



On July 7, 2008, Gamble filed a request for counseling with the OOC. Following receipt on August 9, 2008 of the end-of-counseling notice, Gamble requested mediation on August 22, 2008. The OOC issued a notice of End of Mediation Period on December 3, 2008 and on March 4, 2009, Gamble filed a complaint. In the complaint, Gamble alleges that: 1) in December 2007, he had been denied leave under the Family and Medical Leave Act (“FMLA”), in violation of Section 202 of the CAA; 2) he had continuously been given different jobs than white co-workers of the same grade, in violation of Section 201 of the CAA; and 3) he had been given a dangerous job causing disabling injury “and denial of claim” on January 3, 2008, in violation of Section 207. In addition, Gamble alleges that the AOC discriminated against him and retaliated against him “due to injury sustained on January 3, 2008” and because he filed three previous claims with the OOC for denying and disputing his claims for compensation under FECA. He also states in the complaint that the AOC was “negligent” by assigning employee duties in areas with unsafe working conditions.

On April 20, 2009, the AOC filed a Motion to Dismiss the Complaint (“Motion to Dismiss”), asserting that the Office of Compliance lacked subject-matter jurisdiction to hear Gamble’s claims because: 1) the claims for damages were only compensable through FECA; and 2) Gamble lacked standing to raise health and safety claims because those could only be addressed through the General Counsel of the OOC, not raised in an individual complaint. The AOC also stated that Gamble failed to state a claim upon which relief could be granted because his request for counseling had been untimely. The AOC further contends that because Gamble’s retaliation and denial of FMLA leave claims stem from a work related injury that occurred on January 3, 2008, his request for counseling on July 7, 2008 was more than 180 days from the alleged violation. Appellant filed a response to the motion.

By a ruling made at a May 4, 2009 hearing and in an Order dated May 6, 2009, Hearing Officer Michael Doheny granted Appellee’s motion to dismiss. The Hearing Officer found that although Gamble properly sought the remedy for his injuries and lost wages from the DOL under FECA, he had exhausted those remedies and the OOC did not have the jurisdiction either to review the manner in which the AOC conducted itself in the DOL proceedings nor to grant the remedies that were denied in those proceedings. Agreeing with the AOC, the Hearing Officer found that Gamble did not follow the procedures under the CAA for obtaining relief from alleged safety violations. Finding that the only actions that could have been reviewed under the CAA were the alleged denial of leave under the FMLA in December 2007 and the alleged discriminatory assignment of work on or before January 3, 2008, the Hearing Officer found that the July 7, 2008 request for counseling was outside the statutory time period for both allegations.

Appellant appealed the dismissal of the complaint on May 15, 2009 and filed supplemental information to his appeal on May 18, 2009. The AOC filed a timely Brief in Opposition to Appellant’s Petition for Review on June 15, 2009.

## II. Standard of Review

The Board’s standard of review for appeals from a hearing officer’s decision requires the Board to set aside a decision if it determines the decision to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with the law; (2) not made consistent with required

procedures; or (3) unsupported by substantial evidence. 2 U.S.C. § 1406(c). The Board's review of the legal conclusions that led to the Hearing Officer's determination is *de novo*. *Nebblett v. Office of Personnel Management*, 237 F.3d 1353, 1356 (Fed. Cir. 2001).

### III. Analysis

The Board has considered the Hearing Officer's decision, the parties' briefs, and the record in this proceeding. For the reasons that follow, and except as modified herein, the Board affirms the Hearing Officer's finding of no violation and dismissal of the complaint.

#### *The Alleged Retaliatory Opposition to the Workers' Compensation Claim*

The Hearing Officer dismissed Appellant's claim that the AOC improperly contested his workers' compensation claim. For the following reasons, we agree that dismissal of this claim is warranted.

The basis of Appellant's claim is that Appellee engaged in multiple efforts to prevent him from recovering workers' compensation, including denying incidents, delaying the filing of paperwork, and misrepresenting the facts to the DOL. Appellant alleges that this was all done in retaliation for his having gone through the OOC's procedures in three cases that resulted in a settlement more than 18 months before the accident. We find that Appellant fails to identify any evidence that would support a finding that AOC obstructed or opposed the processing of his workers' compensation claim in retaliation for protected activity.

Before dismissing the complaint, the Hearing Officer provided Appellant with an opportunity to fully explain his position and specify what claims he was making.<sup>1</sup> Appellant's complaint and supplementary statements, including his testimony at the limited hearing conducted by the Hearing Officer, clearly indicate the character of his grievance. Thus, as Appellant maintained, it was not until he learned that the "AOC was not going to pay [him] or give [him] his benefits" that he decided that he was being retaliated and discriminated against for past complaints. Appellant testified that the AOC: 1) delayed its submission of paperwork; 2) denied that the incident took place or that a report had been filed; and, 3) finally, opposed the FECA award. Appellant also testified that he had a witness who could testify that Appellee was trying to deny the claim. However, if proven, Appellant's proffered evidence would show only that Appellee vigorously (or perhaps negligently) challenged Appellant's compensation claim. Appellant's testimony and the documents he presented to the Board fail to show either: 1) that Appellee's conduct was in retaliation for activity protected by the CAA, or 2) that the DOL's ultimate decision not to extend Appellant's FECA benefits was causally related to conduct to which retaliatory intent may be attributed. As such, Appellant failed to demonstrate to the Hearing Officer or to this Board that there is a factual basis for allowing the retaliation claim to proceed to a full hearing.

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<sup>1</sup> On May 4, 2009, before rendering his decision from the bench, the Hearing Officer held what appeared to be a hearing limited to Appellant's sworn testimony and narrative. He was asked questions and to clarify his claims under oath. There was no other testimony offered at the hearing.

Since this claim fails for lack of proof, we need not address the jurisdictional issues raised by it. While this Board has no mandate or plenary authority under the CAA to remedy abuses or police the integrity of the FECA process, it does have plenary jurisdiction to protect legislative employees from reprisals for exercising rights protected by the CAA. *Eastham v. U.S. Capitol Police Board*, 06-CP-41 (RP) (February 25, 2008).<sup>2</sup>

### *The Remaining Claims*

As noted above, Appellant was injured on January 3, 2008. He filed his request for counseling on July 7, 2008, 186 days after the accident and what was his last day at work. With respect to the Section 202 (FMLA) and Section 201(Title VII) allegations, the Hearing officer properly dismissed these claims because the request for counseling was untimely. With respect to Appellant's claim that the Appellee retaliated against him by assigning him to a dangerous job that resulted in his injury, we find that the Hearing Officer correctly dismissed this allegation, but, as discussed more fully below, did so for the wrong reason. Nevertheless, the request for counseling of this claim was also untimely filed and the allegation is dismissed on this ground.

In his complaint, Appellant alleges that he had been denied leave under the Family and Medical Leave Act ("FMLA") in December 2007. As the request for counseling was filed well after the 180-day limitations period, the Hearing Officer properly dismissed this portion of the complaint. In a May 18, 2009 supplemental filing, Appellant claims that he submitted his request for FMLA leave in December 2007, but didn't request to use it until January 8, 2008, when it was denied. Despite being on notice that there was a timeliness issue with this allegation, Appellant never raised the contention that he was actually denied FMLA leave on January 8 in any documents or narrative before the Hearing Officer. As this was not presented to the Hearing Officer, it cannot now be raised for the first time on appeal.<sup>3</sup>

Appellant also alleges that he had continuously been given different jobs than white co-workers of the same grade, in violation of Section 201 of the CAA. The Hearing Officer properly found that this claim should also be dismissed because the request for counseling was untimely filed. At the hearing, Appellant provided very few details about this allegation. However, the incidents about which he was complaining had to have occurred before or on January 3, 2008, the day of the accident and the last day that he worked. The July 7, 2008 request for counseling was filed 186 days after any discriminatory assignment of work could have occurred. We affirm the

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<sup>2</sup> Member Wallace concurs with this decision but disagrees with the majority's suggestion that the OOC would have jurisdiction to opine on any matter in which the substantive decision of the Secretary of Labor in a FECA case would be directly at issue. Such a claim would be within the exclusive jurisdiction of the Department of Labor. *See, Lockett v. Potter*, 2007 WL 496361 (N.D. Ohio, Feb. 12, 2007) (court lacked jurisdiction over collateral attack on denial of FECA benefits where plaintiff indicated that he became aware of the employer's alleged discrimination when his OWCP claim was denied); *Almaguer v. White*, 2002 WL 31396123(W.D.Tex Sept.12, 2002)(court is without subject-matter jurisdiction where plaintiff alleges retaliation for having engaged in protected activity in the past resulting in the discontinuation of FECA benefits); *Nicastro v. Runyon*, 60 F.Supp.2d 181 (S.D.N.Y.1999) (plaintiff could not get around the rule prohibiting judicial review of administrative decisions denying FECA claims by collaterally attacking a denial of FECA benefits as retaliatory).

<sup>3</sup> In the hearing below, Appellant did mention that after the accident, he requested an advancement of annual leave but was denied. This claim is not before us. Similarly, we do not review Appellee's argument that the complaint was properly dismissed because Appellant failed to participate in mediation sessions as this issue was not raised before the Hearing Officer and only comes to us on review.

Hearing Officer's dismissal of these claims because of Appellant's failure to file his request for counseling within the limitations period. *See Perez v. Office of Representative Sheila Jackson-Lee*, 04-HS-21(CV, RP) (June 29, 2005) (claim properly dismissed where Appellant failed to request counseling within 180 days of the alleged violation of the Act).<sup>4</sup>

In dismissing Appellant's claim that he had been assigned to an unsafe job in retaliation for prior complaints, the Hearing Officer held that this claim was not properly before the him because it was only the General Counsel who had authority to file a complaint alleging health and safety hazards, not an employee. While the Hearing Officer was correct in dismissing this allegation, he misconstrued the nature of Appellant's claim. Thus, although Appellant does comment in his complaint that Appellee was "negligent" by assigning employee duties in areas with unsafe working conditions, it is clear that rather than alleging a violation under Section 215 of the Act<sup>5</sup>, he was alleging a violation of Section 207-- that the assignment itself was in retaliation for earlier claims. In so far as this allegation raises a retaliation claim under Section 207, Appellant had standing to raise this issue, even if it ultimately relates to a health and safety concern. While it is true that the allegation was related to the safety of the job site and it appears that Appellant did raise his concerns with the OOC General Counsel, this does not convert Appellant's retaliation allegation in the complaint into an allegation that AOC violated Section 215 of the Act. He alleged retaliation under Section 207 relating to health and safety concerns, an activity protected under the CAA.<sup>6</sup> As noted above, however, because Appellant filed his request for counseling six days after the limitations period, this allegation is dismissed as untimely.

## **ORDER**

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(e) of the Office's Procedural Rules, the Board affirms the Hearing Officer's finding of no violation and dismissal of the complaint in its entirety.

It is so ORDERED.

Issued, Washington, DC on September 9, 2010

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<sup>4</sup> Unlike the *Perez* case, the instant case does not involve a request for equitable tolling.

<sup>5</sup> Under Section 215 of the Act, "Each employing office and each covered employee shall comply with the provisions of section 5 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 654)." In addition, "If after issuing a citation or notification, the General Counsel determines that a violation has not been corrected, the General Counsel may file a complaint with the Office against the employing office named in the citation or notification. The complaint shall be submitted to a hearing officer for decision pursuant to subsections (b) through (h) of section 405, subject to review by the Board pursuant to section 406." 2 USC 1341 (a)(1) and (c)(3).

<sup>6</sup> See, *Duncan v. Architect of the Capitol*, 02-AC-59 (RP) (August 5, 2004), *aff'd* 541 F.3d 1377(Fed.Cir. 2008)(the express, unambiguous language of Section 207 of the CAA, accords legislative employees anti-reprisal protection for OSHA-related claims). Although Appellant does not allege, as did the Appellant in *Duncan*, that the AOC retaliated against him for opposing a violation of the health and safety provision, his allegation that Appellee assigned him to an unsafe position in retaliation for prior complaints is nonetheless encompassed under Section 207 of the Act.