

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 October 2018

CASE NO.: 2019-WPC-00001

In the Matter of:

GREGORY KELLY,
Complainant

v.

ALABAMA PUBLIC SERVICE COMMISSION,

ALABAMA STATE PERSONNEL DEPARTMENT,

**ALABAMA STATE PERSONNEL DEPARTMENT
BOARD MEMBERS,**

RETIREMENT SYSTEM OF ALABAMA,

**RETIREMENT SYSTEM OF ALABAMA
BOARD MEMBERS,**

STATE OF ALABAMA GOVERNOR OFFICE,

STATE OF ALABAMA ATTORNEY GENERAL OFFICE,

**STATE OF ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT,**

**STATE OF ALABAMA ENVIRONMENTAL
MANAGEMENT COMMISSION,**

and

STATE OF ALABAMA DEPARTMENT OF EDUCATION,
Respondents

DECISION AND ORDER OF DISMISSAL

This is a claim for relief brought under the whistleblower provisions of the Federal Water Pollution Control Act (sometimes referred to as the Clean Water Act), 33 U.S.C. § 1367 (FWPCA), the Solid Waste Disposal Act, 42 U.S.C. § 6971 (SWDA), and the Safe Drinking

Water Act, 42 U.S.C. § 300j-9(i) (SDWA), brought by Gregory Kelly (Complainant) against Alabama Public Service Commission, Alabama State Personnel Department, Alabama State Personnel Department Board Members, Retirement System of Alabama, Retirement System of Alabama Board Members, State of Alabama Governor Office, State of Alabama Attorney General Office, State of Alabama Department of Environmental Management, State of Alabama Environmental Management Commission, and State of Alabama Department of Education (Respondents).

On August 27, 2018, the Occupational Safety and Health Administration (OSHA) referred this matter for formal hearing. The Office of Administrative Law Judges docketed this case on October 3, 2018, and assigned the matter to the Covington District Office on October 12, 2018. Based upon a thorough review of the record and the history of litigation initiated by Complainant based upon the facts presented, this matter is hereby **DISMISSED WITH PREJUDICE** under the doctrines of collateral estoppel and res judicata and for lack of jurisdiction and failure to state a claim upon which relief can be granted.

I. STATEMENT OF THE CASE

This is Complainant's fifteenth whistleblower action against one or more agencies of the State of Alabama involving the same set of facts and circumstances surrounding Complainant's termination in 2009.¹ His prior cases spanned three district offices within the Office of Administrative Law Judges (OALJ) and alleged violations of all 19 whistleblower statutes under the OALJ's jurisdiction, all surrounding the same set of facts surrounding his termination from employment as an engineer with Alabama's Public Service Commission on April 9, 2009.²

Complainant filed the underlying complaint with OSHA on August 8, 2018. He alleged that he was terminated on April 9, 2009, as a result of reporting violations of the FWPCA, SWDA, and SDWA. Because the alleged adverse employment action occurred longer than eight years prior to the complaint, OSHA dismissed the complaint as untimely on August 27, 2018. The OALJ docketed Complainant's objections to OSHA's findings on October 3, 2018. Therein,

¹ Complainant filed the following actions with the OALJ under the whistleblower provisions of multiple federal acts: 2014-SOX-00030 (dismissed 07/07/2014); 2014-AIR-00018 (dismissed 10/16/2014); 2014-CAA-00004 c/w 2014-PSI-00002 (dismissed 10/23/2014); 2014-SOX-00042 c/w 2014-SDW-00002 c/w 2014-ACA-00003 (dismissed 01/15/2015); 2015-ACA-00002 (dismissed 03/30/2015); and 2015-ACA-00003 c/w 2015-ACA-00004 c/w 2015-ACA-00006 c/w 2015-ACA-00007 c/w 2015-ACA-00008 c/w 2015-SOX-00015 (dismissed 09/29/2015). The undersigned has received no indication that Complainant has any pending appeals stemming from his prior actions.

² The 19 whistleblower statutes under the Office's jurisdiction are: 1) Affordable Care Act; 2) Aviation Investment & Reform Act; 3) Clean Air Act; 4) Comprehensive Environmental Response, Compensation and Liability Act; 5) Consumer Financial Protection Act of 2010 (Dodd-Frank, § 1057); 6) Consumer Product Safety Improvement Act; 7) Energy Reorganization Act; 8) Food Safety Modernization Act; 9) Federal Rail Safety Act; 10) Moving Ahead for Progress in the 21st Century Act; 11) National Transit Systems Security Act of 2007; 12) Pipeline Safety Improvement Act; 13) Safe Drinking Water Act; 14) Sarbanes-Oxley Act; 15) Seaman's Protection Act; 16) Surface Transportation Assistance Act; 17) Solid Waste Disposal Act; 18) Toxic Substances Control Act; and 19) Federal Water Pollution Control Act (Clean Water Act).

Complainant alleged that he has “been smeared, retaliated against[,] and blacklisted” by Respondents for “refusing to participate in public corruption” and “for reporting and disclosing wrongdoing” by Respondents. He did not allege any specific adverse employment actions or otherwise claim that any action occurred within the 180 days preceding his OSHA complaint.

II. DISCUSSION

Complainant’s claims under the 19 whistleblower statutes have been dismissed by final order six times—some for lack of jurisdiction and some for collateral estoppel and res judicata. A review of his complaint to OSHA and his objections filed with the OALJ demonstrates that *sua sponte* dismissal is likewise appropriate here.

Collateral estoppel is not available where a prior administrative law judge decision is pending review. *See Parker v. Stone & Webster*, OALJ No. 2000-ERA-00002 (Dec. 22, 1999) (no final decision where decision pending on review by ARB); *Coupar v. Federal Bureau of Prisons*, OALJ No. 1992-TSC-00012 (May 13, 1994) (principles of res judicata and collateral estoppel do not apply when Secretary had not yet issued final order). As noted above, the undersigned has received no indication that Complainant has any pending appeals stemming from his prior actions. *See* n.1, *supra*. Consequently, the doctrine of collateral estoppel is available here.

Collateral estoppel, or “issue preclusion,” is a concept included within the doctrine of res judicata that “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. 05-0099 ERA, slip op. at 6-7 (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). Collateral estoppel applies when the following elements are met: 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. 05-0099, slip op. at 7 (citations omitted); *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, OALJ 1999-CAA-00004 (Mar. 10. 1999).

The first inquiry is whether the issues at stake in this fifteenth complaint are identical to those alleged in prior litigation that have been actually litigated. The statutes asserted in this matter (FWCPA, SDWA, and SWDA) have been litigated in at least six of the previous actions. *See* 2014-SOX-00030; 2014-AIR-00018; 2014-CAA-00004 c/w 2014-PSI-00002; 2014-SOX-00042 c/w 2014-SDW-00002 c/w 2014-ACA-00003; 2015-ACA-00002. The issues at stake are identical as all involve the termination of Complainant’s employment tenure with Alabama in 2009. Complainant merely restates allegations about his purported protected activities and the resulting retaliation long after his termination. In previous claims, Complainant’s actions did not survive timeliness challenges, and he could not establish equitable tolling. Further, he was unable to substantiate actual instances of blacklisting, and his “continuing violations” theory was disproven by the facts. Complainant has not asserted any new and distinct cause of action here. Accordingly, I find that the issues at stake in the instant litigation are identical to the issues alleged in prior litigation that have been actually litigated.

The second inquiry is whether resolution of the issues was necessary to the outcome of the prior litigation. Complainant alleges again that he was terminated in 2009 and suffered ongoing retaliation for years without giving specific instances and dates. The current complaint repeats all allegations contained in the previous fourteen claims, all of which form the same basis of this complaint, and all of which have been dismissed by several judges in the OALJ and the ARB. Accordingly, I find that the issues adjudicated herein—collateral estoppel 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 now constitutes a basic unfairness to the party sought to be bound by the earlier decisions. Complainant has previously asserted fourteen actions before the OALJ that the State of Alabama has retaliated against him. 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. He has alleged no new causes or and certainly no new adverse employment actions occurring within the 180 days of his OSHA complaint. Accordingly, I find that precluding litigation in this matter would not be unfair to Complainant, who has already asserted the same claims in fourteen previously litigated cases.

Accordingly, since all three elements of collateral estoppel are satisfied, I find that Complainant is precluded from litigated the allegations of the present action. Nonetheless, should this matter reach appellate review and should such a review result in reversal on the issue of collateral estoppel, dismissal is also warranted for lack of jurisdiction and/or failure to state a claim upon which relief can be granted. The standards for summary decision, 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 administrative law judges in Complainant's several prior actions. I incorporate the facts and reasoning from the prior dismissals and find that dismissal is likewise appropriate here.

III. ORDER

Based upon the foregoing, Complainant's allegations under FWPCA, SWDA, and SDWA are dismissed under the doctrine of collateral estoppel and for lack of jurisdiction and failure to state a claim upon which relief can be granted. Case No. 2018-WPC-00001 is hereby **DISMISSED WITH PREJUDICE.**

So ORDERED.

LARRY W. PRICE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order 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 Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov.

The date of the postmark, facsimile transmittal, or e-filing 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 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.

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.

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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.