



Issue Date: 30 March 2015

CASE NO.: 2015-ACA-00002

IN THE MATTER OF

**GREGORY KELLY,
Complainant**

v.

**STATE OF ALABAMA –
PUBLIC SERVICE COMMISSION,
Respondent**

ORDER OF DISMISSAL

This complaint has been brought under Section 1558 of the Patient Protection and Affordable Care Act (ACA), P.L. 111-148 (March 23, 2010), codified at Section 18C of the Fair Labor Standards Act, 29 U.S. § 218c, 29 C.F.R. Part 1984.

This is the eighth proceeding decided by the Office of Administrative Law Judges in eight months involving Gregory Kelly (“Complainant”) the State of Alabama – Public Service Commission (“Respondent”) (hereinafter “the Commission” or “Alabama PSC”). Most recently, on January 15, 2015, the undersigned issued an Order of Dismissal in three consolidated cases (2014-SOX-42, 2014-SDW-2, 2014-ACA-3) involving the same set of facts and circumstances surrounding Complainant’s termination by Respondent in 2009. For the reasons stated below, this complaint is being dismissed under the doctrine of collateral estoppel/res judicata and, alternatively, for lack of jurisdiction and/or failure to state a claim upon which relief can be granted.

I. UPDATED BACKGROUND AND PROCEDURAL HISTORY

A. Complainant’s Previous Seven Complaints

As stated in the Order to Consolidate, Order of Dismissal in Part, and Order to Show Cause issued November 14, 2014 and the January 15, 2015 Order of Dismissal (hereinafter Jan. 15, 2015 Order), Complainant has filed several cases spanning three OALJ offices covering all 19 whistleblower statutes under the OALJ’s jurisdiction, all surrounding the same set of facts surrounding his termination from employment with the Commission on April 9, 2009. Based on previous filings, Complainant worked as an engineer for the Commission. This is the eighth case that has been decided by the OALJ as of the date of this decision. The undersigned and the Hon.

Stephen Purcell (ret.) of Washington D.C. and Hon. John Sellers of Cincinnati, Ohio disposed of complaints in orders of dismissal issued July 7, 2014, (ALJ Kennington, *Kelly v. State of Ala. – Pub. Serv. Comm’n*, 2014-SOX-30 (July 7, 2014)); October 16, 2014 (ALJ Purcell, *Kelly v. Ala. Pub. Serv. Comm’n*, 2014-AIR-18 (Oct. 16, 2014)) and October 23, 2014 (ALJ Sellers, *Kelly v. State of Ala., Pub. Serv. Comm’n*, 2014-CAA-4 (Oct. 23, 2014)) and January 15, 2015 (ALJ Kennington, *Kelly v. State of Ala. – Pub. Serv. Comm’n*, 2014-SOX-42 (Jan. 15, 2015)).

The 19 employee whistleblower statutes under the jurisdiction of the OALJ are:

1. ACA - Affordable Care Act
2. AIR 21 - Aviation Investment & Reform Act
3. CAA - Clean Air Act
4. CERCLA - Comprehensive Environmental Response, Compensation and Liability Act
5. CFPA - Consumer Financial Protection Act of 2010 (Dodd-Frank, § 1057)
6. CPSIA - Consumer Product Safety Improvement Act
7. ERA - Energy Reorganization Act
8. FSMA - FDA Food Safety Modernization Act
9. FRSA - Federal Rail Safety Act
10. MAP- 21 - Moving Ahead for Progress in the 21st Century Act (MAP21)
11. NTSSA - National Transit Systems Security Act of 2007
12. PSIA - Pipeline Safety Improvement Act
13. SDWA - Safe Drinking Water Act
14. SOX - Sarbanes-Oxley Act
15. SPA - Seaman's Protection Act
16. STAA - Surface Transportation Assistance Act
17. SWDA - Solid Waste Disposal Act
18. TSCA - Toxic Substances Control Act
19. FWPCA - Federal Water Pollution Control Act (Clean Water Act).

In the Nov. 4, 2014 Order, the undersigned disposed of complaints under seven of 14 statutes, many of which duplicated complaints before Judge Purcell as well as the SOX complaint as res judicata from my July 7, 2014 Order. *See* DISCUSSION.II.A, *infra*. The Order to Show Cause issued as part of the Nov. 4, 2014 Order provided Complainant with an additional opportunity to explain why his remaining claims under the seven statutes should not be dismissed as untimely. (Nov. 4, 2014 Order, p. 11). Both parties filed responses to the Order to Show Cause in mid-November 2014.

On December 5, 2014, the Administrative Review Board issued an Order of Case Closing in *Kelly v. Ala. Pub. Serv. Comm’n*, ARB No. 15-0006, ALJ No. 2014-AIR-18 (ARB Dec. 5, 2014). In the Order of Case Closing, the ARB noted that since Complainant failed to file a proper Petition for Review with the Board as ordered, his case was closed. (Ord. of Case Closing, p. 2).

On January 14, 2015, the undersigned contacted the ARB regarding whether an appeal was filed in 2014-CAA-4 & 2014-PSI-2, the consolidated cases before ALJ Sellers. The ARB

indicated that no appeal had been filed in either case, thus making the decisions final order of the administrative law judge.

On January 15, 2015, I issued an Order of Dismissal under the remaining claims before me (SDWA, FWCPA, SWDA, CAA, CERCLA, PSIA and NTSSA).

On February 3, 2015, Complainant filed a petition for review with the ARB to appeal the Jan. 15, 2015 Order. On March 12, 2015, the ARB stated in a letter to Complainant that his case was not accepted for review and, accordingly, the undersigned's Order of Dismissal of January 15, 2015 had become the Secretary's final order.

B. Complainant's Current Complaint

Complainant filed his initial complaints with OSHA in this matter on September 2 and September 8, 2014 and asserted whistleblower protection under claims under the ACA, CAA, CFPA, CERCLA, FWCPA, PSIA, SDWA, and SWDA statutes. On October 21, 2014, OSHA dismissed his claims as untimely and also, in the case of the CFPA, for lack of jurisdiction. On November 12, 2014, Complainant filed an appeal to OALJ for the eighth time based on the same set of facts and circumstances, and was assigned case number 2015-ACA-2.

Similar to his previous complaints and responses to the Court, Complainant's complaint to the OALJ in this matter involve broad assertions of allegations of misconduct of by "AL-GOP officials" and their "RICO criminal enterprise." (*See generally*, Compl., pp. 3, 6-7.). His complaint focuses heavily on water-based issues under the FWPCA (Clean Water Act) and only vaguely references the ACA on pages 1 and 6. Complainant again references statutes not within the OALJ's jurisdiction, such as Asbestos Hazard Emergency Response Act (AHERA). He describes his period as being "inside state service" from 2002 to 2009, before two of the statutes for which he asserts he conducted protected activity and seeks protection under even existed (ACA and CFPA). (*Id.* at p. 6; OSHA Ltr.). He concludes the complaint by asking for "immediate relief from all individual (sic) inside the state of Alabama from these possible public safety threats," as well as compensation. (Compl., at p. 7).

II. DISCUSSION

A. Collateral Estoppel/Res Judicata

Again, Complainant has filed complaints under all 19 whistleblower statutes under the OALJ's jurisdiction, all involving his employment with Respondent and termination from "state service" on April 9, 2009. There have been three final decisions dismissing the claims as untimely, one dismissing the claim for lack of jurisdiction following a motion by Respondent, and two orders of dismissal where the ALJ determined, *sua sponte*, that no jurisdiction existed covering all 19 whistleblower statutes under the OALJ's jurisdiction.

Collateral estoppel/res judicata is not available where a prior ALJ decision is pending ARB review. *See Parker v. Stone & Webster*, 2000-ERA-2 (ALJ Dec. 22, 1999) (finding that collateral estoppel could not apply because the first ALJ's recommended decision was still

pending on review by the ARB, and therefore there is, as yet, no final decision in that first matter) and *Coupar v. Federal Bureau of Prisons*, 92-TSC-12 (ALJ May 13, 1994), (holding that the principles of res judicata and collateral estoppel do not apply to the prior decisions of ALJs when the Secretary had not yet issued a final order).

Complainant's claims in the previous seven cases involving all 19 statutes under the OALJ's jurisdiction have reached the status of being final orders, and no matters are pending (statutes listed in **BOLD** in the sequence of dismissal):

- On July 7, 2014 he undersigned dismissed the first **SOX** claim in *Kelly*, 2014-SOX-30, which was not appealed to the ARB.
- On July 15, 2014, Judge Purcell acting *sua sponte*, dismissed complaints under **AIR 21**, **TSCA**, **CFPA**, **CPSIA**, **FRSA**, **SPA**, **STAA**, **ERA**, and **SOX** for lack of jurisdiction in *Kelly*, 2014-AIR-18. No appeal was made of the order.
- On October 16, 2014, Judge Purcell issued an Order of Dismissal in the remaining claims under the **CAA**, **SWDA**, **FWCPA** or "Clean Water Act", **NTSSA**, **SDWA**, and **CERCLA**. Complaint filed appeal-like paperwork with the ARB in those cases.
- On October 23, 2014, ALJ Sellers issued an Order of Dismissal in *Kelly*, 2014-CAA-4 and *Kelly*, 2014-PSI-2 for complaints under the CAA and **PSIA**. No appeal was made of the order.
- On November 4, 2014, the undersigned, acting *sua sponte*, dismissed claims under **MAP-21**, **ACA**, and **FSMA** for lack of jurisdiction. No appeal was made of the order.
- On December 5, 2015, the ARB's Order of Case Closing on December 5, 2014, which followed Judge Purcell's Order of Dismissal in *Kelly*, 2014-AIR-18, officially closed Complainant's claims under six statutes where jurisdiction existed, including the five environmental statutes and the NTSAA.
- On January 15, 2015, the undersigned dismissed claims under SDWA, FWCPA, SWDA, CAA, CERCLA, PSIA, and NTSSA in *Kelly*, 2014-SOX-42, *Kelly*, 2014-SDW-2, and *Kelly*, 2014-ACA-3. A petition for review was filed with the ARB.
- On March 12, 2015, the ARB issued a notice stating that the Board did not accept Complainant's petition for review in *Kelly*, 2014-SOX-42, *Kelly*, 2014-SDW-2, and *Kelly*, 2014-ACA-3, and the undersigned's decision in these cases is now final.

Consequently, the doctrine of collateral estoppel/res judicata is available, and *Parker* and *Coupar* do not apply.

Collateral estoppel, or "issue preclusion," a concept included within the doctrine of res judicata, which "refers to the effect of a judgment in foreclosing a relitigation of a matter that has been litigated and decided." *Hasan v. Sargent & Lundy*, ARB No. 05-099, ALJ Case No. 2002-

ERA-32, slip op. at pp. 6-7 (ARB Aug. 31, 2007) (citing *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984). Collateral estoppel applies in administrative adjudication. *Id.* (citing *Univ. of Tenn. v. Elliot*, 478 U.S. 788, 797-799 (1986)).

Our jurisprudence holds that collateral estoppel applies when: 1) the same issue has been actually litigated; 2) the issue was necessary to the outcome of the first case; and 3) precluding litigation of the contested second matter does not constitute a basic unfairness to the party sought to be bound by the first determination. *Hasan*, ARB No. 05-099, slip op. at p. 7 (citations omitted); *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, 199-CAA-4 (ALJ Mar. 10, 1999).

The first inquiry is whether the issues at stake in the eighth complaint to the OALJ, 2015-ACA-2, are identical to the issues alleged in prior litigation and whether they have been actually litigated. Again, the statutes asserted in this matter (ACA, CAA, CFPA, CERCLA, FWCPA, PSIA, SDWA, and SWDA) have been actually litigated in the previous six of the seven cases before the undersigned, Judge Purcell, and Judge Sellers in 2014-SOX-42 (consol.), 2014-AIR-18, and 2014-CAA-4 (consol.). The issues at stake are identical, involving his tenure with the state of Alabama which ended in 2009 with his termination. He merely restates, for the eighth time, complaints about his activities and how he has been allegedly retaliated against long after the employee-employee relationship was severed. Complainant was unable to overcome untimeliness and could not establish that equitable tolling applied in the previous claims. He was unable to substantiate actual instances of blacklisting within the period of the complaint before the undersigned in 2014-SOX-42 (consol.), and his “continuing violations” theory was disproven by the facts. The orders issued by each judge are final decisions pursuant to the respective statute and to the ARB’s Order of Case Closing and March 12 notice of non-acceptance. He has not asserted a new and distinct cause of action. Accordingly, I find that the issues at stake in the instant litigation are identical to the issues alleged in prior litigation and these issues have been actually litigated.

The second inquiry is whether the issue was necessary to the outcome of the first case. The issues of lack of jurisdiction and untimeliness present in this case were critical and necessary parts of the judgments in the previous decisions, as they are here. Complainant states again that he ended state service in 2009 and repeats unproven claims of retaliation for years, without giving specific instances and dates. The current complaint repeats many elements of the previous seven claims, all of which form the same basis of this complaint, and all of which have been dismissed by three different judges in three OALJ offices and the ARB. Accordingly, I find that the issues of untimeliness and lack of jurisdiction were critical and necessary to the decisions in the previous cases involving the statutes claimed in the instant matter.

The third inquiry is whether precluding litigation of the contested second matter does not constitute a basic unfairness to the party sought to be bound by the first determination. Complainant has previously asserted in cases before all three judges that his “disabilities” should toll the statute of limitations. This is unfounded because, by his own admission in this matter, Complainant asserted alleged concerns “thousands of times” since 2002 about alleged wrongful conduct. (Compl., p. 3). Additionally, Complainant states he has spent “tens of thousands of dollars” in “legal and document reproduction costs,” and devoted “tens of hundreds of hours”

over the last six years “conducting scientific and legal research, drafting letters and pleadings.” (Compl. pp. 3, 7). Clearly, he has demonstrated an ability to assert, and continue to assert any allegations of wrongdoing in the future and would not be prejudiced by preclusion in the instant matter. In addition, Complainant has two new claims, 2015-ACA-3 and 2015-ACA-4, pending before OALJ against Respondent, likely under different causes of action stemming from the November 5, 2014 letter from the State of Alabama which removed him from its employment register. Accordingly, I find that precluding litigation in this matter would not be unfair to Complainant, who has already asserted the same claims in seven previously litigated cases.

Accordingly, since all three elements are satisfied, I find that the allegations of Complainant’s eighth complaint are subject to collateral estoppel. Thus, Complainant’s current claims for relief under the ACA, CAA, CFPA, CERCLA, FWCPA, PSIA, SDWA, and SWDA are hereby **DISMISSED** under the doctrine of collateral estoppel/res judicata.

B. Dismissal for Lack of Jurisdiction and Failure to State a Claim

In the event someone decides that the doctrine of collateral estoppel/res judicata does not apply, I dismiss the complaints for lack of jurisdiction and/or failure to state a claim upon which relief can be granted under 29 C.F.R. §§ 18.29 and 18.1 and Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The standards for summary decision/summary judgment, dismissal for lack of jurisdiction, dismissal for failure to state a claim upon which relief can be granted, and dismissal of a complaint for untimeliness were previously identified by the undersigned and ALJ Purcell in *Kelly*, 2014-SOX-30 and *Kelly*, 2014-AIR-18, respectively. *See also* 29 C.F.R. §§ 18.40 and 18.41; Fed. R. Civ. P. 12 and 56. The standards for summary decision and failure to state a claim upon which relief can be granted were again stated in the Jan. 15, 2015 Order of Dismissal.

I incorporate the facts and reasoning from the Judge Purcell’s July 15, 2014 and October 16, 2014 Orders in 2014-AIR-18, Judge Sellers’ October 23, 2014 Order in 2014-CAA-4 & 2014-PSI-2, and the undersigned’s November 4, 2014 and January 15, 2015 Orders in 2014-SOX-42 (consol.) in Complainant’s current claims for relief under the ACA, CAA, CFPA, CERCLA, FWCPA, PSIA, SDWA, and SWDA, and are they are hereby **DISMISSED** for lack of jurisdiction, untimeliness, and/or failure to state a claim upon which relief can be granted.

III. ORDER

Based on the foregoing:

IT IS HEREBY ORDERED that Complainant’s claims under ACA, CAA, CFPA, CERCLA, FWCPA, PSIA, SDWA, and SWDA against Respondent as contained in 2015-ACA-2 are **DISMISSED** because the ARB issued an Order of Closing on the same set of facts and circumstances in *Kelly*, 2014-AIR-18 on December 5, 2014, the time for appeal in 2014-CAA-4, which was consolidated with a claim under the PSIA (2014-PSI-2) has expired, and the ARB issued a notice that it did not accept the claims in 2014-SOX-42, 2014-SDW-2, and 2014-ACA-3, and thus collateral estoppel/res judicata applies to the instant complaints.

IT IS HEREBY ORDERED that Complainant's claims under ACA, CAA, CFPA, CERCLA, FWCPA, PSIA, SDWA, and SWDA against Respondent as contained in 2015-ACA-2 are **DISMISSED** for lack of jurisdiction, untimeliness, and/or failure to state a claim upon which relief can be granted.

SO ORDERED this 30th day of March, 2015, in Covington, Louisiana.

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1984.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1984.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-N, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1984.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1984.109(e) and 1984.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1984.110(b).