

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 17 May 2005**

CASE NO.: 2005-WPC-00002

*In the Matter of*

**DOUGLAS A. COUPAR,**  
Complainant

v.

**UNICOR (Federal Prison Industries),**  
Respondent

**RECOMMENDED DECISION AND ORDER DISMISSING CASE AND VACATING TRIAL**

On February 15, 2005, a notice of hearing and pre-hearing order was issued setting hearing in this whistleblower action for May 6, 2005 in Lompoc, California.

On March 4, 2005, after reviewing the file, I issued an Order to Show Cause Why Case Should Not Be Dismissed ("OSC Re: Dismissal") based on the Ninth Circuit Court of Appeals' decision against Complainant styled *Coupar v. Dept. of Labor*, 105 F.3d 1263 (9<sup>th</sup> Cir. 1997), finding Complainant was not an "employee" of Respondent and not covered by the applicable statutes (the Clean Air Act or the Toxic Substances Control Act) in that case. It is presumed that, similarly in this case, Complainant is not an "employee" under the Federal Water Pollution Control Act because his relationship to Respondent was "penological, not pecuniary."

On March 8, 2005, the hearing was re-scheduled for June 16, 2005, still in Lompoc, California, to accommodate the OSC Re: Dismissal deadlines. Complainant's response to the OSC Re: Dismissal was due on April 13, 2005.

By motion dated April 12, 2005 and filed April 29, 2005, Complainant sought a thirty (30) day extension of time, until May 13, 2005, to respond to the OSC Re: Dismissal as he alleged that he had not received certain documentary information. No objection to the motion was filed by Respondent.

On May 16, 2005, I issued an order granting Complainant's extension of time to May 13, 2005 to file his response to the OSC Re: Dismissal. The May 16 Order specifically informed Complainant in bold print that no further extensions of time shall be allowed and that failure to file a timely response to the OSC Re: Dismissal shall be grounds for dismissal of this case under the power to control my docket and prevent undue delays in the disposition of pending cases

Enacted to further coordinate efforts between the Federal and State governments to prevent, control and abate water pollution, Employee Protection Section 1367 of the Federal Water Pollution Control Act (the "Act") provides remedies for any "employee" who has been discharged or discriminated against due to his or her testimony or proceeding against their employer for violating the provisions of the Act. The Regulations in 29 C.F.R. Part 24, as well as those in 40 C.F.R. Part 108 establish procedures for the handling of complaints and discriminatory action.

Under 29 C.F.R. Section 24.6(e)(4)(B), the Administrative Law Judge may, at the request of either party or on his own motion, issue a recommended decision and order dismissing a claim upon the failure of the complainant to comply with a lawful order of the Administrative Law Judge. 29 C.F.R. Section 24.6 (e) (4) (B). Furthermore, 29 C.F.R. § 18.6(d)(2)(v) also provides me authority to strike Complainant's notice of appeal and request for hearing and render a recommended decision against him dismissing his case for failure to comply with my March 4, 2005 OSC Re: Dismissal.

This authority to dismiss a case also comes from my inherent power to control my docket and prevent undue delays in the disposition of pending cases. *See Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962).

As of May 16, 2005, Complainant has not filed any response to the March 4, 2005 OSC Re: Dismissal. I find that Complainant has failed to comply with my March 4, 2005 OSC Re: Dismissal and subsequent May 16, 2005 Order requiring Complainant to serve and file a response to the OSC Re: Dismissal no later than the extended filing date of May 13, 2005 in the form of a filed memorandum of points and authorities, affidavits and other documentary evidence in support of his legal position as to why this matter should not be dismissed.

Accordingly, Complainant has failed to provide cause why his earlier case filed on January 30, 1997 by the Ninth Circuit Court of Appeals and known as *Douglas Coupar v. U.S. Department of Labor*, 105 F.3d 1263 (9<sup>th</sup> Cir. 1997), is not controlling in this case. Complainant was specifically informed that if he failed to file a response to the March 4, 2005 OSC Re: Dismissal by May 13, 2005, his case could be dismissed for lack of prosecution. Finally, I find that any lesser sanction would be inadequate given the repeat orders and warnings ignored by Complainant to comply with my March 4, OSC Re: Dismissal and the prior extension of 30 days to respond.

Since Complainant has not complied with my March 4 and May 16 Orders and has not submitted his response to the OSC Re: Dismissal in advance of the June 16, 2005 trial in this matter, his complaint shall be dismissed for lack of prosecution

### **RECOMMENDED ORDER**

**IT IS RECOMMENDED** that the complaint filed by Douglas A. Coupar under the provisions of Section 1367 of the Federal Water Pollution Control Act, 33 U.S.C. § 1367 be **DISMISSED**.

**IT IS FURTHER ORDERED** that the trial set in this case for June 16, 2005 at the Federal penitentiary in Lompoc, California is **VACATED**.

**A**

GERALD M. ETCHINGHAM  
Administrative Law Judge

*San Francisco, California*

**NOTICE:** This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.