



Issue Date: 01 April 2013

Case Number: 2013-ERA-00004

In the Matter of:

KELLY FLOYD,

Complainant

v.

CABELL HUNTINGTON HOSPITAL,

Respondent.

ORDER OF DISMISSAL

On February 19, 2013, the United States Department of Labor, Office of Administrative Law Judges (“OALJ”) received correspondence dated February 10, 2013 from Kelly Floyd (“Ms. Floyd” or “Complainant”) seeking a hearing before an administrative law judge with regard to the Occupational Safety and Health Administration’s (“OSHA”) dismissal of her discrimination complaint. According to the January 28, 2013 letter from OSHA’s Philadelphia Regional Office dismissing Ms. Floyd’s complaint, the complaint was dismissed under Section 11(c) of the Occupational Safety and Health Act, 29 C.F.R. § 660(c).

In her February 10 correspondence, Ms. Floyd stated that she was appealing OSHA’s dismissal of her Section 11(c) complaint, but also asserted that OSHA failed to address her complaint under several environmental whistleblower laws: The Safe Drinking Water Act, 42 U.S.C. § 300j-9, the Toxic Substances Control Act, 15 U.S.C. § 2622, the Solid Waste Disposal Act, 42 U.S.C. § 6971, the Clean Air Act, 42 U.S.C. § 7622 and the Energy Reorganization Act, 42 U.S.C. § 5851.

The regulations governing environmental whistleblower complaints at 20 C.F.R. §§ 24.104, 24.105, 24.106 and 24.107 indicate that the right to a hearing before an administrative law judge arises after OSHA has issued written findings and an order on a complaint filed under such environmental statutes. Inasmuch as OSHA’s January 28, 2013 denial letter referred only to a complaint of discrimination under Section 11(c) of the OSH Act, and OALJ has no authority to review OSHA determinations in a complaint filed under Section 11(c), it appeared that OALJ may

not have jurisdiction over Ms. Floyd's appeal if OSHA never issued written findings and an order with respect to the environmental issues referenced in Complainant's appeal and request for hearing.

Based on the foregoing, in a February 28, 2013 "Notice of Docketing and Order to File Brief Regarding Authority to Conduct Hearing" the parties were notified that OALJ had docketed the Complainant's hearing request solely for the purpose of determining whether OALJ has the authority to consider Ms. Floyd's appeal. The parties, including OSHA's Office of Whistleblower Protection Programs,¹ were ordered to file briefs on the question of whether OALJ has the authority to conduct a hearing on the Complainant's purported environmental whistleblower claims where OSHA has neither investigated nor issued findings on such claims. The parties were directed to file briefs in time to be received by OALJ no later than the close of business (4:30 pm EDT) on Friday, March 15, 2013. The Complainant was warned that her failure to establish OALJ's authority to conduct a hearing will result in denial of the hearing request.

To date, OALJ has no record of a brief filed by any party to this matter. Accordingly, I find that the Complainant has abandoned her request for a hearing. Alternatively, even if the Complainant has not abandoned her request for a hearing, she has failed to establish OALJ's authority to conduct a hearing under the circumstances presented.

Based on the foregoing, **IT IS ORDERED** that the above captioned matter is hereby **DISMISSED** without prejudice.

STEPHEN L. PURCELL
Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Order of Dismissal will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., 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

¹ The current name of OSHA's whistleblower office is the "Directorate of Whistleblower Protection Programs."

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.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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 a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.