Bricker v. Rockwell Hanford Operations, Div. of Rockwell Int'l Corp.

United States District Court for the Eastern District of Washington

September 17, 1991, Decided

NO. CY-90-3090-AAM

Reporter
1991 U.S. Dist. LEXIS 18965 *; 1991 WL 268026

EDWIN L. BRICKER and CYNTHIA BRICKER, husband and wife, Plaintiffs, v. ROCKWELL HANFORD OPERATIONS, a division of ROCKWELL INTERNATIONAL CORPORATION, WESTINGHOUSE CORPORATION, and WESTINGHOUSE HANFORD COMPANY, Defendants.

Judges: [*1] McDONALD

Opinion by: ALAN A. McDONALD

Opinion

ORDER RE: SUMMARY JUDGMENT, INTER ALIA

On Thursday, June 13, 1991, the court conducted a hearing on defendants' motions to dismiss and for summary judgment. Michael Withey, Schroeter, Goldmark & Bender, and Thad Guyer, Government Accountability Project, appeared on behalf of plaintiffs. Stuart Dunwoody, Davis Wright Tremaine, represented defendant Westinghouse. David Jurca and Mark Rising, Helsell, Fetterman, Martin, Todd & Hokanson, represented defendant Rockwell.

I.

Plaintiff Edwin L. Bricker [1] began employment at the Hanford Nuclear Facility, Richland, Washington, with Rockwell Hanford in July 1977. He left in August of 1979 to attend college and returned to the employ of Rockwell Hanford in February of 1983 as a nuclear process operator. Bricker was employed at Hanford's Plutonium Finishing Plant in 1983 and reported numerous alleged health, safety and environmental conditions which he believed had the potential of harming the health and safety of workers and the public. In 1984 Bricker transferred to the Hanford tank farm area.

[*2] As a result of the work Bricker performed, the conduct he observed, and conversations he held at Hanford, Ed Bricker purportedly became concerned about the operations at Hanford, safety violations and unsafe work practices, particularly at the Plutonium Finishing Plant, the tank farm, and the Z-plant. Bricker took steps to voice his concerns with co-employees, supervisors, agents and officials of the defendants who were in a position to respond to and/or correct or address the alleged problems.

Bricker contends that the defendants' agents, officials, and employees denied that there were any safety problems or unsafe work practices at Hanford, concealed crucial information about much safety violations and practices, and discredited him. Bricker further contends that when he determined it was clear that the defendants were not responding to his well-founded concerns about the safety violations and unsafe work practices, he articulated these same concerns to representatives of the United States Congress, wrote letters to the editors of news papers, and contacted and spoke to newspaper and television reporters.

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[1] While the complaint also names Ed Bricker's wife, Cynthia, as a defendant, it is entirely void of any averment that Cynthia Bricker worked at Hanford.

Bricker alleges that in response thereto and in order to suppress the exercise [*3] of his constitutional rights and for the specific purpose and deliberate intention of injuring him, the defendants engaged in a concerted and joint effort and in conspiracy with one another and others to: (1) Terminate Bricker from employment with the defendants; (2) retaliate against Bricker for the exercise of his constitutional rights to free speech and association; (3) conduct an improper campaign of harassment and intimidation against the Brickers and their congressional and press contacts; (4) implement a program to gather information on Bricker and his congressional and press contacts, including spying, surveillance, and unreasonable searches and seizures of conversations and physical effects; (5) use friends and associates of Bricker as informants and stool pigeons to attempt to gather derogatory information about Bricker for defendants' improper and wrongful purposes; (6) conduct a secret and public campaign in an attempt to smear and discredit Bricker and cause him to lose credibility; (7) compel Bricker to go to psychologists for psychiatric evaluation and treatment in order to further discredit and humiliate him; (8) intentionally inflict emotional distress on Bricker; [*4] and (9) deprive Bricker of due process of law by rejecting his complaints, punishing him for bringing complaints, and requiring him to engage in fruitless procedures to voice his grievances, all for the purpose of and intent to further injure, discredit, and harass him.

II.

Framed as a motion to dismiss for failure to state a claim under *Fed.R.Civ.P. 12(b)(6)*, resolution of the Motion to Dismiss Constitutional Claims requires reference to material outside the pleadings. Accordingly, as allowed by *Rule 12(b)*, the court shall treat the motion to dismiss as one seeking summary judgment. The court's decision to do so is made easier by the fact that the parties have submitted a vast amount of material in support of separately filed motions for summary judgment that were heard in conjunction with the motion to dismiss.

III.

While the Brickers' complaint sets forth a multitude of legal claims, they can readily be placed into two specific categories; (1) federal Bivens claims and (2) pendent state law claims. Plaintiffs' constitutional claims are predicated upon *First Amendment* rights to free speech and association, *Fourth Amendment* right to be free from unreasonable searches and [*5] seizures, and (while not specifically articulated) apparently *Fifth Amendment* due process and privacy rights.

Defendants Westinghouse and Rockwell have conducted operations and provided services at the Hanford Nuclear Facility under contract with the United States. Hanford is commonly referred to as a government-owned, contractor-operated (GOCO) facility. Plaintiffs claim the defendants were delegated functions by the United States which were traditionally reserved for governmental agencies. Plaintiffs conclude that the relationships and links between the defendants and the United States were such as to make the defendants federal actors and thus, subject to a Bivens action for violations of constitutional rights. While the defendants have not raised the issue of their "private party" status by way of this set of motions, they do not concede that they are federal actors for purposes of fashioning a Bivens remedy.

The record as it currently stands is insufficient for any determination as to whether defendants are "federal actors" against whom liability can be imposed under Bivens. Nor, for purposes of defendants motion to dismiss constitutional claims, shall the court assume [*6] that the defendants are federal actors.

In *Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 389 (1971)*, the Supreme Court established that the victims of a constitutional violation by a federal agent have a right to recover damages from the agent in federal court despite the absence of any statute conferring such a right. The Bivens ruling was based, in part, upon the Court's finding no special factors counselling hesitation in the absence of affirmative action by Congress and no explicit congressional declaration that money damages may not be awarded, but must instead be remitted to another remedy equally effective in the view of Congress. *Bivens, 403 U.S. at 396-97*. The Court also recognized that it was not dealing with a question of federal fiscal policy, which in specified instances should prevent creation of a Bivens remedy. *Id. at 396*.

The basis for Bivens subject matter jurisdiction is *28 U.S.C. 1331* which gives this court "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *28 U.S.C. 1331*; See *Bush v. Lucas, 462 U.S. 367, 374 (1983)*. [*7] Bivens actions lie only for violations of rights secured by the Constitution. *Bivens, 403 U.S. at 396-97*. In this vein, the court notes that the Supreme Court has specifically allowed Bivens actions for violations of the *Fourth Amendment*,

Bivens, 403 U.S. at 397, the *Fifth Amendment*, *Davis v. Passman, 442 U.S. 228, 248-49 (1979)*, and the *Eighth Amendment*, *Carlson v. Green, 446 U.S. 14, 19 (1980)*.

Defendants move to dismiss plaintiffs' constitutional claims contending a Bivens remedy is barred by a congressionally created alternative remedial scheme and the concept of "special factors counselling hesitation" first articulated in Bivens and later significantly expanded in *Bush v. Lucas, 462 U.S. 367 (1983)* and *Schweiker v. Chilicky, 487 U.S. 412 (1988)*. The plaintiff in Bush v. Lucas was a federal employee who had publicly criticized his employing agency and was subsequently demoted. He alleged his *First Amendment* rights were violated by the demotion. Through administrative channels he won retroactive restoration of his position and $ 30,000 in [*8] backpay but still attempted to maintain a Bivens action against his supervisors. The Bush Court, for purposes of its decision, assumed that Bush's *First Amendment* rights were violated and that the civil service remedies available to him were less effective than a damages remedy, found that because Bush's claims arose "out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States" it was inappropriate to supplement the new regulatory scheme with a judicially created remedy like *Bivens. Bush v. Lucas, 462 U.S. at 368*. The Court stressed that the case involved policy questions in an area that had received careful attention from Congress. *Id. at 380-88*.

The Bush rationale was taken several steps further in *Schweiker v. Chilicky, 487 U.S. 412*, which held that even an incomplete statutory remedy rendered a Bivens cause of action unavailable. While recognizing that the congressionally created remedy for wrongful termination of Social Security benefits failed to provide complete relief because it did not allow for money [*9] damages to compensate independently for constitutional violations, the Court nonetheless found such a remedy adequate.

The concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an *appropriate judicial deference to indications that congressional inaction has not been inadvertent.* When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that occur in the course of its administration, we have not created Bivens remedies. (emphasis added)

Chilicky, 487 U.S. at 423. The Court specifically recognized that the "absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the federal [official] responsible for the [constitutional] violation." *Id. at 421-22*.

The Ninth Circuit has applied the Chilicky expansion in a number of cases and held that where Congress has provided some mechanism for relief, Bivens claims are precluded. *Berry v. Hollander, 925 F.2d 311 (9th Cir. 1991)* [*10] (combination of remedies under Civil Service Reform Act, 5 U.S.C. § 1206-08, Federal Employees Compensation Act, *5 U.S.C. § 8101*, and statute governing Veterans Administration disciplinary proceedings, *38 U.S.C. § 4110*, is adequate to preclude Bivens remedy for VA physician who claimed denial of *First* and *Fifth Amendment* rights in connection with harassment and retaliation for his reporting incidents of possible surgical malpractice). *Saul v. United States, 928 F.2d 829 (9th Cir. 1991)* (Social Security claims representative who brought a Bivens action against supervisors for opening his personal mail barred from doing so because Civil Service Reform Act provided adequate remedy). *Karamanos v. Egger, 882 F.2d 447 (9th Cir. 1989)*, *Kotarski v. Cooper, 866 F.2d 311 (9th Cir. 1989)* (Civil Service Reform Act precludes Bivens remedy).

Westinghouse and Rockwell move to dismiss all constitutional claims lodged against them on the grounds that a Bivens remedy cannot be fashioned in light of the existing remedies available to plaintiff by way of: (1) the grievance procedure under the collective bargaining agreement; [*11] (2) the remedial process set forth in DOE Order 5483.1A; and (3) an unfair labor practice claim under *29 U.S.C. §§ 157* and *158*. In addition, the defendants argue that any congressional inaction was not inadvertent. Finally, defendants contend that federal fiscal policy prohibits creation of a Bivens remedy in this case.

The Department of Energy (hereafter DOE) requires that collective bargaining agreements at its government-owned, contractor-operated (GOCO) facilities contain "an effective grievance procedure with arbitration as its final step. . . ." 48 C.F.R. § 970.2201(b)(5)(ii). Defendants argue that the collective bargaining agreement between Westinghouse and the Hanford Atomic Metal Trades Council contains a grievance procedure and requires that it be used to resolve "claims and disputes on all matters subject to collective bargaining" irrespective of whether they require interpretation of the contract (Ct. Rec. 30, Turnbow declaration, Ex. C, Art. XVIII, para. 6). The collective bargaining agreement further provides for arbitration of any unsettled grievance that involve either "the interpretation or application of a provision of this Agreement" or "[a] disciplinary penalty [*12] (including discharge) . . . which is alleged to have been imposed without just cause. . . ." (Ct. Rec. 30, Turnbow

declaration, Ex. C, Art. XIX, para. 1). Defendants argue that any claim that the safety provisions of the collective bargaining agreement were violated or that an employee has suffered retaliation for raising a safety concern should be raised in the grievance procedure.

Defendants next claim that *42 U.S.C. § 2201(i)* [2] [*13] gives the Department of Energy the authority to protect health and to minimize danger to life or property. It is pursuant to this statute that DOE promulgated Order 5483.1A (attached as exhibit A to the Dutton declaration) which prescribes occupational health and safety standards for government-owned, contractor-operated (GOCO) facilities. It specifically forbids discrimination against an employee who files an OSHA complaint or otherwise exercises his or her rights under the law. [3] It is upon the remedial process set forth in DOE Order 5483.1A which defendants contend precludes this court from fashioning a Bivens remedy for plaintiffs' claims.

[*14] Plaintiffs' response to both arguments is twofold. Their first attack on the administrative remedies is directed at what they perceive as an absence of a high level of direct congressional involvement in the development of either the grievance procedure or DOE Order 5483.1A. They contend that because the grievance procedure is based solely on regulations created through the unilateral sua sponte decision of the Secretary of the Department of Energy, not by clearly announced congressional mandate, it cannot be the basis for denial of a Bivens remedy. Plaintiffs second attack proceeds directly to the adequacy of the remedies. Simply, that neither the grievance procedure nor DOE Order 5483.1A is a comprehensive scheme contemplated as a remedial mechanism for constitutional violations.

The previously quoted portion of Chilicky defines the concept of "special factors" to include "appropriate judicial deference to indications that congressional inaction has not been inadvertent." Chilicky also recognizes that a Bivens remedy should not be created when the design of a government program [*15] suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations. Plaintiffs concede the former in their reply by suggesting that in order for a Bivens remedy to stand the court must determine whether the failure by Congress of money damages, or other significant relief, was inadvertent. It is upon Congress's perceived inadvertence which plaintiffs' claims hinge.

The Energy Reorganization Act of 1974 created the Energy Research and Development Administration (subsequently the Department of Energy) and the Nuclear Regulatory Commission. The Act was divided into four separate titles, now subchapters. Subchapter I establishes the Energy Research and Development Administration (now DOE) and defines its responsibilities. Subchapter II establishes the Nuclear Regulatory Commission and defines its responsibilities. Subchapter III sets forth miscellaneous and transitional provisions. Subchapter IV is a specific prohibition of sex discrimination under the entire Energy Reorganization Act of 1974. At its inception, the Energy Reorganization Act of 1974 did not contain specific "whistleblower" protection provisions.

In 1978 section 210 of Pub.L. [*16] 93-438 amended subchapter II of the Energy Reorganization Act of 1974 to include a specific whistleblower protection provision. The Fourth Circuit has previously recognized what this court now recognizes, that

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[2] "In the performance of its functions the [Atomic Energy] Commission is authorized to--

(i) prescribe such regulations or orders as it may deem necessary . . . (3) to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property."

[3] Chapter III of Order 5483.1A provides in relevant part:

"No contractor shall discharge or in any manner demote, reduce in pay, coerce, restrain, threaten, or take any other negative actions against any contractor employee as a result of the employee's filing of a complaint, or in any other fashion, exercising on behalf of himself or herself or others any right set forth in this Order.

Any employee who believes he or she has been discharged or in any other manner discriminated against, in violation of this Order, may file a complaint with the cognizant CO or CO representative within 30 days after the alleged discrimination, setting forth the nature of the alleged discrimination. The CO or CO representative, the safety and health director, and other appropriate elements of the field organization shall investigate the complaint, and if it is found that such discrimination has occurred, the field organization shall assure that appropriate measures are taken by the contractor, including rehiring or reinstatement of the employee, restoration of lost seniority, and back pay. The field organization shall report the disposition of the matter to the contractor employee filing the complaint of alleged discrimination within 30 days after receipt of the complaint."

"it appears that Congress was deliberate in assigning all provisions relating to the Nuclear Regulatory Commission to" subchapter II. *Adams v. Dole, 927 F.2d 771, 776 (4th Cir. 1991)*. That deliberateness appears to have continued with the whistleblower amendment to subchapter II. As evidence in support of the separateness of subchapters I and II of the Energy Reorganization Act of 1974, the Fourth Circuit in Adams v. Dole acknowledged that the explicit prohibition against sex discrimination is contained in subchapter IV and is applicable to both the DOE and the NRC. Id. The inescapable conclusion (one that the Adams court reached) -- if Congress wanted to make the whistleblower provision applicable to both the DOE and the NRC, it would have amended subchapter IV, not subchapter II. Id. Moreover, as Adams v. Dole also notes, at the time section II was amended, the DOE already had in effect its own internal provisions protecting whistleblowing [*17] activities -- the predecessor provisions of DOE Order 5483.1A. Id.

In recent years, members of Congress have introduced legislation which sought to apply the whistleblowing provisions of *42 U.S.C. § 5851* and OSHA (*29 U.S.C. § 651 et seq.*) to the DOE. All have failed.

On October 8, 1986 in material in extension of remarks in the House of Representatives, the Honorable Thomas A. Luken of Ohio stated:

"Mr. Speaker, today I am introducing legislation [Nuclear Whistleblower's Protection Act Amendments of 1986] that will close a loophole in our laws that leaves many employees without protection if they blow the whistle against practices at nuclear facilities that endanger either the public or their coworkers. These employees are found at facilities that are owned by the Department of Energy and operated by private contractors."

132 Cong.Rec. E3479-02 (October 7, 1986) (statement of Rep. Luken). The amendments did not pass.

On March 2, 1988 the Honorable Jim Slattery of Kansas introduced H.R. 4071 entitled the Nuclear Whistleblowers Protection Act Amendments of 1988. 134 Cong. Rec. H630-02 (March 2, 1988) (Statement of Rep. Slattery). The amendments sought to extend the whistleblower [*18] protections of section 210 of the Energy Reorganization Act of 1974 (*42 U.S.C. § 5851*) to the employees of contractor-operated Department of Energy nuclear facilities. 135 Cong.Rec. E794-02 (March 23, 1988). The amendments, however, failed.

In the Nuclear Facilities Occupational Safety Improvement Act of 1989, H.R. 3521, Congress sought to extend the provisions of the Occupational Safety and Health Act (OSHA) to Department of Energy nuclear facilities. The act failed.

In 1990 Congress sought to enact the Employee Health and Safety Whistleblower Protection Act, S.436. Senate Report 101-349 (June 28, 1990) recites one of the primary purposes of the bill.

Finally, one particular gap in coverage deserves special mention because its existence is not apparent from a review of current statutes. Employees at government-owned, contractor-operated (GOCO) nuclear weapons facilities have no statutory protection from retaliation when they report health or safety violations. James Simpkin, formerly an employee at the Hanford, Washington GOCO facility, provided compelling evidence of this problem. During the 100th Congress, at the request of the House Energy and Commerce Committee, Mr. Simpkin testified [*19] about safety problems at the Hanford facility. Upon his return to work after his congressional testimony, the private contractor operating the Hanford facility began a campaign of intimidation and harassment that ultimately forced Mr. Simpkin to leave his job. At a subsequent congressional hearing convened specifically to review the retaliation against Mr. Simpkin, the Department of Energy, the owner of the facility, publicly admitted that (1) Mr. Simpkin was an excellent employee; (2) his belief that he had been harassed out of his job by the contractor because of his earlier testimony was reasonable; and (3) the Department of Energy failed to protect him. See Safety at DOE Nuclear Weapons Facilities: Hearings before the Subcommittee on Oversight and Investigations of the of the House Committee on Energy and Commerce, 100th Cong. 2nd Sess. 542-45 (1988).

Mr. Simpkin, and other GOCO facility worker, are caught in limbo. They are not considered federal employees, so they may not take advantage of the whistleblower protections under the Civil Service Reform Act. But under current interpretations of section 210 of the Energy Reorganization Act, which protects private sector workers licensed [*20] by the Nuclear Regulatory Commission, GOCO facility workers are outside the scope of coverage. See, e.g., Wensil v. B.F. Shaw Co., 86-ERA-15 (Secretary of Labor, March 29, 1990); 4(b)(1) Report at 12. Therefore, Mr. Simpkin had no federal statutory remedy. His only

option was to rely on the very weak administrative system established within the Department of Energy -- a system that failed him miserably. [footnote omitted]

The bill failed.

Congressional inaction that is inadvertent? Hardly. The congressional record is clear that Congress is and has been aware of the situation regarding "whistleblowers" at GOCO facilities, but has failed to enact a comprehensive statutory remedial scheme. It is difficult to imagine a stronger case of what this court shall term "deliberate inaction." Chilicky's pronouncement is similarly clear - this court must afford *appropriate judicial deference to indications that congressional inaction has not been inadvertent.* Accordingly, the court cannot create a Bivens remedy under these circumstances.

The court also finds that there is a "special factor" which, coupled with Congress's deliberate inaction, further supports the decision not to create [*21] a Bivens remedy. This special factor is the existing remedial scheme previously described. [4] While the court recognizes that these remedies, either alone or in combination, do not constitute a comprehensive statutory scheme, they are in fact a remedial mechanism designed to provide relief in circumstances that exist in the instant case as evidenced by the United States Department of Labor, Occupational Safety & Health Administration, Final Investigation Report. The report is based on a written complaint filed by Ed Bricker pursuant to DOE Order 5483.1A and finds that Bricker was discriminated against for raising safety and health concerns. More importantly, the report recommends that (1) Bricker's files be expunged of all negative references regarding his protected activity, (2) Bricker be awarded back pay and out-of-pocket expenses, and (3) the appropriate notice be posted at his work location advising other employees of the action taken.

[*22] IV.

In light of the foregoing, IT IS HEREBY ORDERED that defendants' Motion to Dismiss Constitutional Claims be GRANTED. The complaint and claims contained therein as they relate to plaintiffs' Bivens claims are DISMISSED WITH PREJUDICE.

V.

IT IS FURTHER ORDERED, there being no independent basis for subject matter jurisdiction, plaintiffs' pendent state law claims are DISMISSED WITHOUT PREJUDICE. *United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)*; *Jones v. Community Redevelopment Agency, 733 F.2d 646, 651 (9th Cir. 1984)*.

VI.

IT IS FINALLY ORDERED that all motions heretofore not ruled upon are DENIED AS MOOT.

IT IS SO ORDERED. The Clerk shall enter this Order and forward copies to counsel.

DATED this 17 day of September, 1991.

ALAN A. McDONALD

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[4] (1) The grievance procedure under the collective bargaining agreement, (2) the remedial process set forth in DOE Order 5483.1A, and (3) an unfair labor practice claim under *29 U.S.C. §§ 157* and ***158***. The NLRA declares it an unfair labor practice for an employer to interfere with employee rights protected under the NLRA, which include the right to engage in "concerted activities for . . . mutual aid or protection," *29 U.S.C. § 157*, and gives the National Labor Relations Board broad discretion to formulate remedies for such unfair labor practices. ***29 U.S.C. § 158***, ***160***. Defendants argue that Bricker's complaints regarding safety and health are protected concerted activity, making any retaliation by WHC against Bricker for making the complaints an unfair labor practice. The National Labor Relations Board has jurisdiction to investigate unfair labor practices, including discharges based upon protected activity such as safety complaints. *Zurn Industries Inc. v. NLRB, 680 F.2d 683, 694 (9th Cir. 1982)*, cert. denied, ***462 U.S. 1131 (1983)***.

Plaintiffs initially respond by stating that an unfair labor practice remedy does not extend to constitutional violations by federal actors acting under color of federal authority. Their characterization of the claim, however, is not dispositive of the issue. The issue is whether Congress has provided what it considers adequate remedial mechanisms for constitutional violations. Without citing to any authority, plaintiffs argue that Ed Bricker does not have a claim for relief under the National Labor Relations Act.

United States District Judge

JUDGMENT IN A CIVIL CASE - September 18, 1991, Filed

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Federal Bivens claims are dismissed with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that all pendent state law claims are [*23] dismissed without prejudice.

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