



Issue Date: 23 December 2004

CASE NO: 2004-ERA-15

In the Matter of

PATRICIA ANDERSON,  
Complainant

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,  
Respondent

**RECOMMENDED ORDER OF DISMISSAL  
WITH PREJUDICE**

On February 24, 2004, Complainant Patricia Anderson filed with the Office of Administrative Law Judges (OALJ), an appeal of the determination made by the Assistant Secretary for the Occupational Safety and Health Administration (OSHA) that Respondent U.S. Environmental Protection Agency (EPA) had not violated, *inter alia*, Section 211 of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851. Complainant now requests that this case be dismissed without prejudice. Respondent's counsel objects to Complainant's request and instead seeks dismissal of her complaint with prejudice. Based on the reasons set forth below, I recommend that the complaint of Patricia Anderson be dismissed with prejudice.

**I. Procedural History**

In a letter dated August 7, 2003, Complainant, through her representative Edward A Slavin, was informed that OSHA had completed an investigation into her allegation that EPA violated the whistleblower provisions of several environmental statutes in 1989, 1991, and February 2002 when it did not select her for higher level positions and delayed reimbursement for expenses incurred by her after she disagreed with certain management decisions made by EPA personnel. OSHA determined that, although Complainant had filed a *prima facie* case of retaliation, EPA had shown by clear and convincing evidence that the same unfavorable personnel action would have been taken against Complainant in the absence of her alleged protected activities. By separate letter, also dated August 7, 2003, a copy of OSHA's determination letter was purportedly forwarded to the Office of Administrative Law Judges (OALJ).

In a letter dated February 13, 2003 [sic – 2004] to OSHA's Washington, DC Office of Investigative Assistance, Mr. Slavin wrote that he had written to OSHA on April 4, 2003, August 12, 2003, October 21, 2003, November 25, 2003, and January 28, 2004 concerning Ms. Anderson's previously filed complaint and that OSHA had ruled against Ms. Anderson without ever having replied to his inquiries. Complainant requested a formal hearing regarding her complaint and asked that the matter be immediately remanded to OSHA because it never held a

closing conference or complied with certain procedures allegedly required by an OSHA investigator's manual. A copy of this letter was forwarded via facsimile to OALJ on February 13, 2004, and this matter was docketed by OALJ under the above-listed case number that same day.

On February 23, 2004, copies of the two August 7, 2003 OSHA letters were transmitted to OALJ via facsimile.

On February 26, 2004, Associate Chief Administrative Law Judge Thomas Burke issued an order staying these proceedings pending disposition of the Notice of Judicial Inquiry And Order To Show Cause issued to attorney Edward Slavin under 29 C.F.R. § 18.34 on December 24, 2003 in the matter of *Daniel Somerson v. Eagle Express Lines Incorporated*, 2004-STA-12.

In a February 26, 2004 letter to Chief Administrative Law Judge John Vittone, which was received by OALJ on March 2, 2004, Respondent's counsel opposed Complainant's request for hearing on the ground that her request was untimely. Counsel's letter notes that: Complainant was informed of OSHA's determination by letter dated August 7, 2003; the letter was mailed to Complainant in care of her attorney Edward Slavin; the letter was not sent by certified mail; and any request for hearing was due on or before August 19, 2003.<sup>1</sup>

On March 4, 2004, Respondent's counsel filed via Federal Express a response to Complainant's request for hearing and remand to OSHA. According to the response, remand is not appropriate under the regulatory scheme governing this matter since proceedings before OALJ are *de novo* and no lawful purpose would be served by remanding the case to OSHA.

Also on March 4, 2004, Respondent's counsel filed via facsimile a letter concerning Complainant's untimely request for hearing. Attached to counsel's letter was, *inter alia*, a return receipt dated August 7, 2003, the same date as OSHA's letter of determination, reflecting that David Wallace signed as having received said letter of determination on behalf of Edward Slavin on August 11, 2003.

On March 9, 2004, Judge Burke issued an order requiring Complainant to show cause why this matter should not be dismissed based on her failure to file a timely request for hearing. The order further required complainant and her attorney to show cause why Mr. Slavin's apparent neglect of his professional obligation to Complainant should not be added to the matters being considered in the Judicial Inquiry in *In re Slavin*, 2004-MIS-2 and 2004-STA-12.

On March 11, 2004, Edward Slavin filed via facsimile a letter addressed to Chief Judge Vittone asking that this matter be assigned to a judge for hearing. In his letter, he states, *inter alia*, that:

My father, Mr. Edward A. Slavin, Sr., died on August 10, 2004 and we left for his funeral on August 12, 2004 after completing numerous DOL filings. I do not

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<sup>1</sup> Respondent's counsel calculated the due date based on the provision of 29 C.F.R. § 18.4(c)(2) which requires adding five calendar days to prescribed periods when computing any period of time with respect to documents served by mail.

recall receiving any determination in Ms. Anderson's case and while Mr. Wallace signs for our certified mail, the photocopy of the certified mail card does not bear a round USPS stamp as is usual. The photocopy of the green card filed by EPA does not show a legible date. The provenance of EPA's filing is, at best, uncorroborated hearsay and irrelevant in light of the August 12, 2004 letter to OSHA [from Mr. Slavin inquiring when OSHA was going to issue findings].

Mr. Slavin further noted that his local Post Office manager was "somewhat ineffectual [and] it may be that Mr. Wallace signed a card for another case and that it was mistakenly associated with Ms. Anderson's case."

In another letter to Chief Judge Vittone dated March 14, 2004, Mr. Slavin wrote that the Department of Labor was originally provided with Ms. Anderson's mailing address in her July 4, 2002 complaint and that neither OSHA nor OALJ had served on her copies of documents pertaining to this matter.

On March 22, 2004, EPA's counsel responded to Mr. Slavin's March 11, 2004 letter in which Mr. Slavin claimed that OSHA had not responded to his letters dated April 4, 2003, August 12, 2003, October 21, 2003, November 25, 2003, and January 23, 2004. Attached to counsel's letter were copies of correspondence from OSHA to Mr. Slavin specifically responding to his correspondence dated October 21, 2003, November 25, 2003, and January 28, 2004. Each of the OSHA letters attached to counsel's March 22, 2004 letter informed Mr. Slavin that the complaint filed by Ms. Anderson on July 10, 2002 had been dismissed in August 2003.

On March 25, 2004, Mr. Slavin wrote to the Administrative Review Board asking that it order OALJ to appoint a judge and promptly hold a hearing on Ms. Anderson's whistleblower complaint.

On March 31, 2004, Judge Burke issued an order in Case Nos. 2004-MIS-2 and 2004-STA-12 disqualifying Edward Slavin from appearing in a representative capacity before OALJ in all cases which were then pending before OALJ and which may be filed or returned on remand to OALJ in the future.

On April 1, 2004, Judge Burke issued an order reassigning this matter to me and staying proceedings for thirty days to allow Complainant the opportunity to retain another attorney.

In a letter dated April 7, 2004, Mr. Slavin informed the undersigned that he was "honored to represent Ms. Patricia Ann Anderson" in this matter and was appealing Judge Burke's order disqualifying him from representing parties before OALJ.

On April 12, 2004, Respondent's counsel filed a response in opposition to Mr. Slavin's April 7, 2004 letter.

On May 5, 2004, I issued an order requiring that Complainant show cause why this matter should not be rescheduled for formal hearing forthwith. I directed Complainant to respond to the order by filing a written declaration stating that she had retained substitute

counsel; had not retained substitute counsel and wished to proceed *pro se*; had not retained substitute counsel and needed additional time to do so; or wished to stay these proceedings pending a decision on Mr. Slavin's appeal of Judge Burke's order of disqualification.

In a letter dated May 18, 2004, Complainant requested this case be stayed for six months. She wrote:

Based on the current circumstances of having my attorney disqualified by purported Orders issued by the Department of Labor, Case Nos: 204-MIS-2 and 2004-STA-12, and other reasons, I have not retained substitute counsel to represent me in these proceedings.

On June 10, 2004, the Administrative Review Board issued a decision and order dismissing Complainant's petition to review OALJ's failure to hold a timely hearing.

On June 16, 2004, I issued an order temporarily staying these proceedings for six months and directing that Complainant notify me in writing at the expiration of that period whether she had retained counsel or wished to proceed *pro se* in this matter.

In a letter dated June 28, 2004, Respondent's attorney wrote that neither Complainant's letter requesting a stay of these proceedings, nor her response to my show cause order, had ever been served on Respondent. Counsel's letter further stated that, due to EPA counsel's absence from the office from June 18 to June 25, 2004, counsel did not receive my order to show cause until June 28, 2004. Respondent therefore requested that Complainant be admonished of the requirement to properly serve all documents on all parties of record pursuant to 29 C.F.R. § 18.3

On December 14, 2004, Complainant filed a letter requesting that this case be dismissed without prejudice. In support of her request, she wrote, *inter alia*, that EPA appears to have ceased all adversarial and retaliatory actions against her and states that she was promoted to a GS-13 level approximately one year ago.

On December 17, 2004, Respondent filed an objection to Complainant's request in which it asked that this matter be dismissed with prejudice. According to Respondent, withdrawal of the complaint without prejudice would allow Complainant to refile her complaint or litigate underlying claims in other fora in the future. Respondent further argues that Complainant's request for hearing was untimely, and it would be unfair to subject EPA to possible litigation in the future given the facts of this case.

## **II. Discussion**

The ERA and its implementing regulations are silent with respect to a complainant's right to voluntarily dismiss an appeal. Similarly, there is no provision in Part 18 of 29 C.F.R. governing voluntary dismissal. Under these circumstances, I must rely on the Federal Rules of Civil Procedure in deciding whether to grant Ms. Anderson's request for dismissal without prejudice. 29 C.F.R. §18.1(a).

According to Fed. R. Civ. P. 41(a), an action may be dismissed voluntarily by a plaintiff without order of court. Such dismissal is without prejudice, except that the notice of dismissal operates as an adjudication upon the merits if the plaintiff has previously dismissed an action based on the same claim. Dismissal may be accomplished under the rule by filing a notice of dismissal at any time before service by the adverse party of an answer or a motion for summary judgment. Fed. R. Civ. P. 41(a)(1)(i). The rule further permits voluntary dismissal based on a stipulation of dismissal signed by all parties to the action. Fed. R. Civ. P. 41(a)(1)(ii). Since Respondent has answered Ms. Anderson's complaint, subsection (i) of the rule does not apply. Subsection (ii) of the rule is also inapplicable since no stipulation of dismissal signed by the parties has been filed.

When subsection 41(a)(1) does not apply, dismissal requires an order from the court setting forth such terms and conditions as the court deems proper. Fed. R. Civ. P. 41(a)(2). Unless otherwise specified in the court's order, dismissal under subparagraph (2) of the rule is without prejudice. Because a dismissal with prejudice prevents a complainant from reinstating a case, *Ball v. City of Chicago*, 2 F.3d 752, 757-59 (7th Cir. 1993), it is not a sanction to be imposed lightly.

Rulings with respect to Fed. R. Civ. P. 41(a)(2) must consider: (1) whether to allow dismissal; (2) whether the dismissal, if permitted, should be with or without prejudice; and (3) if dismissal is granted without prejudice, whether any terms and conditions should be imposed. *Nolder v. Raymond Kaiser Engineers, Inc.*, 84-ERA-5 (Sec'y June 28, 1985) slip op. at 5 citing *Spencer v. Moore Business Forms*, 87 F.R.D. 118 (1980); see also *Stokes v. Pacific Gas & Electric Co.*, 84-ERA-6 (Sec'y July 26, 1988) slip op. at 2. In making these determinations, the court must be cognizant of the rule that dismissal without prejudice should be granted unless the adverse party will suffer some legal harm. *Ibid.* Dismissal with prejudice is a very severe sanction since it bars a plaintiff from ever prosecuting another action based on the same cause, either in federal or state court. *Nolder, supra*, slip op. at 7.

Regarding the first consideration described in *Nolder*, Ms. Anderson has requested that she be allowed to voluntarily dismiss her complaint without prejudice. Respondent, however, has opposed this request, in part because Complainant might hereafter attempt to relitigate her claim in a subsequent proceeding. As the Secretary noted in *Nolder*, "legal prejudice . . . does not result simply when [a respondent] faces the prospect of a second lawsuit or when [the complainant] merely gains some tactical advantage." *Nolder, supra* at 6 quoting *Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982). Thus, an order granting Complainant's request might be warranted if legal prejudice to EPA were the only consideration. It is not.

As noted above, EPA opposes Complainant's request and seeks dismissal of the claim with prejudice based on Ms. Anderson's failure to timely request a hearing after OSHA issued its August 7, 2003 determination letter. Because I agree that Complainant's request for hearing was untimely, I find that voluntary dismissal should be denied and this matter should be dismissed with prejudice.

Applicable regulations require that any request for hearing must be filed with the Chief Administrative Law Judge within five business days of a party's receipt of the notice of determination issued by OSHA. 29 C.F.R. § 24.4(d)(2). As noted above, OSHA issued a determination letter regarding Complainant's original whistleblower claim on August 7, 2003. This letter was addressed to Patricia Anderson, c/o Edward A. Slavin, Post Office Box 3084, St. Augustine, FL 32085-3084. The address listed for Mr. Slavin in OSHA's letter is the same address used by him on correspondence filed in this case, up through and including his most recent communication dated April 7, 2004. I thus have no question that the determination letter was properly addressed to Complainant's representative.

Furthermore, on March 4, 2004, EPA's counsel wrote that she had "received copies of certified receipts from OSHA showing the dates on which its letter of determination was mailed, certified, to . . . Complainant's counsel of record, Edward Slavin." A copy of the certified receipt signed by Mr. Wallace, Mr. Slavin's assistant, was attached to counsel's correspondence and, contrary to Mr. Slavin's subsequent assertion that such receipt did "not bear a round USPS stamp as is usual," a circular stamp is clearly visible over the signature of Mr. Wallace. In addition, Respondent's counsel subsequently filed copies of letters properly addressed to Mr. Slavin and dated October 22, 2003, November 26, 2003, and January 30, 2004, each of which clearly state that Mrs. Anderson's July 2002 whistleblower complaint had been dismissed in August 2003. Ms. Anderson's representative thus had notice of OSHA's determination not once, but four times between August 7, 2003 and January 30, 2004. Under these circumstances, it is clear that Ms. Anderson's February 13, 2003 request for hearing was not filed within five business days of OSHA's notice of determination. Dismissal of this claim with prejudice is thus appropriate.

### **RECOMMENDED ORDER**

For the reasons set forth above, it is recommended that the complaint of PATRICIA ANDERSON against U.S. ENVIRONMENTAL PROTECTION AGENCY under § 211 of the Energy Reorganization Act be **DISMISSED WITH PREJUDICE**.

**A**

STEPHEN L. PURCELL  
Administrative Law Judge

**NOTICE:** This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge, *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).