U.S. Department of Labor

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

In the Matter of:

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, U.S. DEPARTMENT OF LABOR

CASE NO. 91-OFC-20

DATE: July 17, 1996

PLAINTIFF,

v.

THE CLEVELAND CLINIC FOUNDATION

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

FINAL DECISION AND ORDER

Defendant, The Cleveland Clinic Foundation (CCF), fired Leonard Westbrook, a black sergeant in its Security Department, on September 29, 1988, P (Plaintiff's Exhibit) 15, for sending a letter to the CCF Board of Governors which "contained statements [that] violated [CCF] Policy" prohibiting "deliberate false, fraudulent, or malicious statements . . . involving [CCF] . . . ." P-14. Westbrook's letter made numerous allegations of racial discrimination and racial harassment in the Security Department. In addition, CCF fired Phyllis Lee, a black officer in the Security Department, on May 23, 1988, when it discovered a false statement she had made on her employment application. D (Defendant's Exhibit) 36. The Administrative Law Judge (ALJ) found that CCF discriminated against both Westbrook and Lee in violation of Executive Order No. 11,246, as amended (E.O. 11,246 or the Executive Order), 3 C.F.R. 339 (1964-1965), *reprinted as amended* in 42 U.S.C. § 2000e note (1988), *see* ALJ Recommended Decision and Order (R. D. & O. at 36). The ALJ recommended adoption of a stipulation between the parties specifying the relief due if a final order is issued upholding the ALJ's recommendations. *See* Supplemental Recommended Decision and

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[1/] On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under the executive order and regulations involved in this case to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996) (copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Board now issues final agency decisions. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization is also attached.

Order on Remedial Relief.[2/] CCF filed exceptions to these findings of the ALJ and OFCCP filed responses to those exceptions.[3/]

BACKGROUND

Westbrook

Leonard Westbrook had been employed by CCF as an officer in its Security Department since 1970 and had filed several charges of discrimination against CCF with the EEOC and the Ohio Civil Rights Commission. R. D. & O. at 18; T. (Transcript of hearing) at 990. On January 1, 1988, Westbrook signed a letter with a group of twelve employees sent to the CCF Director of Human Resources and the Director of Protective Services complaining of race discrimination and racial harassment in the CCF security department. P-11. CCF conducted an internal investigation of the charges and concluded they had no merit. D-15. The Acting Director of Human Resources, David Posch, and the Director of Protective Services, Thomas Seals, met twice with Westbrook to discuss the charges in that letter and the investigation of the charges by the Department of Human Resources. T. 996. Two staff meetings were also held to emphasize CCF's policy against discrimination and give employees an opportunity to raise questions. T. 789.

Westbrook apparently believed CCF had not adequately responded to his charges,[4/] and on July 15, 1988, he wrote a letter to the Board of Governors of CCF raising many of the same charges made in the group letter of January 1, as well as additional charges. P-13. When Seals received a copy of the letter from a member of the Board of Governors, he was "shocked." T.1002. He showed the letter to Robert Koverman, Chief of Security, who told Seals that the statements in the letter were lies and that some were malicious. T. 1002-3. Koverman recommended that Westbrook be fired

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[2/] The ALJ also found that CCF did not discriminate against four other employees, as alleged in OFCCP's complaint, and OFCCP did not file exceptions to those findings.

[3/] In an Order granting Plaintiff's motion to remand this case to the ALJ for submission of a recommended decision on remedies, the Secretary ordered the parties to file their exceptions to the ALJ's decisions within 30 days of the ALJ's recommended decision on relief, allowed 30 days for filing responses to exceptions, and established page limits for both the exceptions (25 pages) and responses (15 pages). The Secretary also later granted Plaintiff's request for a 60 day extension of time to file responses to CCF's exceptions. Without requesting relief from the briefing order, Plaintiff filed its responses to exceptions together with a motion for leave to exceed the page limit by 15 pages. Defendant did not file a response in opposition to that motion and for that reason the motion is granted. Plaintiff had 90 days from the filing of Defendant's 13 page exceptions to move for an extension of the page limit, but instead chose to file its motion at the same time as its 30 page response. In addition, because Defendant's exceptions were limited to the ALJ's findings on only two employees, the factually complex nature of the case and extensive record, cited by Plaintiff as justification for its motion, did not support such an extension. In the future, motions such as these, not filed sufficiently in advance of a due date with time for the opposing party to respond before the passage of the due date, will be disfavored.

[4/] Westbrook died before the hearing in this case, T.228; an OFCCP investigator testified that her impression was that Westbrook was sincere and did not believe his charges were false or malicious. T. 406.

and Seals agreed. T. 1003. Seals met with Westbrook who acknowledged writing the July 15 letter, T. 1015, Koverman suspended Westbrook on September 19, 1988 for "violations of [CCF] polic[ies] 121 K and 121 R,[5/] and fired Westbrook on September 29, 1988. P-15.

Lee

CCF fired Lee on May 23, 1988, when it discovered that she had falsely answered "no" on her employment application to questions about whether she had ever lost time at work due to injury or had ever filed a claim for worker's compensation. R. D. & O. at 12. CCF's disciplinary policies classify falsification of CCF records as a major violation, P-14, and the employment application materials state that inaccurate or false answers will result in termination. P-3. CCF suspended a white officer for one day after he furnished a false statement to his supervisors about performance of his duties and lied about it during an internal investigation. R. D. & O. at 12-13. CCF suspended another black officer for five days for making a false statement. D-25.

DISCUSSION

Westbrook

The regulations implementing E.O. 11,246 require covered contractors "to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the administration of the order . . . ." 41 C.F.R. § 60-1.32 (1995). The parties and the ALJ assumed that this provision paralled the anti-retaliation provision, § 704(a), of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (1988), and that case law developed under that section should be applied here as well. We adopt that approach. Although the anti-retaliation provision of the regulations does not include specific language protecting "opposition" to practices made unlawful by the Executive Order, the language is similar to other employee protection statutes administered by the Department of Labor under which the Secretary has held, and courts have agreed, that internal complaints are protected. *See, e.g., Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 931-33 (11th Cir. 1995) (Energy Reorganization Act, (ERA), 42 U.S.C. § 5851); *Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 478-80 (3d Cir. 1993) (Water Pollution Control Act, 33 U.S.C. § 1367); *Jones v. Tennessee Valley Auth.,* 948 F.2d 258, 264 (ERA); *Kansas Gas & Electric v. Brock*, 780 F.2d 1505, 1513 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986) (ERA); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (ERA); *contra Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1031-36 (5th Cir. 1984) (internal safety and

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[5/] These policies proscribe

> 121 K. Deliberate false, fraudulent, or malicious statements or action involving . . . [CCF], another employee or the public; or other action disloyal to the foundation.
>
> 121 R. Any conduct seriously detrimental to patient care, fellow employees, or [CCF] operations.

health complaints to management not protected under ERA; this decision was legislatively overturned by the Comprehensive Energy Policy Act of 1992, Pub.L.No. 102-486, 106 Stat. 2776, 3123).

There is no dispute that CCF fired Westbrook for making the complaints of discrimination contained in his July 15 letter. *See* P-31 at 6. The question is whether those complaints are protected conduct under the regulations.

Opposition to alleged unlawful employment practices is protected if the employee reasonably believed the practice was unlawful and the reasonableness of an employee's belief "must be assessed according to an objective standard - one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases for their claims." *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994), *cert. denied, California Dep't of Corrections v. Moyo*, 115 S. Ct. 732 (1995); *Grant v. Hazelett Strip- Casting Corp.,* 880 F.2d 1564, 1569 (2d Cir. 1989) (Age Discrimination in Employment Act, 29 U.S.C. § 629(b)). As remedial legislation, equal employment laws such as Title VII and E. O. 11,246 must be construed broadly and such broad construction "applies to the reasonableness of a plaintiff's belief that a violation occurred . . . ." *Moyo v. Gomez, 40 F. 3d at 985.*

Where the asserted protected activity consists of internal opposition to alleged unlawful employment practices, "the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare." *Hochstadt v. Worcester Foundation for Experimental Biology,* 545 F.2d 222, 233 (1st Cir. 1976). Under some circumstances an employee's means, manner or conduct in expressing an otherwise protected internal complaint can become so extreme and disruptive as to fall outside the protection of the statute or the regulations. *Id.*[6/] *Cf. Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986) ("An otherwise protected 'provoked employee' is not automatically absolved from abusing his status and overstepping the defensible bounds of conduct.")

We agree with the ALJ that the means and substance of Westbrook's complaints cannot be compared to the kind of disruptive or insubordinate conduct found in other cases to lie outside the protection of anti-retaliation provisions. In contrast to cases such as *Hochstadt* and *Dunham*, Westbrook did not express the complaint for which he was fired verbally, in a loud or abusive manner that might have disrupted the workplace or interfered with the ability of other employees to do their jobs, nor did it interfere with his own performance or constitute insubordination.[7/] In another case in which employees expressed their complaint in the form of a letter addressed to one

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[6/] Each party and the ALJ relied on *Hochstadt* as supporting their respective positions. We note that several courts have viewed *Hochstadt* as "clearly an exceptional case . . . that 'must be read narrowly lest legitimate activism by employees asserting civil rights be chilled.' *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1355 (9th Cir. 1984)." *Grant v. Hazlett Strip-Casting Corp.,* 880 F.2d 1564, 1570 (2d Cir. 1989).

[7/] Westbrook received an overall performance evaluation of 115 points out of a possible 120, with outstanding ratings on each of six categories, on September 15, 1988, after he sent the letter to the Board of Governors and only four days before being suspended.

of the most important customers of the employer, possibly endangering the business relationship, the court held that this was a reasonable, protected form of opposition to alleged unlawful employment practices. *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014-16 (9th Cir. 1983). The court distinguished *Hochstadt* and similar cases because the protest activity there disrupted the workplace and in some cases directly hindered the protesting employee's job performance, while sending a letter "had absolutely no effect upon [plaintiffs'] job performance or upon the workplace environment." *Id.* at 1015.[8/]

CCF argues that Westbrook's letter was not protected under the regulations because he persisted in asserting allegations of race discrimination and harassment "determined to be unfounded" and because he made "blatantly false and malicious statements regarding the management of his department [that] made it impossible for [him] to continue to function effectively in his role as a Sergeant in the Security Department." CCF's Exceptions at 11. Westbrook's outstanding performance evaluation, issued within days of his suspension and reviewed by Koverman, the CCF manager who recommended Westbrook's dismissal, shows that he was fully capable of performing his job duties and that his expression of allegations of discrimination did not interfere with his effective working relationship with his superiors. If there were any impediment to his effectiveness in his job, therefore, it could only come from the hostility of his supervisors because of Westbrook's insistence on raising his complaints to the highest level at CCF. T. 705 (Koverman took the letter personally because it impugned his integrity and professionalism); T. 825 (Koverman and Seals were upset by the letter to the Board of Governors). But as the court pointed out in *E.E.O.C. v. Crown Zellerbach,* "almost every form of 'opposition to an unlawful employment practice' is in some sense 'disloyal' to the employer, since it entails a disagreement with the employer's views and a challenge to the employer's policies." 720 F.2d at 1014.

Applying an objective standard to assess whether Westbrook's belief in the validity of his complaint was reasonable, and keeping in mind that a lay plaintiff cannot be held to the same standard as an attorney filing a pleading in court, *see Moyo v. Gomez*, 40 F.3d at 985, we agree with the ALJ that there is no basis for CCF's assertion that Westbrook knew or should have known his allegations were false and malicious. R. D. & O. at 35. He had a reasonable basis for his claims, although he may not have been able to prove them by a preponderance of the evidence or meet the requirements of Rule 11(b) of the Federal Rules of Civil Procedure.

Westbrook alleged that the signers of the January 1 letter were denied a meeting with CCF officials. CCF claimed this charge to be a lie because CCF offered to meet with each signer individually and did in fact meet individually with Westbrook and some others. T. 505; 776. But Westbrook believed he and the other signers of the January 1 letter had asked for a joint meeting because they had sent the letter as a group. CCF's response that it would meet individually with each employee appeared as a rejection of a request for a joint meeting. T. 407; 505.

[8/] CCF argues that Westbrook's charge in the July 15 letter that "the stinch [sic] of racism in a workplace rise [sic] this high only in South Africa" was inflammatory and he should have known it was false. CCF's Exceptions at 3. But in *Crown Zellerbach*, the court did not find the employee's heated charge that a manager "has been the Standard Bearer of the bigoted position of racism at Zellerbach Paper Company," 720 F.2d at 1-11, sufficient to deprive the letter at issue there of protection.

Westbrook asserted in his letter that "[t]he word 'Nigger' is commonly used by white supervisors, officers and radio operators." The OFCCP investigator found that one officer had used the word, T. 503, and other minority employees stated in interviews that the word was commonly used, but the investigator could not document it. T. 504; *see, e.g.,* T. 35. Koverman concluded that this statement in Westbrook's letter was false and malicious because in his seven years as director of security he could recall only one instance where an employee actually complained about use of the word. T. 644-45. Koverman could not "substantiate [that charge] in its entirety," and gave a warning to the lieutenant involved. T. 645. Posch conceded that "the nature of the situation was such that apparently these [racial slurs] occurred in one on one situations . . . so it is difficult to prove one way or the other." T. 787. This shows that there was a basis for Westbrook's charge, rather than showing that the charge was deliberately false and malicious.

Westbrook alleged that "white officers [are] given opportunities for specialized training and jobs while minorities are denied the same." P-13. Another black officer had complained to the EEOC about disparate treatment in training, T. 179, and Westbrook provided OFCCP forms he had filled out requesting training, but to which he had never received a response from CCF. T. 508. OFCCP was unable to obtain from CCF the files and data it needed to determine the validity of this charge. T. 507. CCF had investigated this allegation and Posch told Westbrook the internal investigation found it was not true, T. 796, but Koverman conceded that CCF had no records on the amount of money spent on training or the number of courses taken broken down by race. T. 704. Westbrook may have been mistaken when he disagreed with the CCF investigation and raised this charge to the Board of Governors, but we cannot find that the charge was deliberately false or malicious. If an employee is mistaken about a claim of discrimination :

> [t]he mistake must . . . be a sincere one; and presumably it must be reasonable . . . for it seems unlikely that the framers of Title VII would have wanted to encourage the filing of utterly baseless charges by preventing employers from disciplining the employees who made them. But it is good faith and reasonableness, not the fact of discrimination, that is the critical inquiry in a retaliation case.

Rucker v. Higher Educational Aids Board, 669 F.2d 1179, 1182 (7th Cir. 1982).

Westbrook claimed that black officers were ridiculed for being in ill health and their privacy was invaded by inquiries about past medical problems. Koverman concluded this was not true because he had never heard a complaint about "this kind of activity." T. 647. Westbrook also charged that injured black officers were assigned duties that would make recovery difficult while white officers were given light duty for extended periods. The OFCCP investigator could not substantiate the allegation that black officers were purposely assigned tasks to make recovery more difficult because CCF did not provide any data or information on medical leave and medical restrictions. T. 510. Another black officer testified that her assignment after injuring her ankle, which involved a lot of walking, complicated recovery from her injury. T. 117-128. That officer testified that white officers were treated differently when they sustained injuries. T. 128. Koverman determined that these charges were false because he did not know of any such instances of disparate

treatment with respect to an employee's medical restrictions. T. 650. We cannot conclude on this record that theses charges were "utterly baseless" and lacking any protection under the regulations.[9/]

Westbrook claimed that two black female officers were discharged for filing worker's compensation claims, but Koverman found this false because one of the officers was fired for lying on her employment application form about having made a worker's compensation claim in the past. P-3. The ALJ found that CCF discriminated against this officer because a white officer who made a false statement was only suspended for one day and another black officer who made a false statement received a longer, five day, suspension. R. D. & O. at 28. The OFCCP investigator concluded from her interviews with Westbrook that he sincerely believed, based on information given him by co-workers, that they had been fired for filing worker's compensation claims. T. 501-2.

Westbrook complained that black officers were accused of being troublemakers and militants, while a white officer displayed a photograph of Governor George Wallace whom, Westbrook asserted, "openly advocated racism in America." Officer Lee testified that white officers teased Westbrook about his advocacy of the rights of blacks in the Security Department. T. 40-41. CCF did not deny that Thomas Seals, Director of Protective Services, displayed a picture of Gov. Wallace on the wall of his office and Seals could "understand how it might be offensive to some black persons." T. 1067.[10/]

We find that Westbrook's July 15, 1988 letter to the Board of Governors of CCF was a protected activity under 41 C.F.R. § 60-1.32, and the fact that CCF explicitly fired Westbrook for the content of that letter is direct evidence of retaliation. *Carroll v. United States Dep't of Labor*, 78 F.3d 352, 357 (8th Cir. 1996) (Direct evidence is "evidence showing a specific link between an improper motive and the challenged employment decision.") In addition, we find persuasive evidence of discriminatory intent in the disparate treatment of Westbrook and a white officer, Pierre Stolkowski. Beginning in 1983 and continuing over a period of three years, Stolkowski repeatedly violated CCF disciplinary procedures and work rules, *see* P-14, including CCF's "major" disciplinary rules, and never received more than a "verbal counseling." P-21. Stolkowski misrepresented himself to outside parties as a representative of CCF, wrote articles in local newspapers revealing confidential information about CCF patients, made disparaging remarks about other medical facilities to prospective patients of those facilities, intruded on the privacy of and "badgered" CCF patients, interfered with and disturbed patients and staff in the patient Registration Department, and demanded confidential information about patients from the Registration Department. *Id.* CCF received numerous complaints about Stolkowski's behavior both from outside parties and other CCF staff, characterizing Stolkowski's behavior as "bothersome," "harassment,"

[9/] The fact that the ALJ found no discrimination in the treatment of Jones does not preclude protection for Westbrook's allegations under the anti-retaliation provision. *Rucker*, 669 F. 2d at 1182.

[10/] The fact that Seals was proud of the photographs on his wall because they depicted famous individuals for whom he had provided protective services, T. 1010, and had no intent to harass or discriminate against any employee by exhibiting the pictures, does not show that Westbrook's reaction to the picture of Gov. Wallace was unreasonable.

"upsetting," and "inappropriate, insulting, and obnoxious." Although CCF warned Stolkowski in 1983 that "future incidents of this nature will result in your immediate termination," the only discipline imposed for repeated violations was "verbal counseling." Koverman explained that he was ordered by the director of operations and the director of protective services in 1983 to impose only "verbal counseling" because Stolkowski was "an enthusiastic employee" of CCF who drove patients to the hospital for their appointments, provided accommodations in his home to some patients and encouraged individuals to use CCF services. T. 656. We find this further evidence of retaliation against Westbrook. Stolkowski, an employee who embarrassed CCF to patients and other outside parties, and did actually disrupt the workplace by his conduct, in violation of the "major" disciplinary rules of CCF, was only given warnings after repeated infractions. Yet, Westbrook was fired for internal complaints of race discrimination and harassment with no evidence of workplace disruption or detrimental communication to outside parties and with no account taken of his years of outstanding service to CCF. CCF's exceptions to the recommendation of the ALJ that CCF violated the Executive Order and regulations when it fired Westbrook are DENIED.

Lee

We find the record supports the ALJ's conclusion of disparate treatment of Lee. CCF does not dispute the fact that two black officers were given more severe penalties, a five day suspension and discharge, for making false statements than a white officer, who received only a one day suspension. The ALJ found CCF's explanation for the more lenient treatment of the white officer, that it was simply a mistake because Koverman was out of town at the time, not credible. R. D. & O. at 28. Koverman signed both documents imposing discipline on the white officer and on Lee. There is relatively little evidence on this issue, not surprisingly because the unit involved is small and there were few employees disciplined for falsification of CCF documents. But on the evidence available in the record, we agree with the ALJ that the preponderance supports OFCCP's allegation that Lee was discriminated against.

Relief

As recommended by the ALJ, we adopt the stipulation of the parties on the relief due to bring CCF into compliance with the Executive Order and the regulations. We do not agree, however, that it is sufficient simply to order CCF to pay back pay with interest. The order should include a provision requiring CCF to comply with Executive Order No. 11,246 or face debarment from federal contracting. As the Secretary has pointed out, a contractor found in violation of the Executive Order is usually given an opportunity to bring itself into compliance and only if it does not comply will it be declared ineligible for future contracts and have its current contracts cancelled. *OFCCP v. Lasko Metal Products, Inc.*, Case No. 87-OFC-00009, Sec'y. Dec. Aug. 31, 1992, slip op. at 11-12. Without the inclusion of such a provision in the final order, CCF would have no immediate incentive to comply.[11/]

[11/] By entering into a stipulation on relief, CCF demonstrated its good faith intention to comply with the Executive Order and by including this provision in the final order we do not intend to question CCF's sincere intent to comply.

Accordingly, it is ORDERED that CCF pay $119,091.00 to the estate of Leonard Westbrook, and $23,477.86 to Phyllis Lee both with interest as provided in 28 U.S.C. § 1961. If CCF fails to provide such relief within 30 days of the date of this order, all of defendant The Cleveland Clinic Foundation's current government contracts and subcontracts shall be canceled and terminated and The Cleveland Clinic Foundation, its officers, subsidiaries and successors shall be ineligible for further government contracts and subcontracts (including modifications and renewals) until The Cleveland Clinic Foundation satisfies the Administrative Review Board that it is in compliance with the provisions of Executive Order No. 11,246 and the Regulations which have been found to have been violated in this case.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member