

U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)



Issue Date: 21 April 2006

CASE NO.: 2005-DBA-00011

In the Matter of

Disputes concerning the payment of prevailing wage rates by:

F.R. GHIANNI ENTERPRISES, INC., Sub-Contractor,

and

Proposed debarment for labor standards violation by:

F.R. GHIANNI ENTERPRISES, INC., Sub-Contractor,

and

FRANK GHIANNI and DEBI WEAKLEM, individually,

With respect to laborers and mechanics employed by F.R. Ghianni Enterprises, Inc. on subcontract No. 422-09250 of prime contract No. N68711-94-C-1455 from August 1996 to November 1996;

Respondents.

ORDER DENYING RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS

The first phase of hearing in this case took place the week of February 27, 2006 in San Diego, California with the Secretary's case-in-chief concluding on March 2, 2006. Respondents' defense began later that day with phase two scheduled for completion of trial in late summer also in San Diego, California.

On February 27, 2006, Respondents filed their motion for judgment on the pleadings (the "Motion") arguing that I should "enter judgment holding that Respondents are not liable for any back wages and dismissing the Secretary's claim in its entirety, as the Secretary's claim, brought nine years after the alleged violations, is barred by the statute of limitations." Motion at 6. More specifically, Respondents argue that either California's three-year statute of limitation at California Code of Civil Procedure ("C.C.P.") § 338 or the six-year statute of limitations at 28 United States Code ("U.S.C.") § 2415(a) are applicable here to bar the Secretary's claims.

On March 9, 2006, the Secretary, through the Solicitor's Office, served its response to the Motion (the "Response") arguing that there is no specific statute of limitation applicable to this

ongoing *non-judicial* and *non-private* administrative proceeding under the Davis-Bacon Act absent specific limiting language from Congress. Consequently, neither C.C.P. § 338 nor 28 U.S.C. § 2415(a) are applicable to bar the claims at issue. More specifically, the Secretary argues that the plain meaning of 28 U.S.C. § 2415(a) provides that actions for money damages brought by the government are not barred until a year *after* final decisions have been rendered in applicable administrative proceedings such as the instant action before me. I have not yet issued a final decision in this case as trial has not concluded so this action is not barred by under 28 U.S.C. § 2415(a).

On March 24, 2006, Respondents filed a further reply to the response (the “Reply”) after receiving leave of court by me to proceed with their further briefing. The Reply further argues that even the Secretary’s field operations handbook states that the federal six-year statute of limitations would apply in government enforcement actions citing to 28 U.S.C. § 2415(a). Respondents argue that because this administrative proceeding took more than six years to arise, it is barred as the alleged underpayments occurred in 1996 and the Secretary did not initiate the claim until April 2005. While maintaining that California’s three-year limitations period carries the day for Respondents, they continue to argue that the longer six-year statute of limitations does not save the Secretary’s claims here where nine years have elapsed to bar the claims.

On April 12, 2006, the Secretary filed her reply to the Reply (“ReplyII”) once again arguing and citing cases showing that California’s three-year statute of limitations does not apply here to the government’s claims serving public rights or interests. In addition, the Secretary argues that the cases cited in support of Respondents’ six-year statute of limitation argument do not involve administrative proceeding like here. Instead they involve court proceedings filed more than one year after the conclusion of administrative proceedings. Finally, the Secretary argues that even if the six-year limitation period applied in this case, only her claims before September 16, 1996 would be barred because her September 16, 2002 charging letter is to be given the same effect of a complaint.

California Code of Civil Procedure Section 338 [3-year statute of limitations]

Respondents initially argue that this case should be dismissed because the Secretary failed to commence this action within a statute of limitations period, which the Respondents argue is three years. Respondents and the Secretary acknowledge that the courts and the Wage Appeals Board (“Board”) have ruled that the Portal-to-Portal Act’s two year statute of limitations does not apply to actions under the Davis-Bacon Act. *See Glenn Electric Company, Inc. v. Donovan*, 755 F.2d 1028 (3d Cir. 1985) and *J. Slotnik Company*, WAB Case No. 80-05 (March 22, 1983).

Respondents instead invite this tribunal to apply the three year statute of limitations imposed by the State of California on actions to recover upon a liability, penalty, or forfeiture created or imposed by statute. Respondents argue that federal courts are required to apply the most analogous statute of limitations from the state in which the court sits when a federal statute does not contain a statute of limitations. However, the cases cited by Respondents to support their argument involve a private right of action taken under a federal statute. E.g. *Graham*

County Soil & Water Conservation District v. U.S. ex rel. Karen T. Wilson, 125 S.Ct 2444, 2448-449 (2005) and *North Star Steel Co. v. Thomas*, 515 U.S. 29 (1995).

In cases such as here, where the United States in its official capacity brings the action, it is beyond dispute that the United States is not bound by state statute of limitations absent its consent. *United States v. John Hancock Mut. Life Insurance*, 364 U.S. 301 81 S.Ct. 1 (1960); *United States v. Summerlin*, 310 U.S. 414, 60 S.Ct. 1019, 84 L.Ed. 1283 (1940); *United States v. Bacon*, 82 F.3d 822 (9th Cir. 1996); *United States v. AMC Entertainment, Inc.*, 232 F.Supp.2d 1092, 1117 (C.D.Cal. 2002); *S.E.C. v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993) (State limitations periods do not bind the United States when it sues to vindicate public right or interest, absent clear showing of congressional intent to the contrary.) *See also Marshall v. Intermountain Electric Co.*, 614 F.2d 260, 262 and fn.3 (10th Cir. 1980)(State limitations periods do not apply where an action in part or total is brought by the federal government to serve public rights or interests).

Accordingly, Respondents' invitation to apply a California statute of limitations period is declined and the Respondents' motion for judgment on the pleadings requesting dismissal of this matter as untimely filed is denied.

28 U.S.C. Section 2415(a) [6-year statute of limitations]

The Supreme Court in *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59 (1953), a case cited in the Response, held that similar language to Section 2415(a) in the Portal-to-Portal Act refers "to suits in the conventional sense" rather than administrative complaints. Based on the Supreme Court's construction of the similar language contained in the Portal-to-Portal Act, I find that timing of administrative actions is irrelevant to the six-year limitations period in section 2415(a). Consequently, the fact that the Order of Reference apparently was not received by OALJ until April 2005 -- more than six years after Respondents' last alleged violative act in December 1996-- does not result in a violation of the six-year limitations period in Section 2415(a).

I find 28 U.S.C. § 2415(a) applicable to this case but that the one-year limitations period, commencing with my final decision, has not yet run. Respondents ignore the one-year limitations period in Section 2415(a) and do not allege that it was violated by the Secretary.

The language and meaning of the one-year limitations period is quite clear that the period starts to run when the administrative process has been completed. I find as the Supreme Court in effect held in *Unexcelled Chemical*, that even a determination by an administrative law judge is part of the administrative process.

Therefore, in the instant case the final administrative decision is yet to be rendered, and the one-year limitations period has not commenced to run.

Based on the foregoing, I find that the Secretary's claims against Respondents are not barred by the one-year limitations period in 28 U.S.C. Section §2415(a) and the Motion is denied.

For the reasons stated above,

IT IS ORDERED that Respondents' motion for judgment on the pleadings is **DENIED** in its entirety.

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GERALD M. ETCHINGHAM
Administrative Law Judge