

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)



Issue Date: 17 June 2014

Case No.: 2014-SPA-00001

In the Matter of:

BRADLEY L. HIGGINS, *pro se*,

Complainant,

v.

ENSCO,

Respondent.

ORDER DISMISSING COMPLAINT FOR LACK OF JURISDICTION

This matter arises from a complaint filed under the employee “whistle blower” protection provisions of Section 2114 of the Seaman’s Protection Act (SPA), 46 USC §2114, as amended, and is governed by the implementing Regulations found in the Code of Federal Regulations, Title 29, Part 1989. Pursuant to federal regulations at 29 CFR §1989.107, the proceeding will be held in a manner consistent with the procedural rules set forth in federal regulations at 29 CFR Part 18, Subpart A (29 CFR §18.1 to §18.59).

By Order issued May 14, 2014, the Parties were directed to file documentation related to the issue of whether jurisdiction over the complaint resided with the Office of Administrative Law Judges.

JURISDICTIONAL ISSUE

Federal regulations prohibit review the OSHA investigation and remand of a case for further investigation by OSHA, 29 CFR §1989.109(c). Accordingly, this presiding Judge has no jurisdiction to direct the Occupational Safety and Health Administration (OSHA) to conduct further investigation into this matter or to examine how the investigation by OSHA was conducted.

Additionally, Federal regulations provide that a settlement agreement approved by the Administrator while the complaint is at the OSHA level, is the final order of the Secretary of Labor and is enforceable in a U.S. District Court pursuant to 49 U.S.C. §31105(e), as incorporated by 46 U.S.C. §2114(b). see 29 CFR §1989.111(e).

In this case the only allegation is that the Respondent violated a term of an approved SPA settlement agreement “By informing TWC (Texas Workforce Commission) that I was fired for the same reason that they gave OSHA.”

DISCUSSION

On June 13, 2014 the Complainant filed his response to the May 14, 2014 Order. He stated “As far as to the jurisdictional issue with whether or not the Respondent violated the terms of the settlement agreement. The Complainant agrees that that part of the complaint falls out of this court’s jurisdiction and falls under the U.S. District Court. Furthermore the Complainant understands that he needs to file with that court regarding breach of contract.” He added “It’s the belief of the Complainant that [Respondent] retaliated against him again after the settlement agreement was signed by making disparaging comments about him to TWC after they agreed not to in the settlement agreement ...”

The Complainant attached a copy of the settlement agreement approved by OSHA at the Regional level on November 20, 2013¹. The settlement agreement provided that “acceptance of this Agreement constitutes settlement in full of any and all claims against [the Respondent] arising out of Complainant’s complaint filed with OSHA on September 17, 2013, and will cause the complaint to be closed.”

The Complainant also attached February 13, 2014 printouts, attributed to the Texas Workforce Commission (TWC), which indicated that as of October 9, 2013 the reason for the Complainant’s discharge from employment with Respondent was “Not Qualified” and that as of January 2, 2014 the reason was “The Claimant was discharged for unacceptable and improper conduct. The claimant was terminated after he performed an unsafe act onboard, he was using a pressure washer to clean his boots and this is a very high pressure hose also he was not wearing any PPE equipment ...”

The Respondent filed a response on June 13, 2014 and attached not only a copy of the same settlement agreement but also a copy a “Complaint for Consequential Damages, Fees and Costs, Compensatory Damages and Punitive Damages” filed by the Complainant in the Harris County U.S. District Court for the Northern District of Texas on May 28, 2014. The factual allegations in the complaint allege that the parties had entered into a settlement agreement in November 13, 2013, the Defendant violated the settlement agreement on or about January 2, 2014 by informing TWC that the Complainant was discharged for unacceptable and improper conduct, and that the Complainant became aware of the alleged violation of the settlement agreement on January 9, 2014.

The complaint referred for hearing alleges that the Respondent advised TWC on or about January 2, 2014 that the Complainant had been fired for unsafe acts and was thereby not qualified for rehire.²

¹ In the Matter of: ENSCO / Higgins / Case No.: 6-1050-13-105

² Complainant’s original January 9, 2014 e-mail to OSHA Investigator, A. Fisher.

The complaint referred for hearing alleges acts by the Respondent on or about January 2, 2014 that violated the terms of a settlement agreement approved at the OSHA Regional level on November 20, 2013. The Complainant provided printouts attributed to TWC indicating an update to the Complainant's unemployment compensation claim entered on January 2, 2014 substantiating the complaint referred for hearing.

In that the acts alleged occurred after the settlement agreement was approved on November 20, 2013 and the allegation is that the Respondent's acts on or about January 2, 2014 violated the terms of the settlement agreement, the proper venue for adjudication is before the U.S. District Court pursuant to 49 U.S.C. §31105(e), as incorporated by 46 U.S.C. §2114(b)³. see 29 CFR §1989.111(e). Accordingly, the Office of Administrative Law Judges does not have jurisdiction over the complaint alleged and the referred complaint must be dismissed.

ORDER

It is hereby Ordered that **the Complainant filed January 9, 2014 is hereby DISMISSED.**

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

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. § 1986.110(a). Your Petition must specifically identify the

³ From Respondent's attachments, it appears the Complainant took this action on May 28, 2014.

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. § 1986.110(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-North, 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 for Occupational Safety and Health. *See* 29 C.F.R. § 1986.110(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. §§ 1986.109(e) and 1986.110(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. § 1986.110(b).