



Issue Date: 30 January 2006

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In the Matter of

SEEMA BHAT

Complainant

Case No. 2003 CAA 00017

v.

DISTRICT OF COLUMBIA WATER
AND SEWER AUTHORITY

.....

Order Denying Motion to Amend Decision and Order,
To Conduct Post-Decision Discovery,
And To Reopen the Record

On November 1, 2005, a Decision issued in this matter which concluded that Respondent had improperly terminated Complainant, Seema Bhat, for engaging in activity protected by Safe Drinking Water Act. The accompanying Order awarded her, *inter alia*, back pay relief. By motion filed November 15, 2005, Respondent seeks to alter or amend that order under Federal Rule 59(e),¹ reopen the record, and conduct post-decision discovery relating to Complainant's efforts to mitigate back pay damages.

In support of its motion, Respondent argues that Complainant was "personally involved with the investigation and prosecution of her whistleblower complaint." It notes that findings of fact were entered confirming her attendance at depositions, her participation in media interviews, and her testimony before the District of Columbia City Council. It reasons from this that Bhat was not otherwise available for work and should not receive back pay for time spent in litigation and claim-related activity. WASA argues further that back pay was ordered from the date of termination through the date of reinstatement, but approximately 18 months passed since the conclusion of the hearing. Respondent contends that the record should be reopened, and it should be granted permission to engage in discovery on back pay and mitigation issues while the matter was pending decision.

¹ Fed. R. Civ. P. 59(e) applies to this matter pursuant to 29 C.F.R. §18.1(a).

Complainant opposes the motion. She argues that it was WASA's burden to establish that she did not attempt to mitigate damages, and it presented no such evidence at the hearing. She argues further that she: "continually sought alternative employment from the date of her discharge to present;" however, she argues that the matter is pending appeal, and since the order entered on November 1, 2005, was not a "final" order, Respondent's motion is not "ripe" for consideration. For the reasons which follow, Respondent's motion to amend, reopen the record, and conduct discovery will be denied.

I. Jurisdiction

Complainant contends that Respondent's motion is not "ripe" for consideration, because the November 1, 2005 Order was a "recommended" not a "final" order, and the decision has been appealed. Yet, the style or caption of the decision is not the determining factor. By regulation, the decision and order of the trier of fact in a whistleblower case may be designated a "Recommended Decision." At other agencies, such as the Federal Trade Commission, the decision of the ALJ is called an "Initial Decision." In many types of DOL cases, no particular decision title is designated. Administratively, however, all of these share in common the attribute that if they resolve all of the issues presented by the parties, they are administratively "final" at the hearing level within the meaning of the Administrative Procedure Act, 5 U.S.C. §557. They are not interlocutory, and, as such, may be appealed. The decision and order which issued in this matter on November 1, 2005, addressed all of the issues raised by the parties at the hearing, was the "final" decision of the trier of fact, and was, accordingly, subject to appeal.

Such decisions may, of course, be reviewed by the trier of fact upon filing of a proper motion for reconsideration or amendment² or by an appellate tribunal upon a timely filed appeal. In this instance, Respondent sought review at both the trial level and the appellate level; however, it filed its Petition for Review at 12:46 p.m. on November 15, 2005, and four hours later, at 5:08 p.m., it filed its filed

² The courts have held that an improperly filed Rule 59(e) motion is a nullity. Feinstein v. Moses, 951 F.2d 16, (1st Cir. 1991). A Rule 59(e) motion must be filed in federal court within 10 days of entry of the judgment, and, in the absence of such motion, federal appeals must be filed within 30 days of entry of the judgment. In view of the different time limits for the Rule 59(e) motion and the appeal in the courts, the motion typically precedes the filing of the appeal. In the administrative practice, in contrast, the time for filing is 10 days for both the motion, under applicable federal rules, and the appeal, under applicable administrative Safe Drinking Water Act rules, *see* 29 CFR § 24.8(a); and this presents a potential conflict which the time limitations in the federal rules tend to avoid.

motion to amend and reopen; and the consequences of this chronology are not insignificant.

When a motion to alter or amend a judgment is filed in federal court under Rule 59(e) before a notice of appeal is filed, it stays the time for filing an appeal under Federal Rule of Appellate Procedure 4(a)(4). Bay Medical Center v Humana Military Healthcare Services, Inc., - F.3d - C., 04-1390, -1391 (Fed Cir. January 28, 2005). Scola v. Beaulieu Wielsbeke, No. 97-1230 (1st Cir. December 19, 1997). If the appeal is filed first, however, jurisdictional precedents apply; and in this instance, the appeal preceded the motion. As such, it appears that the action to amend at the trial level was no longer available.

The filing of a notice of appeal, generally, divests a lower court of its control over aspects of the case involved in the appeal and confers jurisdiction on the appellate court. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); U.S. v. Batka, 916 F.2d 118, 120 (3d Cir. 1990) (when an appeal is taken, the appellate court obtains exclusive jurisdiction over the issues on appeal). Willie v. Continental Oil Co., 746 F.2d 1041, 1046 (5th Cir. 1984); Fobian v. Storage Tech. Corp., 164 F.3d 887, 889 (4th Cir. 1999); Boyko v. Anderson, 185 F.3d 672, 674 (7th Cir. 1999). *See*, Smith v. Lujan, 588 F.2d 1304, 1307 (9th Cir. 1979). In this instance, both liability and damage issues are pending before the appellate tribunal; and a cogent line of authority, under these circumstances, requires a remand by the appellate tribunal before post-decision matters, usually in cases involving motions under Rule 60, may be considered at the lower court. *See*, Puerto Rico v. SS Zoe Colocotroni, 601 F.2d 39, 41 (1st Cir.1979). These holdings, analogous to the situation here, are designed to promote efficiency and avoid confusion by preventing simultaneous jurisdiction and the risk of redundant or contradictory rulings. Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 97 (3d Cir. 1988).

Several courts, however, have taken a bit more nuanced approach, deciding that it aids appellate review to permit a lower court to retain jurisdiction to *deny* a post-decision motion even as they withhold from the lower court authority to grant the motion without a remand from the appellate tribunal. *See, e.g.*, Bennett v. Gemmill, 557 F.2d 179, 201 (9th Cir. 1977); *See*, Fobian, 164 F.3d at 890; Boyko, 185 F.3d at 675; Toliver v. County of Sullivan, 957 F.2d 47, 49 (2d Cir. 1992); Winter v. Cerro Gordo County Conservation Bd., 925 F.2d 1069, 1073 (8th Cir. 1991); Hoai v. Vo, 935 F.2d 308, 312 (D.C. Cir. 1991); Winter, 925 F.2d at 1073. In drawing this distinction, these decisions reason that granting such relief would require the lower court to vacate the judgment on appeal, thereby creating a

situation wherein “two courts would be exercising jurisdiction over the same matter at the same time.” Fobian, 164 F.3d at 890. These appellate decisions under the Federal Rules inform the administrative analysis of the issue, but the parties in this proceeding cite no governing ARB precedent.

Under these circumstances, I conclude that jurisdictional considerations trump “ripeness.” When Respondent filed its appeal prior to its motion, jurisdiction to proceed in this matter lodged with the ARB and the authority of the Office of Administrative Law Judges to address the post-decision issues raised by Respondent verily, but instantly, decamped. Thus, the simultaneous exercise of post-appeal jurisdiction either to grant or deny such motions is not authorized by the applicable Safe Drinking Water Act regulations, and in the absence of a contrary ruling by the ARB, I conclude that the appeal divested OALJ of jurisdiction in this matter. Accordingly, WASA’s motion will be denied for lack of jurisdiction, and an appropriate order is entered below.³ To facilitate an expeditious resolution of this matter on appeal should the Board conclude that Respondent’s motion was properly before me, I have, however, also considered the merits of Respondent’s motion.

II.

A.

Failure to Mitigate Pre-Decision

Respondent’s initial contention that Complainant failed to mitigate damages and should be denied back pay for time spent in litigation and claim-related activities is without merit. It was WASA’s burden at the hearing to establish that Bhat failed to mitigate damages, and it was afforded a full opportunity, pre-hearing, in discovery and, later, at hearing to meet that challenge. As Respondent alleges, Bhat did participate fully in this litigation; however, the record demonstrated that she also actively sought alternative employment without success. Indeed, the November 1, 2005, Decision specifically addressed this issue in several places. *See*, D & O at pg. 81, Fn. 38; pg. 163, Finding 279; and pg. 180, Findings 373 and 374. Under these circumstances, and notwithstanding her participation in the litigation, Respondent failed to meet its burden of demonstrating that Bhat breached her duty to mitigate damages.

³ An exception to the transfer of jurisdiction to the appellate tribunal involves matters relating to petitions for attorney’s fees. Itemized attorney fee petitions for work performed at the trial level are adjudicated as collateral matters which may be, and frequently are, filed for approval while appeals are pending. To date, however, Complainant’s attorneys have not petitioned for their fees; but since no date was set for them to file, they may, accordingly, file their petition at their convenience.

B.
Mitigation While a Matter Is Pending Decision

Respondent also argued that 18 months passed between the conclusion of the hearing and the November 1, 2005 decision, and it should be permitted discovery to determine what Bhat did to mitigate her damages while the decision was pending. Of course, a significant portion of that 18-month period was granted to the parties for the preparation of their Proposed Findings of Fact and briefs, but Respondent's observation about the time it takes to render a decision in a case of this type is still valid. In a broader sense, the question Respondent poses is whether complex cases that involve running awards must be bifurcated or even trifurcated on the issue of damages to accommodate the fairly lengthy periods of post-trial adjudicative consideration they ordinarily entail, not only by ALJ's, but by the ARB and by the courts. It is the rare fully litigated whistleblower case that is finally resolved in less than a year after the hearing.

I am mindful that bifurcation of liability and damage issues is a procedure employed in some cases, mainly in response to the argument that it would be inefficient to inquire into damage issues before the liability issues are decided because damages need not be addressed at all if the complaint is dismissed. Conversely, however, if the Board, which reviews these matters, *de novo*, were to reverse the dismissal, it would have no record basis for an order granting relief, and a remand, which a consolidated hearing would have obviated, would be necessary. Thus, the rules which govern these proceedings do not mandate bifurcation, and efficiency arguments supporting requests to split the liability from the damage issues when evaluated case-by-case may be less compelling than arguments against bifurcation.

Rather than foster the expeditious resolution of whistleblower adjudications, bifurcation of the hearing may significantly delay the time it takes to reach a final decision at the trial level. In Welch v. Cardinal Bankshares Corp., for example, the decision on liability which issued on January 28, 2004, after extended litigation was deemed by the Board interlocutory and not subject to appeal. Cardinal Bankshares, 2003-SOX-15, (ARB May 13, 2004). Over a year later, following more litigation, the decision on damages issued on February 15, 2005, and included a running award of back pay until reinstatement. The entire matter is now on appeal with back pay damages running while the appellate decision is

pending.⁴ Similarly, in Bobreski v. District of Columbia Water and Sewer Authority, 2001 CAA 6 (ALJ July 11, 2005) proceedings were bifurcated. The hearing in Bobreski preceded the hearing in this matter. The decision on the merits in Bobreski issued on July 11, 2005, and found that WASA had violated federal whistleblower protection statutes. *See*, Bobreski at 2001-CAA-6 (ALJ, July 11, 2005). To date, a decision on damages in Bobreski has not been rendered, and the decision on liability remains interlocutory.

As these examples suggest, the time and efficiency arguments supporting bifurcation are not entirely clear-cut, particularly in cases involving violations. Yet, WASA arguments here are even more tenuous. The question it presents is whether an employer who was afforded a full opportunity at hearing, but proved unsuccessful in demonstrating that a complainant failed to mitigate back pay damages, may insist upon bifurcation, further discovery and separate damage adjudication, to determine whether a complainant attempted to mitigate each time an adjudicative level hands down a decision. In support of its argument, Respondent cites Smith v. Tennessee Valley Auth., 89 ERA 12 (SEC. March 17, 1995) as a case which WASA describes as an example of an ALJ granting a request to reopen a record for additional discovery on the issue of damages. Resp. Motion at 2. Smith, however, is distinguishable.

In Smith, it appears that the ALJ did not “reopen” the record. He granted the parties a bifurcated hearing at the outset. The judge in Smith issued a decision on the merits finding respondent liable on October 1, 1991, and scheduled a separate hearing on damages which were postponed while the parties conducted discovery. This case, in contrast, was not litigated in contemplation of bifurcation. Liability issues and damage issues were consolidated at a single proceeding, were the subject of pre-trial discovery, were fully tried at the hearing, and were decided on the merits.

Moreover, assuming a complainant has a continuing obligation, pending decision, to try and mitigate back pay damages, the rationale for separate damage proceedings would apply as long as the award is running which may continue until liability is finally decided at the highest level of appeal the parties decide to pursue, and the complaint is either dismissed or a reinstatement offer is tendered.

⁴ The Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A § 1514A (West 2002), places severe constraints on the time Congress has afforded administrative decisionmakers to resolve whistleblower matters. Consequently, procedures such as bifurcation which may prolong the process may not be entirely consistent with congressional intent unless all parties agree to it.

Consequently, bifurcation at the trial level may accomplish little in running award situations, since back pay damages continue to accrue while appeals are pending, and the appeals can, on occasion, be quite time-consuming. Thus, as a back-pay damage award is running, it makes little sense, and achieves no efficiencies, to initiate proceedings, as WASA suggests, after each interim adjudicative level finishes its review and renders its decision.

Thus, WASA was afforded an opportunity at the hearing to demonstrate that Complainant breached her duty to mitigate damages. The matter is now pending appeal, and nothing in the precedents mandates the type of cumbersome intermittent damage proceedings WASA envisions to confirm a complainant's mitigation efforts in running award situations while a whistleblower case is pending decision. Under these circumstances, and in the absence of any Board directive to the contrary, I find WASA's motion for sequential damage proceedings lacking in merit. Accordingly;

ORDER

IT IS ORDERED that Respondent's MOTION TO ALTER OR AMEND THE ALJ'S NOVEMBER 1, 2005 ORDER TO PROVIDE FOR AN OFFSET TO COMPLAINANT'S BACK PAY AWARD WHEN SHE WAS UNAVAILABLE FOR WORK DUE TO PROSECUTION OF HER CLAIMS, AND TO ALLOW FOR DISCOVERY AND THE MAKING OF A RECORD WITH RESPECT TO COMPLAINANT'S INTERIM EARNINGS AND EFFORTS TO FIND REPLACEMENT EMPLOYMENT FOLLOWING THE HEARING be, and it hereby is, dismissed for lack of jurisdiction.

A

Stuart A. Levin
Administrative Law Judge