U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

DON A. JOHNSEN,

COMPLAINANT,

v.

HOUSTON NANA, INC., JV, and ALYESKA PIPELINE SERVICE COMPANY,

RESPONDENTS.

ARB CASE NO. 00-064

ALJ CASE NO. 99-TSC-4

DATE: January 27, 2003 (Reissued on February 10, 2003)

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Thad M. Guyer, Esq., *Medford, Oregon*

For Respondent Houston NANA, Inc., J.V.:
Gregory L. Youngmun, Esq., *DeLisio, Moran, Geraghty & Zobel, P.C., Anchorage, Alaska*

For Respondent Alyeska Pipeline Service Company:
Thomas P. Owens III, Esq., *Burr, Pease & Kurtz, Anchorage, Alaska*

FINAL DECISION AND ORDER

This case is before the Board pursuant to an appeal by Complainant Don A. Johnsen (Johnsen) of his environmental whistleblower complaint arising under the Clean Air Act, 42 U.S.C. § 7622 (CAA), Toxic Substances Control Act, 15 U.S.C. § 2622 (TSCA), and Water Pollution Control Act, 33 U.S.C. § 1367 (WPCA). An Administrative Law Judge (ALJ) ruled that Respondents Houston/NANA, Inc., J.V. (HNJV) and Alyeska Pipeline Service Company (Alyeska) were entitled to summary decision because Johnsen failed to file his complaint within the thirty-day limitations periods governing the CAA, TSCA and WPCA. A review of the pleadings indicates that Johnsen was informed that he had been subjected to adverse action more than thirty days prior to initiating his complaint with the Occupation Safety and Health Administration (OSHA). We therefore affirm the ruling of the ALJ.

BACKGROUND

On June 2, 1998, HNJV hired Johnsen through his union, the International Brotherhood of Electrical Workers (IBEW), to perform electrical work. Johnsen continued working at HNJV until December 10, 1998, when HNJV terminated him from his employment with the company. In conjunction with Johnsen's termination HNJV completed an Employment Termination Report (Termination Report), which contains several box-checked categories. Under "Reason for Termination," there is a mark in the box labeled "Job Complete." Under "Eligible for Rehire," there is a mark in the "No" box (the "no-rehire" decision). Alyeska's Motion for Summary Decision Based on Statute of Limitations, Exhibit (RX) 1.

On December 11, 1998 Johnsen initiated a complaint with Alyeska's Employee Concerns Program (ECP) protesting his termination, and by January 1999 was pursuing this complaint through ECP investigators.[1] Also on December 11, 1998 Johnsen attempted to file a complaint with IBEW Local 1547 (Local 1547).

On March 31, 1999, Johnsen filed an additional complaint with the Joint-Pipeline Office (JPO). The JPO consists of seven state and six federal agencies which share regulatory responsibility over the Trans-Alaska Pipeline System and other Alaska oil and gas pipelines. Although the JPO Intake Statement begins by stating that Johnsen filed a complaint in order to "pass along information about deficiencies he observed while working on the B023 project," it also notes that "Don wishes to formally lodge a complaint with JPO about his 'no rehire' notice on his lay-off form." RX 4.

On May 10, 1999 Johnsen filed an unfair labor practice charge against HNJV with the National Labor Relations Board (NLRB). In his charge to the NLRB Johnsen stated "On or about December 10, 1998, the above Employer terminated Don Johnson (sic) because of his union and/or other protected concerted activities." On May 19, 1999, Johnsen filed an unfair labor practice charge against Local 1547 for refusing to further pursue his grievance against HNJV.

In late May 1999, Local 1547 referred Johnsen to HNJV for employment. On May 24, 1999, HNJV notified Local 1547 that Johnsen had been terminated on December 10, 1998, and was not eligible for rehire. On June 9, 1999, HNJV notified Johnsen that his employment bid had been rejected.

---

[1] Alyeska's motion notes that this chronology was attached to Johnsen's August 19, 1999 complaint to OSHA. Although not actually attached in the record before the Board, Johnsen does not dispute that the document is his creation.

PROCEDURAL HISTORY

On June 9, 1999, Johnsen initiated his whistleblower complaint by letter to OSHA. In that letter Johnsen stated that his termination and Respondents' subsequent refusal to rehire him were in retaliation for reporting safety concerns during his employment with HNJV. On July 6, 1999 OSHA informed Johnsen that his complaint was untimely, as it had not been filed with thirty days of his December 10, 1998 termination. Johnsen appealed that determination to an ALJ. On May 17 and 18, 2000 the Respondents filed separate motions for summary decision.

On June 26, 2000 the ALJ issued a Recommended Decision and Order Granting Motions for Summary Judgment (R. D. & O.). Citing *Hadden v. Georgia Power*, 1989-ERA-21 (Sec'y Feb 9, 1994), the ALJ held that Johnsen was informed on December 10, 1998 that he had been subjected to adverse action, and therefore the limitations period governing his complaint began to run on that date, thereby rendering his complaint untimely. The ALJ also ruled that HNJV's decision not to rehire Johnsen was not a continuing violation, and that permanently barring Johnsen from future employment did not constitute an act of blacklisting.

POSITIONS OF THE PARTIES

Johnsen argues that a notice of an "inevitable delayed action" *(i.e.*, the "no rehire" decision) must be clear, unequivocal and final, and where such clarity does not appear in the notice itself, summary decision is inappropriate and a hearing must be conducted. He believes that the ALJ erred in ruling that HNJV's May 24, 1999 letter to the union stating Johnsen was not eligible for rehire did not constitute blacklisting and that, even if his wrongful termination claim is untimely, his continuing violation and blacklisting claims are timely.

In its brief HNJV argues that Johnsen received definitive, final and unequivocal notice that adverse action had been taken against him on December 10, 1999 and therefore his complaint is barred by the thirty-day statute of limitations. HNJV also argues that the ALJ correctly decided the blacklisting and continuing violation issues.

Alyeska argues that the Termination Report was final and unequivocal notice that triggered the thirty-day filing period, and Johnsen's own conduct demonstrates that he understood the Termination Report to be a final decision adversely affecting his employment and his opportunities for future employment with HNJV. Alyeska also argues that Johnsen's continuing violation and blacklisting claims are without merit.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ's R. D. & O. pursuant to 42 U.S.C. § 7622 (1994), 15 U.S.C. § 2622 (1994), 33 U.S.C. § 1367 (1994) and 29 C.F.R. § 24.8 (1999). See Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

We review a grant of summary decision *de novo, i.e.,* under the same standard employed by ALJs. Set forth at 29 C.F.R. § 18.40(d) and derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits an ALJ to "enter summary judgment for either party [if] there is no genuine issue as to any material fact and [the] party is entitled to summary decision." "[I]n ruling on a motion for summary decision, we . . . do not weigh the evidence or determine the truth of the matters asserted . . . ." *Stauffer v. Wal-Mart Stores, Inc.,* ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6-7 (ARB Nov. 30, 1999). Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact. We also must determine whether the ALJ applied the relevant law correctly. *Cf. Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith,* 475 U.S. 574 (1986); *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.,* 210 F.3d 1099 (9th Cir. 2000) (summary judgment under Rule 56, Fed. R. Civ. P.).

ISSUES BEFORE THE BOARD

Pursuant to our jurisdiction over this case, the issues before the Board are (1) whether the Respondents are entitled to summary decision as a matter of law because the pleadings and related record evidence indicate Johnsen was informed of his alleged adverse actions more than thirty days prior to commencing his whistleblower claim; (2) whether HNJV's refusal to rehire Johnsen constitutes a continuing violation; and (3) whether HNJV's May 24, 1999 letter to IBEW constituted an act of blacklisting.

DISCUSSION

The "No Rehire" Decision

The CAA, TSCA and WPCA all have thirty-day limitations periods governing the filing of whistleblower complaints. Those limitations periods begin to run either on the date that the employee is subjected to adverse action or, as in Johnsen's case, on the date that the employee receives final and unequivocal notice apprising him of the alleged adverse action. *See, e.g., Overall v. Tennessee Valley Authority,* ARB Case Nos. 98-111, 98-128 (Apr. 30, 2001) (under Energy Reorganization Act), slip op. at 34, *citing*

Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498 (1980) and *Chardon v. Fernandez*, 454 U.S. 6, 102 S.Ct. 28 (1981).

Johnsen argues that "a single and unexplained 'no rehire' box checked on an out-processing form following a layoff" does not constitute final and unequivocal notice of an adverse action, and therefore summary decision is inappropriate. Complainant's Initial Brief at 2, 10-11. We disagree. We have reviewed the Termination Report, which consists of a single page, and conclude that the information contained therein was enough to inform Johnsen that he would not be rehired by HNJV. Even if the meaning of HNJV's decision was unclear, Johnsen was obligated to acquire clarification. *See, e.g., Hadden, supra, citing Pacheco v. Rice*, 966 F.2d 904, 907 (5th Cir. 1992) ("The requirement of diligent inquiry imposes an affirmative duty on the potential plaintiff to proceed with a reasonable investigation in response to an adverse event.").

In any event, the record indicates that Johnsen did understand the adverse nature of HNJV's "no-rehire" decision more than thirty day prior to initiating his whistleblower complaint with OSHA. *See, e.g.*, March 31, 1999 JPO ECP Intake Statement (in which Johnsen states his desire to "lodge a complaint with JPO about his 'no rehire' notice"). We therefore concur with the ALJ's conclusion that there is no genuine issue as to the timeliness of Johnsen's complaint.

The Continuing Violation Allegation

In his June 17, 1999 letter to OSHA, Johnsen alleges that HNJV's refusal to hire him in May 1999 constitutes a continuing violation governed by a new limitations period. We disagree. A continuing violation exists when an employer engages in a series of related discriminatory acts and at least one adverse action has occurred within the limitations period. *See Freels v. Lockheed Martin Energy Systems, Inc.*, 95-CAA-2 and 94-ERA-6, slip op. at 8 (ARB Dec. 4, 1996). HNJV has not subjected Johnsen to adverse action since December 10, 1998, the date on which he was terminated and informed that he was ineligible for rehire. HNJV's refusal to rehire Johnsen months later does not constitute a separate discriminatory act. *See Hadden, supra,* slip op. at 4, *citing Mitilinakis v. Chicago*, 735 F. Supp. 839 (N.D. Ill. 1990) ("[P]laintiff cannot extend the limitations period by repeatedly renewing her demand for reinstatement and then counting her time to file from each denial.").

Johnsen had thirty days from the date of the "no rehire" decision to initiate any complaint alleging that HNJV would not rehire him because he engaged in protected activity. Because he received definitive, final and unequivocal notice that adverse action had been taken against him, his complaint is barred by the aforementioned thirty-day limitations periods.

The Blacklisting Allegation

Finally, Johnsen argues that he was blacklisted when HNJV notified Local 1547 on May 24, 1999 that he had been terminated on December 10, 1998, and was not eligible for rehire. We disagree. A blacklist is "a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate." *Howard v. Tennessee Valley Authority*, 90-ERA-24, slip op. at 2, fn. 4 (Sec'y July 3, 1991), *citing* Black's Law Dictionary 154 (5th ed. 1979). An act of blacklisting may also arise "out of any understanding by which the name or identity of a person is communicated between two or more employers in order to prevent the worker from engaging in employment." 48 Am. Jur. 2d *Labor and Labor Relations § 669* (2002).

Johnsen's allegation that the "no-rehire" decision constitutes an act of blacklisting is untimely for the same reasons mentioned above, *i.e.*, he had thirty days from the date he was informed of the decision to initiate his complaint. His only timely allegation is that HNJV engaged in blacklisting when it communicated it refusal to rehire him. The language of the letter does not support this allegation. HNJV was required by agreement to inform both Local 1547 and prospective employees in writing of the rejection of employment bids referred to HNJV by Local 1547. HNJV's Motion for Summary Decision, Exhibit 9. HNJV's letter to Local 1547 does not mention or imply that Johnsen engaged in any protected activity. Therefore, the letter by itself cannot constitute an act of blacklisting. *See, e.g., Leveille v. New York Air National Guard*, 94-TSC-3, slip op. at 10 (Sec'y Dec. 11, 1995) ("Communication of an adverse recommendation *based on protected activity* may be evidence of a decision to blacklist the employee." (emphasis added)). Johnsen has not alleged that HNJV took any action, other than the letter, to injure his employment prospects. We therefore conclude that Johnsen has not, for purposes of summary decision, sufficiently rebutted HNJV's contention that it did not blacklist him when it sent the May 24, 1999 letter to Local 1547.

CONCLUSION

The undisputed facts in this case indicate that Johnsen had been informed more than thirty days prior to initiating his complaint of the adverse actions he alleges, and that neither Respondent has engaged in acts of blacklisting. The Board therefore grants Respondents' Motions for Summary Decision and the case is **DISMISSED.**

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge