

U.S. Department of Labor

In the Matter of:

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



LAURENT J. BROWN,

ARB CASE NO. 2019-0060

COMPLAINANT,

ALJ CASE NO. 2019-ERA-00003

v.

DATE: FEB 19 2020

BWSR, LLC,

RESPONDENT.

Appearances:

For the Complainant:

Laurent J. Brown; *pro se*; Richmond, Kentucky

For the Respondent:

Timothy M. Lawlor, Esq., Matthew A. Mensik, Esq., and Sawyer R. Margett, Esq.; *Witherspoon Kelley*; Spokane, Washington

Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge*, James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges*.

FINAL DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (2005), and as implemented by regulations codified at 29 C.F.R. Part 24 (2019). The Complainant, Laurent J. Brown, filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, BWSR, LLC, the Respondent, terminated his employment after he engaged in protected activity, in violation of the ERA's whistleblower provisions. OSHA found that there was no reasonable cause to believe that BWSR violated the ERA's whistleblower provisions because Complainant did not make a prima facie showing that his work refusal was protected activity under the ERA. Complainant requested a hearing before an Administrative Law Judge (ALJ), who granted Respondent's motion for summary decision because Respondent is not an "employer" under 42 U.S.C. 5851(a)(2).¹ We affirm, adopting and attaching the ALJ's order.

¹ Order Granting Respondent's Motion for Summary Decision at 3-4 (ALJ May 13, 2019).

JURISDICTION AND STANDARD OF REVIEW.

The Secretary of Labor has delegated to the Administrative Review Board (ARB) authority to review ALJ decisions in cases arising under the ERA and issue final agency decisions in these matters.² The ARB reviews an ALJ's grant of summary decision de novo, applying the same standard that ALJs employ.³ Pursuant to 29 C.F.R. § 18.72 (2019), summary decision must be entered if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

DISCUSSION

Upon review of the ALJ's grant of summary decision, we conclude that it is a reasoned ruling based on the undisputed facts and the applicable law. The ALJ properly concluded that Respondent falls under the exclusion in the statute at §5851(a)(2)(D) such that it is not an employer under the ERA because it is a subcontractor covered by Executive Order 12344. Thus, the ALJ properly concluded that Respondent has established that there is no issue as to a genuine issue of material fact and is entitled to summary decision as a matter of law.

Accordingly, we adopt and attach the ALJ's Order Granting Respondent's Motion for Summary Decision.

SO ORDERED.

² Secretary's Order No. 1-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019).

³ *Siemaszko v. FirstEnergy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012).

U.S. Department of Labor

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Issue Date: 13 May 2019

Case No.: 2019-ERA-00003

In the Matter of:

LAURENT J. BROWN,
Complainant,

v.

BWSR,
Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This is a claim arising under employee protection provisions of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 ("ERA" or the "Act"), and the implementing regulations (29 C.F.R. Part 24). Laurent Brown ("Complainant") seeks recovery from BWSR ("Respondent") for retaliation resulting in his termination on January 17, 2018.

Procedural History

The Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") on or around June 28, 2018, alleging that he was wrongfully terminated from his employment at BWSR in retaliation for refusing to provide "door guard" training to 4 individuals based on the belief that the actions would violate written safety policies for the training of building guards. On January 4, 2019, OSHA sent Complainant its findings dismissing the claim, finding that the Complainant could not establish a *prima facie* case of retaliation. The findings state that the "Respondent is an employer within the meaning of 42 U.S.C § 5851." On January 13, 2019, the Complainant timely filed an objection to OSHA's findings and requested a hearing before the Office of Administrative Law Judges.

On April 24, 2019, the Respondent filed a Motion for Summary Decision arguing that it is not a covered employer under the regulations because it is a subcontractor to the Department of Energy ("DOE") covered under Executive Order 12344 ("ER. Mot."). In support of its

Motion, the Respondent submitted a declaration from BWSR's President, David M. Brown Jr. ("Brown Dec."). On April 27, 2019, the Complainant filed a Memorandum in Opposition to Respondent's Motion for Summary Decision, arguing that the Respondent was a covered employer based on OSHA's statement in its January 4 2019 findings. ("CL. Resp.").

Finding of Undisputed Facts

The Respondent is a subcontractor to Fluor Marine Propulsions, LLC ("FMP"). (Brown Dec. ¶ 4). Prior to 2018, the Respondent was a subcontractor for Bechtel Marine Propulsion Corporation ("BMPC"). (Brown Dec. FT 1). BMPC and FMP are contractors for the DOE Office of Naval Reactors. (Brown Dec. ¶ 4, FT 1). The Office of Naval Reactors is a government office that, together with the U.S. Navy, has the responsibility for the operation of the U.S. Navy's nuclear propulsion program, formally the Naval Nuclear Propulsion Program ("NNPP"). (Brown Dec. ¶ 5). This authority was given to the DOE in Executive Order 12344 Sec. 5, and codified into law at 50 U.S.C. § 2511, 50 U.S.C. § 2406 and 42 U.S.C. § 7158. As a subcontractor for BMPC and FMP, the Respondent provided decontamination and decommissioning and facility upgrade construction at four Naval Reactor Facilities, including a facility in Idaho Falls, Idaho. (Brown Dec. ¶ 6). The Idaho Falls Naval Reactor Facility houses the Expended Core Facility, where spent nuclear fuel from Navy vessels is contained. *Id.* The Complainant was employed by BWSR from March 2, 2015 until January 18, 2018. (Brown Dec. ¶ 10).

Standards for Summary Decision

Summary decision is appropriate when the pleadings, affidavits, material obtained by discovery or otherwise or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. §18.72. In response to a motion for summary decision the non-moving party must support an assertion that a fact cannot be or is genuinely disputed by citing to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or by showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." 29 C.F.R. § 18.72(c)(1). In deciding a motion for summary decision, the fact finder must view the facts in the light most favorable to the non-moving party. *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92 (1994). The moving party bears the burden of proof, though the opposing party "may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Discussion and Applicable Law

42 U.S.C. § 5851(a)(1) prohibits an employer from discharging or otherwise discriminating against an employee with respect to his compensation, terms, conditions, or privileges of employment because engaged in protected activity as described in the regulation. The regulation goes on to define an "employer" as:

- (A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);
- (B) an applicant for a license from the Commission or such an agreement State;
- (C) a contractor or subcontractor of such a licensee or applicant;
- (D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), **but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344;**
- (E) a contractor or subcontractor of the Commission;
- (F) the Commission; and
- (G) the Department of Energy.

42 U.S.C. § 5851(a)(2) (emphasis added).

The parties do not dispute that the Respondent fails to meet the definition of “employer” contained in §§ 5851(a)(2)(A), (B), (C), (E), (F), or (G). (Brown Dec. ¶ 13, 14, 15, 17, 18, 19; ER. Mot. at 4-5; CL. Resp. at 12). At issue is whether the Respondent is an employer under § 5851(a)(2)(D).

The Respondent argues that because it is a subcontractor on a contract received from the Office of Naval Reactors it is covered by Executive Order 12344, and thus cannot be considered an “employer” under § 5851(a)(2)(D). In 1992, Congress passed the Comprehensive National Energy Policy Act, which in pertinent part, amended the ERA whistleblower regulations to provide coverage for private contractors and subcontractors of the DOE. Pub. L. 102-486 §2902. However, the 1992 amendments expressly excluded coverage for “any contractor or subcontractor covered by Executive Order No. 12344.” Part of the plain language definition of “cover” is “to deal with” or “be the subject of.”¹ Accordingly, I find that a plain interpretation of the 5851(a)(2)(D) is that the term “employer” does not include any contractor or subcontractor of the DOE that deals with work that is the subject of Executive Order 12344. I find that BWSR is such a subcontractor.

Executive Order 12344 assigns the Office of Naval Reactors the responsibility to direct and supervise work at naval nuclear reactor facilities. (Sec. 5). BWSR is a subcontractor for BMPC and FMP and these companies contracted with the Office of Naval Reactors to provide services relating to decommissioning, decontaminating and construction at four naval nuclear reactor facilities, including the facility in Idaho Falls, Idaho. I find that the services provided by

¹ <https://www.merriam-webster.com/dictionary/cover> accessed May 7, 2019.

BWSR for the Office of Naval Reactors are for work that is the subject of Executive Order 12344 and therefore that BWSR is a subcontractor covered by Executive Order 12344. The Complainant does not dispute that BWSR is a subcontractor for the DOE and has noted that the prime contracts held by Bechtel Marine Propulsion and Fluor Marine Propulsion were made with the DOE department created by Executive Order 12344. (CL. Resp. at 6-7).

The Complainant points to OSHA's January 4, 2019 findings that state the "Respondent is an employer within the meaning of 42 U.S.C § 5851" to support his argument that the Respondent is an "employer" under the Act. However, an Administrative Law Judge must provide a *de novo* review of the record, and once a formal hearing is requested the OSHA findings are not binding. *Hobby v. Georgia Power Co.*, 90-ERA-30 (Sec'y Aug. 4, 1995); *Billings v. Tennessee Valley Authority*, 91-ERA-12 (ARB June 26, 1996) (noting that Wage-Hour's findings were not binding because the regulations accord complainants a right to *de novo* hearings). Further, I find that the Secretary's findings fail to adequately address the issues raised by the parties² and are not well reasoned or well documented enough to provide any argument for why the Respondent would be a covered employer under the regulations.

In considering all the evidence of record, I find that the Respondent falls within the exclusion created in the regulations at § 5851(a)(2)(D) and is not an "employer" as that term is defined by the Act. Even construing all material in the light most favorable to the Complainant, there exists no factual issues that preclude summary decision in favor of the Respondent.

Conclusion

In order for the Complainant to prevail on claim, it must be brought against an "employer" as that term is defined within the regulations. In considering the factual assertions of the parties and their arguments, I find that the Respondent is a subcontractor for the DOE Office of Naval Reactors, whose work includes providing services to naval nuclear facilities and so is covered under Executive Order 12344 and falls within the exclusion created in the regulations at § 5851(a)(2)(D). I further find the Respondent does not fall under any other definition of "employer" provided in § 5851(a)(2). As the Respondent does not meet any definition of "employer" provided for in the Act, the Complainant is not an employee entitled to FRA whistleblower protection under 42 U.S.C. § 5851.

ORDER

Accordingly, the Respondent's Motion for Summary Decision is **GRANTED** and the Complainant's Claim is hereby **DISMISSED** with prejudice. The hearing scheduled on July 16, 2019, in Lexington, Kentucky, is **CANCELLED**.

² See the Statement of Position by BWSR, LLC dated August 31, 2018 and Reply in Support of Statement of Position by BWSR, LLC dated December 4, 2018 sent to OSHA and filed with this Office on March 25, 2019. See also Complainant's Response to Statement of Position and Response to Reply in Support of Statement of Position sent to OSHA and provided to this office on March 20, 2019.

SO ORDERED.



Digitally signed by Larry A. Temin
DN: CN=Larry A. Temin,
OU=Administrative Law Judge, O=US
DOJ, OU=U.S. Department of Labor,
OU=Administrative Law
Judges, C=US, OU=OLJ
Location: Cincinnati OH

Larry A. Temin
Administrative Law Judge

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Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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. § 1980.110(a). Your Petition should identify the legal 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. § 1980.110(a).