U.S. Department of Labor

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Issue Date: 17 February 2017

OALJ Case No.: 2016-FRS-00054
OSHA Case No. 7-5880-16-011

In the Matter of:

MELISSA PODGORAK,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

DECISION AND ORDER APPROVING WITHDRAWAL, ORDER OF DISMISSAL WITH PREJUDICE, AND ORDER CANCELLING HEARING

This proceeding arises under the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, and the applicable regulations issued thereunder at 29 C.F.R. Part 1982. This matter currently has a hearing scheduled for April 18, 2017, at 9:00 a.m. in or near Kansas City, Missouri, continuing if necessary through April 21, 2017.

On September 13, 2016, I received Complainant's Request for Dismissal stating that the parties had reached a global settlement for a confidential amount in a Missouri state court matter brought under the Federal Employer's Liability Act ("FELA") and thus requested that I dismiss this matter with prejudice. On or about November 21, 2016, I held conference call for counsel with the parties to discuss what effect, if any, 29 C.F.R. § 1982.111(c) had on the request. During that call, counsel for Complainant stated that: (1) the confidential settlement of the FELA action was conditioned upon Complainant dismissing any pending claims against Respondent; and also that (2) Complainant's strategy with respect to settlement of the FELA action was not affected by the existence of this action.

On December 7, 2016, the Office of Administrative Law Judges received Complainant's Unopposed Motion to Approve Request for Dismissal (the "Unopposed Motion"), which re-stated counsel for Complainant's statements during the conference call summarized above and further stated "Complainant's position that the settlement-approval process articulated in 29

C.F.R. § 1982.111(c) does not apply to this matter." I received a second copy of the Unopposed Motion by fax on February 9, 2017.

The regulations provide:

> At any time before the Assistant Secretary's findings and/or order become final, a party may withdraw its objections to the Assistant Secretary's findings and/or order by filing a written withdrawal with the ALJ. … The ALJ … will determine whether to approve the withdrawal of the objections…. If the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or order, and there are no other pending objections, the Assistant Secretary's findings and/or order will become the final order of the Secretary. … If objections … are withdrawn ***because of settlement***, the settlement must be submitted for approval in accordance with paragraph (d) of this section.

29 C.F.R. § 1982.111(c) (emphasis added). Pursuant to 29 C.F.R. § 1982.106(b), once a timely objection to the Assistant Secretary's findings and/or order is filed, "all provisions of … [that] order will be stayed" and such findings and/or order only become final if no timely objection is filed.

In this case, the Assistant Secretary's findings are not yet final because Complainant filed a timely objection to them on or about May 3, 2016. 29 C.F.R. § 1982.106(b). Complainant can thus move to withdraw her objection to those findings, and I can approve that withdrawal unless the withdrawal is "because of settlement," in which case I must review and approve the settlement. 29 C.F.R. § 1982.111(c).

The question, then, is whether Complainant's withdrawal of this matter is "because of settlement" or not. One could argue that because she seeks to withdraw this matter because of her settlement of the FELA action in Missouri state court, I am required to review and approve the settlement of the FELA action. But that would require me to interpret the regulation as if it read, "[i]f objections … are withdrawn because of settlement ***in any matter***, the settlement must be submitted for approval…." I decline to do so.

Instead of reading words into the regulation, it makes more sense to interpret the regulatory reference to "settlement" in "[i]f objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval" to mean "the settlement of the FRSA matter before the ALJ." This reading is particularly appropriate when, as here, Complainant is represented by counsel, the settlement at issue was in a case other than the FRSA action before me, and counsel for Complainant has stated that her "negotiation strategy or approach to her efforts to settle the … [other] case would have remained the same even in the absence of this action." Unopposed Motion, at 2 (footnote omitted).

For these reasons, I find that Complainant's objection is not withdrawn "because of settlement" for purposes of the last sentence of 29 C.F.R. § 1982.111(c). I therefore find that I need not review and approve the confidential settlement of the FELA matter in order to permit Complainant to withdraw her objection.

Accoridngly:

1. Complainant's Unopposed Motion to Approve Request for Dismissal is GRANTED;

2. Case no. 2016-FRS-00054 is DISMISSED WITH PREJUDICE;

3. The hearing of this matter currently set for April 18, 2017, at 9:00 a.m., continuing if necessary through April 21, 2017 in or near Kansas City, Missouri, is CANCELLED;

4. All pending dates in this matter are vacated, and

5. Each party shall bear her or its own attorney's fees and costs.

SO ORDERED.

Digitally signed by PAUL R. ALMANZA
DN: CN=PAUL R. ALMANZA,
OU=ADMINISTRATIVE LAW JUDGE,
O=US DOL Office of Administrative Law
Judges, L=Washington, S=DC, C=US
Location: Washington DC

PAUL R. ALMANZA
Associate Chief Administrative Law Judge

Washington, D.C.