U.S DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

THOMAS SAPORITO, and SAPORITO ENERGY CONSULTANTS	)	
Complainants,	)	ARB Case No. 10-083
v.	)	
	)	ALJ Case No. 2009-ERA-00016
U.S. NUCLEAR REGULATORY COMMISSION,	)	
Respondent.	)	June 10, 2010

RESPONDENT U.S. NUCLEAR REGULATORY COMMISSION REPLY TO COMPLAINANTS' INITIAL BRIEF

This case is before the Department of Labor Administrative Review Board (ARB or Board) on an appeal by the Complainants, Mr. Thomas Saporito and Saporito Energy Consultants. They are appealing the dismissal of their complaint with prejudice by Administrative Law Judge Paul C. Johnson Jr. pursuant to 29 CFR § 24.111(c) following the Complainants' request to withdraw the complaint. Complainants' Initial Brief argues that Rule 41 of the Federal Rules of Civil Procedure should apply and thus any dismissal should be without prejudice. For the reasons set forth below, Rule 41 is no longer applicable with respect to a withdrawal of objections to the findings of the Occupational Health and Safety Administration (OSHA). The Nuclear Regulatory

Commission (NRC or Agency) therefore respectfully requests that the Board uphold Judge Johnson's Order of April 5, 2010 dismissing this complaint with prejudice.

BACKGROUND

On March 23, 2009, Complainants filed a complaint with OSHA against the U.S. Nuclear Regulatory Commission (NRC or Agency) alleging discriminatory employment practices in violation of the employee protection provisions of Section 211 of the Energy Reorganization Act (ERA or Act) of 1974, as amended, 42 U.S.C. § 5851. Complainants amended their complaint three times subsequently (April 26, 2009; May 16, 2009; and June 4, 2009). Although the underlying subject of the complaints is not at issue in this appeal, the various complaints allege that the NRC retaliated against the Complainants by failing to investigate NRC licensees and their alleged discrimination against the Complainants. The Complainants also alleged that the NRC retaliated against them by failing to hire the Complainants as an independent contractor. On September 9, 2009, OSHA issued its findings, dismissing the complaints because Complainants had failed to establish a *prima facie* case by showing that they and the NRC ever had the required employment relationship. *See* OSHA Findings at 4. On September 17, 2009 Complainants filed a timely request for a hearing and on December 10, 2009, Administrative Law Judge (ALJ or Judge) Paul C. Johnson Jr. issued an Order to Show Cause as to why the complaints should not be dismissed. Complainant filed his response on December 28, 2009, to which the Agency responded on January 20, 2010. On January 25, 2010, Judge Johnson issued the "Order Partially Dismissing Complaint and Permitting Additional Briefing" (Partial Dismissal), finding that

Complainants' claims regarding the NRC's alleged failure to investigate various licensees failed to state a claim for which relief could be granted.[1] With respect to the claims that the NRC retaliated by failing to hire Complainants as an independent contractor, the Partial Dismissal deemed the NRC's January 20, 2010 response to be a Motion for Summary Judgment,[2] and permitted Complainants to file an additional briefing by February 12, 2010 On February 2, 2010, Complainants requested additional time to respond and clarification as to what "evidentiary material" Judge Johnson was referring to in the Partial Dismissal,[3] which was granted by Judge Johnson on February 18, 2010 and informed Complainants that the evidentiary material referred to was the two affidavits submitted by the NRC.[4] On March 7, 2010, Complainants filed their motion, "Complainants' Response to Order Partially Dismissing Complaint and Permitting Additional Briefing." Complainants' state, "For the reasons stated below,

[1] The issues regarding the NRC's alleged failure to investigate various licensees is virtually identical to the issues raised by Complainants in Saporito v. Florida Power and Light Co. and Nuclear Regulatory Commission, 2009-ERA-00006 (ALJ July 30, 2009). That case is before the Board on appeal (ARB Case no 09-129).

[2] The NRC's January 20, 2010 response included two affidavits from NRC officials indicating that Complainants have never been employees or contractors of the Agency and have never applied for such positions.

[3] Page 4 of the Partial Dismissal states, "With respect to Complainants" application for employment as an independent contractor, Respondent has submitted evidentiary material for my consideration. I therefore construe Respondents' submission as a Motion for Summary Decision; however, it would be inequitable to rule on such a motion without affording Complainants the opportunity to submit additional evidence and argument in response to Respondents' submission.

[4] The NRC filed a motion in opposition on February 19, 2010, before receiving Judge Johnson's Order granting the extension of time. The NRC's motion also included the affidavits to ensure Complainants' receipt of the aforementioned "evidentiary material."

Complainants hereby withdraw their complaint in accordance with the Rule 41, under the Rules of Practice and Procedure before the Office of Administrative Law Judges." On March 15, 2010, Judge Johnson issued "Order Permitting Response to Request to Withdraw Claim" deeming the Complainants' motion to be a motion to withdraw their objections to the OSHA findings pursuant to 29 CFR § 24.111(c), and permitting the NRC to respond, which it did on March 29, 2010.[5] On April 5, 2010, Judge Johnson's "Order Granting Withdrawal of Claim and Dismissing Complaint" dismissed the complaint with prejudice pursuant to 29 CFR § 24.111(c) and reinstated and made final the OSHA findings.[6] On April 12, 2010, Complainants timely filed their "Petition for Review and for Briefing Schedule" in accordance with the Judge's Order and 29 C.F.R. § 24.110.

STANDARD OF REVIEW

The Board has jurisdiction to review the ALJ's decision pursuant to Order 1-2002 of the Secretary of Labor. 76 Fed. Reg. 64,272 (Oct. 17, 2002). The Board reviews questions of law *de novo*. 5 USC § 557(b). Determining what rule of law applies to the dismissal of a complaint is a question of law. *See* Saporito v. FedEx Kinko's Office

---

[5] The NRC's response noted the Agency's preference for a final decision that addressed whether the NRC's decisions regarding enforcement actions could, in fact, state a claim under the Act. Nonetheless, the Agency did not oppose the motion to withdraw given that the OSHA findings are clear that the Complainants had failed to establish a *prima facie* case, which has been the Agency's position throughout the litigation, including both 2009-ERA-00006 and 2009-ERA-00016.

[6] Judge Johnson's Order also says, "Complainants are deemed to have waived any further proceedings before the Department of Labor regarding the matters that are the subject of their complaint."

and Print Services, Inc., ARB No. 06-043, ALJ No. 2005-CAA-00018, slip op. at 2 (March 31, 2008).

COMPLAINANTS' INITIAL BRIEF

On May 17, 2010, Complainants timely filed their initial brief in this case. They have cited two grounds in which the ALJ erred in this case. First, Complainants argue that Judge Johnson's dismissal pursuant to 29 CFR § 24.111(c) was in error and that they should have been permitted to withdraw their complaint pursuant to Rule 41 of the Federal Rules of Civil Procedure. Complainants' Initial Brief (Initial Brief) at 1-2. Second, Complainants argue that the dismissal should have been without prejudice in accordance with Rule 41 and that Judge Johnson's dismissal constituted a "remand" to OSHA, which is prohibited pursuant to 29 CFR § 1980.109(a). Initial Brief at 4-5.

For the reasons set forth below, the Agency believes that Complainants' arguments are without merit and based on law that has been superseded by the changes made to 29 CFR Part 24 in 2007. The Agency therefore respectfully requests that Judge Johnson's Order of April 5, 2010 be upheld in its entirety and that the September 9, 2009 findings of OSHA become the final order in this complaint.

DISCUSSION

1. Dismissal Pursuant to 29 CFR § 24.111(c) is Appropriate; Complainants' Reliance on Rule 41 is Misplaced

Complainants' Initial Brief incorrectly states that "Rule 41 applies because there are no procedures for voluntary dismissals contained in either the ERA, the implementing regulations at 29 C.F.R. Part 24, or the regulations at 29 CFR Part 18."

Initial Brief at 5. This is simply not an accurate statement of the law based on the 2007 changes to 29 CFR Part 24. Moreover, Complainants cite to several cases regarding the applicability of Rule 41, all of which were decided before the new regulation was put in place. Thus these cases are of limited applicability to this appeal.

Prior to the implementation of the new rules under 29 CFR Part 24, a motion to withdraw pursuant to Rule 41 of the Federal Rules of Civil Procedure would have been appropriate and in accordance with the Department of Labor's rules found at 29 CFR Part 18, "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges." Part 18 are the Department of Labor's general rules of practice; however, when there is a "rule of special application," Part 18 is not applicable. *See* 29 CFR § 18.1(a). Moreover, the Federal Rules are governing only in the absence of a specific Department of Labor regulation, either in Part 18 or in another specific statute, order or regulation. Id. *See also* Nolder v. Raymond Kaiser Engineers, Inc., 1984-ERA-005, slip op. at 3 (Sec'y June 28, 1985).

In August, 2007, the Department of Labor published numerous amendments to 29 CFR Part 24, "Procedures for the Handling of Retaliation Complaints Under Federal Employee Protection Statutes." *See* 72 Fed. Reg. 44,956 (Aug. 10, 2007). The regulations in 29 CFR Part 24, address specific procedures to be followed when handling complaints arising under the ERA and several other environmental whistleblower statutes. With respect to requests to withdraw complaints under this part, 29 CFR § 24.111(c) now provides that "At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a

written withdrawal with the administrative law judge..." Thus, if a hearing request is withdrawn, the findings of OSHA become the final order in the case. This specific provision is new with respect to complaints filed under the ERA, having been effective just since August, 2007. Thus, now that 29 CFR Part 24 contains a specific, controlling provision with respect to the withdrawal of complaints, namely 29 CFR § 24.111(c), 29 CFR Part 18 (and thus Rule 41) is no longer applicable with respect to the withdrawal of complaints filed pursuant to the ERA.

Although it does not appear that the Administrative Review Board (ARB or Board) has had an opportunity to address the meaning and scope of the new 29 CFR § 24.111(c), a virtually identical provision has existed with respect to claims arising under other statutes administered by the Department of Labor such as the Surface Transportation Assistance Act (STAA) and Sarbanes-Oxley. The Board has thoroughly examined the intent and scope of these provisions. For example, pursuant to the Department's STAA regulations, 29 CFR § 1978.111(c),[7] the Board has provided clear guidance as to the meaning of this provision, and whether a withdrawal of a complaint under that provision is with or without prejudice. In Sabin v. Yellow Freight System, Inc., ARB No. 04-032, ALJ No. 2003-STA-005, slip op. at 9 (ARB July 29, 2005), the Board held, "a voluntary dismissal can be granted without prejudice where there has

[7] 29 CFR § 1978.111(c) provides:

At any time before the findings or order become final, a party may withdraw his objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Administrative Review Board, United States Department of Labor. The judge or the Administrative Review Board, United States Department of Labor, as the case may be, shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn.

been no finding on the merits...on the other hand, a withdrawal of objections to OSHA's findings and a request for a hearing before an ALJ does operate as a final decision of DOL and hence is considered with prejudice." Id. In Sabin the Board held that the meaning of 29 CFR § 1978.111(c) was that "[w]hen OSHA has found against a complainant and the complainant withdraws his objection to the findings, the result is a final order upholding the OSHA findings." Id. (internal citations omitted). Thus, as Sabin makes clear, OSHA findings are considered a decision on the merits and thus a withdrawal of objections to OSHA findings results in dismissal with prejudice.[8]

Given that the language in the new provision in 29 CFR Part 24 is virtually identical to the established provision of 29 CFR Part 1978 and certainly identical in intent, extending the holding in Sabin to cases arising under the ERA and 29 CFR § 24.111(c) is appropriate. Consistent with the interpretation of the similar STAA provision, a withdrawal pursuant to 29 CFR § 24.111(c) means that the findings of OSHA become the final order in a case filed under the ERA and dismissal with prejudice is appropriate.[9]

---

[8] With respect to claims arising under the ERA, the Secretary has previously affirmed the long-standing general principle that a withdrawal may be without prejudice when no decision on the merits has been made. *See* Cable v. Arizona Public Service Co., No 90-ERA-15 (Sec'y Nov. 13, 1992). Cable was obviously decided when Rule 41 of the Federal Rules governed withdrawal of complaints under the ERA. The provision in 29 CFR § 24.111(c) essentially makes OSHA findings a decision on the merits in this situation.

[9] Similar provisions with respect to the Sarbanes-Oxley whistleblower regulations, 29 CFR § 1980.111(c), have also resulted in findings by OSHA becoming the final order of a case when a request to withdraw a hearing request has been made. *See* Cantwell v. Northrop Grumman Corp. and Northrop Grumman Information Technology, 2004-SOX-

2. Complainants' Arguments Regarding Remand and Dismissal Without Prejudice Are Meritless

It is also apparent from Complainants' Initial Brief that they have misinterpreted the provision in 29 CFR § 24.111(c) as a "remand" to OSHA, which is not what this provision or Judge Johnson's Order does. As discussed, the various provisions regarding withdrawal of complaints (*e.g.* 29 CFR § 24.111(c) with regard to the ERA; 29 CFR § 1978.111(c) with respect to the STAA; and 29 CFR § 1980.111(c) with regard to Sarbanes-Oxley) mean that the findings of OSHA become *final* without any further action on the part of OSHA. Judge Johnson's Order is clear that the case is not being remanded, but rather that the findings of OSHA will become the final order in the case. The provision cited by Complainants, 29 CFR § 1980.109(a), applies to complaints arising under Sarbanes-Oxley; however, there is a similar provision in the regulations applicable to complaints under the ERA, specifically, 24 CFR § 24.109(c). Regardless, given that the case is not being remanded to OSHA for "completion of an investigation of for additional findings..." neither of these provisions is pertinent in this case.

Moreover, consistent with the holding in Sabin, as discussed above, dismissal pursuant to 29 CFR § 24.111(c) is with prejudice. Complainants have cited several cases which they argue stand for the proposition that dismissals pursuant to Rule 41 are without prejudice. Given that Rule 41 is no longer controlling with respect to complaints under the ERA and the cases cited by Complainants were decided before

---

00075 (ALJ May 11, 2005). In Cantwell, as in this case, the OSHA findings were that the complainant failed to make out a *prima facie* case.

the new regulations in 29 CFR Part 24 were implemented, those cases are no longer applicable.

Finally, Complainants have filed at least two previous appeals before the Board involving the appropriate scope of dismissals pursuant to Rule 41. See Saporito v. Houston Lighting and Power Co. 92-ERA-38 (Sec'y June 28, 1993) and Saporito v. FedEx Kinko's Office and Print Services, Inc., ARB No. 06-043, ALJ No. 2005-CAA-00018 (March 31, 2008). As with the cases cited by Complainants, these were decided prior to the implementation of the new regulations governing the withdrawal of complaints in 29 CFR Part 24. Nonetheless, the FedEx case is particularly interesting for the Board's comment in Note 1, which specifically cites the changes in the Department of Labor regulations at 29 CFR Part 24 but that these changes were not implicated because of the unique issue presented in that case.[10] Id., note 1. Specifically, in the FedEx case OSHA had not made findings but dismissed the case before an investigation had been completed at the Complainant's (Mr. Saporito) urging. *See* Saporito v. FedEx Kinko's Office and Print Services, Inc., 2005-CAA-00018 slip op. at 2 (ALJ Jan. 6, 2006). In contrast, in this case OSHA did complete its investigation, found that Complainants had not established a *prima facie* case, and issued findings to that effect. The dismissal of the present case by OSHA was based on factual

[10] While the Agency recognizes that the average *pro se* litigant may not be aware of changes in regulations, where to find those regulations, or federal register notices regarding changes, Complainants are highly experienced litigants in this forum. Moreover, the Board's comment in note 1 in Saporito v. FedEx Kinko's Office and Print Services, Inc. arguably put Complainants on notice regarding a change in the environmental whistleblower regulations.

underpinnings, the most significant of which is the lack of any employment relationship between Complainants and NRC.[11] It seems clear from the conclusion of Complainants' Initial Brief that Complainants are seeking a withdrawal without prejudice in order to keep their options open if the Agency does not act (investigate) as they believe appropriate regarding their claims against various NRC licensees. This position is problematic because it ignores the clear provisions of 29 CFR 24.111(c) as discussed herein. It also glosses over the primary failing of the compliant which is that Complainants' have yet to make out a *prima facie* case.[12] Moreover, Judge Johnson's Partial Dismissal in this case (and his opinion dismissing 2009-ERA-00006, the appeal of which is pending before the Board) squarely addresses whether claims of dissatisfaction with the NRC's investigatory conclusions can even state a claim for which relief can be granted under the Act.

As a practical matter, permitting the withdrawal of this compliant without prejudice (*i.e.*, pursuant to Rule 41 rather than 29 CFR § 24.111(c)) would effectively

---

[11] On several occasions, the NRC has presented evidence, both to OSHA and to Judge Johnson, to show that the Agency has never employed Complainants, nor have Complainants ever applied for employment with the Agency. In fact, the only remaining issue before Judge Johnson following the Partial Dismissal relates to Complainants' alleged application for employment with the Agency as an independent contractor. The OSHA findings reflect the Agency's position and the evidence in this case: there is not and never has been the requisite employment relationship between Complainants and the NRC such that a *prima facie* case can be made under the Act.

[12] Complainants' Initial Brief seems to imply that because no discovery has been conducted in this case, that dismissal without prejudice is appropriate. *See* Complainants' Initial Brief at 5. In this case discovery was not conducted because Complainants' failed to make it past the threshold requirement of establishing a *prima facie* case.

nullify the requirement in section 211(b)(3)(A) of the Act, which mandates dismissal of complaints that do not make out a *prima facie* case. Complainants' failure to meet this minimum requirement of the statute was cited in the OSHA findings as the reason for dismissal. Moreover, the parties had argued this issue—that is whether any type of employment relationship existed between Complainants and NRC—before Judge Johnson almost to its conclusion. Complainants have yet to present any evidence that they can satisfy the *prima facie* requirements and the timing of their withdrawal certainly suggests that it was motivated in part to avoid a likely adverse ruling on this point. With respect to these complaints, even a dismissal without prejudice will not change the fact that Complainants can not make out a *prima facie* case.[13]

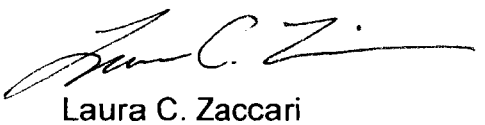
CONCLUSION

Pursuant to 29 CFR § 24.111(c), and consistent with Board case law interpreting similar provisions with respect to other whistleblower protection provisions, Complainants' motion of March 7, 2010 was properly dismissed with prejudice and the OSHA findings of September 9, 2009 made the final order in the case. Complainants' appear to be unaware of the changes made to 29 CFR Part 24 in 2007 and the impact of those changes in circumstances such as these. Nonetheless, the arguments put

[13] The Agency recognizes that this argument is essentially about "legal prejudice," a discussion of which would be more relevant if Rule 41 were applicable in this case. *See e.g.* Nolder v. Raymond Kaiser Engineers, Inc., 1984-ERA-005 (Sec'y June 28, 1985). Obviously, the withdrawal provisions now found in the Department of Labor whistleblower regulations, *i.e.*, 29 CFR § 24.111(c), are intended, in part, to render such arguments unnecessary by making the OSHA findings the final order in a case.

forward in Complainants' Initial Brief are inconsistent with current regulations and otherwise without merit.

For the foregoing reasons, the NRC respectfully requests that Judge Johnson's "Order Granting Withdrawal of Claim and Dismissing Complaint" be affirmed in its entirety.



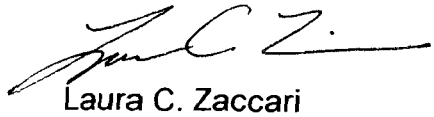
Laura C. Zaccari
Agency Representative
Office of General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop OWFN-15-D-21
11555 Rockville Pike
Rockville, MD 20852

CERTIFICATE OF SERVICE

I hereby certify that a copy of the RESPONDENT U.S. NUCLEAR REGULATORY COMMISSION REPLY TO COMPLAINANTS' INITIAL BRIEF was sent on June 10, 2010 to:

By First Class Mail
Mr. Thomas Saporito
Saporito Energy Consultants
P.O Box 8413
Jupiter, FL 33468-8413

By Overnight Mail. (Original and Four Copies)
Administrative Review Board
U.S. Department of Labor
200 Constitution Ave. NW
Room S-5220
Washington, DC 20210



Laura C. Zaccari
Attorney
U.S. Nuclear Regulatory Commission