

OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

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ZIGGY BAJBOR,)	
)	
Complainant,)	
)	
v.)	Case No. 01-AC-377(RP)
)	Date: May 30, 2003
OFFICE OF THE ARCHITECT)	
OF THE CAPITOL)	
)	
Respondent .)	
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Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens, Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

I. Introduction

This reprisal case, brought under Section 405 of the Congressional Accountability Act (“the CAA”) (2 U.S.C. §1405), is before the Board pursuant to the Complainant Employee’s petition for review of the Hearing Officer’s dismissal of the complaint on the pleadings. The issue on appeal is whether the alleged Respondent Employer action, denying Complainant’s request to inspect two merit promotion vacancy files in reprisal for the Complainant’s prior exercise of his rights under the CAA, stated an actionable claim of reprisal. The Complainant requested those files in connection with his pending earlier discrimination complaint before another Hearing Officer. The Hearing Officer in this matter, ruling from the bench, concluded that the alleged Respondent action was not encompassed by the Act’s anti-reprisal provision (Section 207 of the CAA, 2 U.S.C. §1317). The Hearing Officer also concluded that the earlier case Hearing Officer’s discovery ruling precluded a collateral challenge to that action in this subsequent case.

While we affirm the Hearing Officer’s dismissal of the Complaint, we do so solely on the basis that sound policy and judicial economy dictate that the Complainant pursue his discovery connected claim in the earlier Office of Compliance proceeding in which it arose. In the particular facts of this case, we hold that the Architect’s denial of Complainant’s document request, requiring him to obtain it in the discovery process, does not create an independent retaliation claim. We do not adopt the Hearing Officer’s interpretation regarding the protective

scope of Section 207 of the CAA (“Section 207”), nor do we decide whether the subject denial of merit promotion files could constitute an actionable retaliation claim if it occurred outside of the CAA dispute resolution process. We reserve ruling on these questions until an appropriate case arises in the future.

II. Statement of the Case

A. Background¹

The Complainant, in connection with his earlier age discrimination complaint² before the Office of Compliance, requested from the Respondent (“the Architect”) inspection of two vacancy merit promotion files (“the Files”). The Complainant sought those Files to prepare for the prosecution of his complaint before a CAA hearing officer. Ostensibly, the Files could have informed the Complainant regarding the regularity of the promotion process and how his qualifications compared with those of his more successful competitors.

When the Architect did not respond to the Complainant’s request, he sought the Files through discovery. Hearing Officer Sylvia Bacon examined the files *in camera* and released them to the Complainant in redacted form.³

The Complainant alleges, in this separate and subsequent reprisal complaint, that the Architect did not voluntarily provide him with the Files in accord with its regulations; and, instead, required him to expend time and expense to acquire the Files through discovery: in reprisal for his filing of complaints under the CAA.

B. Hearing Officer’s Decision

After reviewing written briefs, and hearing oral argument, Hearing Officer Warren King dismissed the complaint on the record (Hearing Tr. Pp.38-40). The Hearing Officer held that “[T]he case law is such that the conduct that must be shown to be an adverse action must be

¹Inasmuch as this appeal arose from a complaint dismissal the Board shall accept as true all well-pleaded factual complaint allegations and draw all reasonable inferences in the Complainant’s favor. *H.J. Inc. Northwest Bell Telephone Co.*, 492 U.S. 229, 249-50 (1989); *Conley v. Gibson*, 355 U.S. (1957); and *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1424-25 (3d Cir. 1997).

²The pleadings disclose that the Complainant had initiated even earlier proceedings against the Architect.

³Ultimately, that Hearing Officer ruled for the Architect on the merits. Complainant has petitioned for review of that decision and that appeal before the Board is in the briefing period.

more severe than that which is shown here. . . . I'm satisfied that under the case law that a denial of the promotion file does not rise to the level of an adverse action within the meaning of that term as defined by dozens and dozens of courts.”

The Hearing Officer relied upon the D.C. Circuit’s unpublished *Heamstead*⁴ decision “and dozens of other cases that stand for the same proposition” in deciding that this complaint did not fall within the scope of the CAA anti-reprisal protections.

The Hearing Officer also opined that this complaint might be misdirected because any issue regarding the Complainant’s entitlement to inspect the Files had been decided by Hearing Officer Bacon in Complainant’s underlying age discrimination complaint case, and that her decision to redact the Files could be raised before the Board in the appellate stage of that case.

III. Positions of the Parties

A. Appellant/ Complainant

Counsel acknowledged to the Hearing Officer that the Complainant would not have plead an actionable reprisal claim under Title VII or the Age Discrimination in Employment Act (“ADEA”) because those statutes’ interpretative case law requires that a reprisal action be more adverse than that herein so as to be actionable. However, the Complainant submits that the CAA’s anti-reprisal provision is much broader than are its Title VII and ADEA counterparts and he points out that Section 201 of the CAA (2 U.S.C. §1311) mandates that “All personnel actions affecting covered employees shall be made free from any discrimination . . .”. The Complainant urges the Board not to follow *Heamstead* and related judicial precedent because they were wrongly decided in failing to consider the CAA’s uniquely expansive anti-reprisal provision. Complainant contends that the CAA proscribes management action attributed to retaliatory motivation and asks the Board to be guided by National Labor Relations Board precedent in assessing what alleged reprisals may be entertained under a reprisal claim.

Complainant asserts that the Architect’s refusal to respond and voluntarily provide him with the requested merit promotion files did constitute an adverse action against him because it impeded his ability to ascertain whether he had a cause of action and whether the merits of that cause warranted further pursuit.⁵ Therefore, Hearing Officer Bacon’s discovery ruling in his underlying age discrimination complaint case, Complainant argues, is not dispositive of this

⁴*David Heamstead v. Office of the Architect of the Capitol*, 2002 U.S. App. LEXIS 11366 (D.C. Cir., 04/22/2002).

⁵Complainant plead that he was entitled to the Files as a matter of right pursuant to the Architect’s merit promotion regulation (Chapter 335).

case.

B. Appellee/Architect

The Complainant failed to allege that he suffered any change in the terms and conditions of his employment because the Architect denied him access to the Files. Further, Hearing Officer Bacon's discovery ruling on the Files is preclusive in this proceeding.

The *Heamstead* case, *supra*, is controlling because the Court of Appeals for the District of Columbia affirmed a district court's dismissal of a complaint against the Architect involving an identical CAA reprisal allegation. The appellate court concluded that the Files denial to the employee fell below the legal standard required to be an "adverse personnel action" because: it is neither *severe* or *pervasive* enough to qualify as a basis for supporting a Title VII retaliation claim; and no evidence was presented to the court showing that the employee suffered from any negative employment consequences based on his exercise of protected activity.

IV. Analysis and Conclusions

Just as in an earlier case⁶ the Board chooses to decide this matter on a dispositive ground not requiring it to define the scope of Section 207 protections. We affirm the dismissal of this complaint on policy and judicial economy grounds drawn from the spirit of the issue preclusion doctrines of collateral estoppel and res judicata. While a final decision has not yet been rendered in the Complainant's underlying discrimination case we believe that litigation of his document access claims should be restricted to that proceeding in which they arose.

A. Collateral Estoppel

The Complainant sought the Files in relation to his earlier age discrimination non-promotion complaint pending before CAA Hearing Officer Sylvia Bacon. Respondent required the Complainant to seek the Files through pre-hearing discovery by declining to release them voluntarily. Hearing Officer Bacon, after an *in camera* examination, ordered the Files released in redacted form. The Respondent complied. Complainant filed this complaint, alleging that the Respondent engaged in retaliation by not voluntarily releasing the Files.

Section 406(e)&(f) of the CAA (2 U.S.C. §1405(e)&(f)) provides for discovery in these

⁶In *Lawrence Hatcher v. Office of the Architect of the Capitol*, Case No. 96-AC-15 (CV, RP), 02/18/1998, a prior Board elected not to rest its decision upon a hearing officer's finding that an alleged retaliatory transfer from one position to another did not constitute an actionable adverse action. Instead, the Board affirmed the hearing officer's merits finding that no motive of reprisal caused the transfer.

proceedings, subject to a hearing officer's determinations on objections to the production of subpoenaed testimonial and documentary evidence. The Office's Procedural Rules, at *Subpart F.*, prescribe the discovery process. The Procedural Rules broadly authorize a hearing officer to impose sanctions (§7.02) on any party, including, but not limited to, the payment of attorney's fees and reasonable expenses, for failure to comply with a discovery order.

We, therefore, believe that the Complainant's exclusive avenue for redress regarding his document request was in that very underlying proceeding. The Complainant was at liberty to request that the hearing officer impose sanctions on the Respondent if he felt that the Respondent's discovery position or actions so warranted. Further, the hearing officer's rulings on such a request would have been appealable to the Board.

The compelling interests of judicial economy and case or issue finality are effected through the preclusive legal doctrines of *res judicata* and *collateral estoppel*. In a generic sense *res judicata* bars a second suit if: (1) there is an identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first. Under the doctrine of *collateral estoppel*, when the second action is predicated upon a different cause of action, the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. See, *International Air Response v United States*, 2003 U.S. App. LEXIS 6552 (Fed. Cir. 4/07/2003); *Oakerlee Fernandez v. Office of Personnel Management*, 2003 U.S. App. LEXIS 434 (Fed. Cir. 01/08/2003). Preclusion law is designed to protect litigants,⁷ and the courts,⁸ from the burdens of duplicative litigation.

In the underlying proceeding, and this complaint case, the parties are identical. The Complainant litigated, through discovery, his demand for the Files in the underlying case. That hearing officer ruled by releasing redacted files to the Complainant. This complaint, in essence, is the Complainant's challenge to the Respondent's litigating tactics in the underlying case.

We hold, under policies favoring judicial economy and discouraging duplicative litigation, that the Complainant's exclusive avenue for redress of this claim was before Hearing Officer Bacon and the Board in the underlying case. He may not resurface it as an independent claim of retaliation through this, a new complaint.

⁷ See generally, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (preclusion protects litigants from the burden of relitigating issues already decided).

⁸ *Id.* at 326 (preclusion promotes judicial economy).

ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(d) of the Office's Procedural Rules, the Board affirms the Hearing Officer's dismissal of the complaint, but for the reasons stated in this opinion.

It is so ordered.

Susan S. Robfogel, Chair

Barbara L. Camens, Member

Alan V. Friedman, Member

Roberta L. Holzwarth, Member

Barbara Childs Wallace, Member

Issued, Washington, D.C.: May 30, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May 2003, I delivered a copy of this Decision of the Board of Directors to the following parties by the below identified means:

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