign of error' shows partiality toward Respondents. . . ." *Id.*
- "The ALJ shows palpable, almost pathological 'prejudice' was [sic] against protected activity by [sic] the part of Complainants, wasting their time and funds and robbing them of their dignity and their day in Court." *Id.*
- "The ALJ showed no signs of an active social conscience, or appreciation for whistleblowers, or judicial independence or judicial temperament." *Id.* at 22.
- The ALJ was "[t]ilting toward the retaliators. . . ." *Id.* at 23.
- "The ALJ's refusal to allow Complainants to testify was unreasonable. It was hostile. It was utterly unprecedented." *Id.*
- "The ALJ forced Mrs. Farver and Mr. Williams – both persons the Complaint make clear have disabilities – to travel to Cincinnati the week before Thanksgiving, while not allowing them to testify." *Id.*
- "Refusal to let Complainants testify is one of the most mortal errors ever committed by a DOL ALJ – akin to an intentional tort by the ALJ, who looks down his nose at workers." *Id.*
- "The ALJ made anger, bitterness and insults into an art form, like a judicial Don Rickles." *Id.* at 24.
- "The ALJ misrepresented, ridiculed and twisted the facts in an Oak Ridge whistleblower surveillance civil rights case – marginalizing Complainants. The ALJ's bias is on display, not unlike a judicial confession." *Id.* at 27.
- "The ALJ erred with his hostile mishandling of this case. . . ." *Id.* at 29.

CONCLUSION

For the foregoing reasons these cases are **DISMISSED**.[7/]

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member

[7/] Because we dismiss the complaints we need not address Lockheed Martin Corporation's Motion for Dismissal.