



Issue Date: 08 April 2014

CASE NO. 2014-WPC-00002

In the Matter of

DALE KEN TAKANISHI,
Complainant,

v.

**CITY AND COUNTY OF
HONOLULU,**
Respondent.

DECISION AND ORDER
APPROVING WITHDRAWAL OF OBJECTIONS
TO OSHA DETERMINATION AND DISMISSING CASE

This is a whistleblower claim under the Federal Water Pollution Control Act, 33 U.S.C. § 1367, and the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i). It is set for hearing on June 16, 2014 in Honolulu. On April 7, 2014, Complainant filed a withdrawal of his objections to OSHA's determination that there was no cause to believe that a violation occurred. *See* 29 C.F.R. § 24.111(c). I will approve the withdrawal and dismiss the case. *See id.*

Procedural History

On March 10, 2014, Complainant moved to stay the litigation to give him time to obtain and review OSHA's investigation file. Before responding to the motion, on March 24, 2014, Respondent City and County of Honolulu moved to dismiss, asserting that Complainant's dispute was with OSHA and its investigation, not with Respondent's conduct and that Complainant had failed to meet the pleading standards announced in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

I conducted a telephonic conference on March 28, 2014. Complainant is representing himself and appeared on the phone call. Respondent appeared through counsel of record.

Although I did not rule on Respondent's motion to dismiss because the time had not run for Complainant to file an opposition, I advised Respondent that the filing requirements for environmental whistleblower complaints are very loose. *See* 29 C.F.R. § 24.103(b) (allowing, for example, an oral complaint that OSHA reduces to writing). I stated that *Iqbal* did not apply and that the defense motion was not likely to be successful.

Turning to Complainant, I advised him of his right to retain counsel. I told him that, if his claim was successful, he might be entitled to have the City and County pay his reasonable attorney's fees. I advised him that it would be a considerable challenge to pursue the claim without an attorney, but that he had the right to do so. He stated that he had sought counsel both in Hawaii and on the mainland but without success.

I also advised Complainant that his case before this Office was *de novo*. That meant that the history at OSHA was not relevant and that he had to focus on gathering evidence to prove his whistleblower claim in this forum irrespective of what OSHA did. I stated that the OSHA file might have material that Complainant could potentially find useful while developing the evidence for his case before this Office, and that it was entirely appropriate that he seek a copy of the file. But because this was going to be a hearing *de novo*, there was no reason to stay the litigation here so that Complainant could evaluate the adequacy of OSHA's investigation. I also informed Complainant that I cannot order OSHA to reopen its investigation or do anything further with respect to Complainant's claim. *See* 29 C.F.R. § 24.109(c). I therefore denied the motion for a stay.

Complainant indicated that he was uncertain whether he should go forward. I told him to advise this Office in writing within one week whether he chose to go forward with the litigation or to withdraw it. What followed was the letter stating that he had chosen to withdraw the claim.

Facts

In the withdrawal letter, Complainant states that: (1) he believes the OSHA file is crucial to his claim and (2) he cannot afford counsel. I question the sufficiency of each assertion. There might or might not be information useful to one or both parties in the OSHA file; that is unknown. And a number of attorneys accept whistleblower clients in the hope of obtaining a statutory fee award (or a contingent fee) if they prevail.

But it remains that I fully informed Complainant about these two concerns in the telephone conference; he stated at the time that he understood; and having listened to him, I concluded that he did understand. I find that Complainant was fully informed about OSHA's limited relevance at this time; that his focus needed to be on developing evidence for the hearing, not on evaluating whether OSHA's efforts were adequate; and that it might be possible to retain counsel even without the ability to pay fees because of the statutes' fee-shifting provisions. I therefore conclude that, at the time Complainant withdrew his claim, he understood the requirements of the litigation, the considerations concerning counsel, OSHA's limited role at this juncture, and the effect of a withdrawal. He had time to reflect on whether it is in his interest to pursue the claim, and he knowingly and voluntarily decided to withdraw it.

Conclusion and Order

Complainant's withdrawal of his claim is APPROVED. 29 C.F.R. § 24.111(c). The claim is DISMISSED. Complainant shall take nothing by reason of his complaint. The findings of the

Secretary (as Assistant Regional Administrator James Wulff stated them in his letter of November 19, 2013) are the final decision of the Secretary. *Id.*

SO ORDERED.

STEVEN B. BERLIN
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 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. The date of the postmark, facsimile transmittal, or e-mail communication 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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., 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.

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.

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 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.