U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

EDITH MCCURRY,

COMPLAINANT,

v.

KENCO LOGISTIC SERVICES, LLC,

RESPONDENT.

ARB CASE NO. 2021-0009

ALJ CASE NO. 2019-FDA-00015

DATE: April 30, 2021

Appearances:

For the Complainant:
Edith McCurry; *pro se*; Pembroke, Illinois

For the Respondent:
Jody Wilner Moran, Esq. and Julia Pearce Argentieri, Esq.; *Jackson Lewis P.C.*; Chicago, Illinois

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell, *Administrative Appeals Judge*

ORDER VACATING AND REMANDING

Edith McCurry (Complainant) filed a complaint under Food Safety Modernization Act[1] (FSMA), and its implementing regulations at 29 C.F.R. § 1987, alleging that her former employer, Kenco Logistic Services, LLC (Respondent), had violated the FSMA's employee protection provisions by denying her long-term disability benefits. On November 2, 2020, an Administrative Law Judge (ALJ)

[1] 21 U.S.C. § 399d (2016).

issued a Decision and Order Granting Summary Decision (D. & O.). We vacate and remand the D. & O. for further proceedings consistent with our decision.

BACKGROUND

Complainant worked for Respondent as a human resources administrator at a plant in Manteno, Illinois.[2] Complainant began receiving short-term disability benefits on January 23, 2015, and was approved for a medical leave of absence on January 25.[3] On January 29, Respondent notified all of its employees at the Manteno plant that they would be laid off in March.[4] After her termination, Complainant elected to continue health care benefits under Respondent's health care plan under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).[5] Hartford Life and Accident Insurance Company (Hartford), a third party, administered the plan.[6]

After exhausting her short-term benefits, Complainant transitioned to long-term benefits.[7] Hartford terminated Complainant's benefits in July 2017 based on an erroneous determination that she was capable of part-time work.[8] Hartford reversed the decision in February 2019 and paid her an adjusted rate to compensate for the underpayments.[9] Complainant has filed several legal actions against Respondent and other related parties after her benefits were temporarily terminated, including a discrimination case in United States District Court in which the court granted summary judgment in Respondent's favor.[10]

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2 D. & O. at 4.

3 *Id.*

4 *Id.* Respondent had lost its contract with the company that it was providing warehouse management services. *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 On August 29, 2016, Complainant filed an action in the United States District Court for the Central District of Illinois against Respondent claiming her supervisors discriminated against her based on her race, sex, age, and disability in violation of several federal statutes, to which the court granted summary judgment in Respondent's favor. *McCurry v. Kenco Logistics Servs.*, No. 16-CV-2273, 2018 WL 10321877 (C.D. Ill. Aug. 14,

On April 20, 2018, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent unlawfully retaliated against her for engaging in activity protected under the FSMA by temporarily denying her disability benefits.[11] On May 3, 2019, OSHA issued a final determination letter dismissing the complaint because Hartford, not Respondent, made decisions concerning administration of the benefits plan.[12] On June 7, 2019, Complainant objected to the dismissal and requested a hearing with the Office of Administrative Law Judges (OALJ).[13]

On September 4, 2019, Respondent filed a Motion for Summary Decision of the FSMA retaliation claim.[14] Respondent presented two reasons for dismissal of the claim: (1) "[C]ollateral estoppel bars the re-litigation of the same factual issues that were already conclusively decided by the federal court in granting summary judgment"; and (2) "[T]he Department of Labor lacks jurisdiction over [Complainant]'s claim because it is an ERISA dispute against a third-party benefits administrator – not [Respondent] – which has nothing to do with the [FSMA] and cannot be litigated as a FSMA claim."[15]

On September 25, 2019, the ALJ issued an order converting the scheduled November 13, 2019 hearing to a pretrial session and limited its scope to whether the complaint was barred by collateral estoppel and whether Complainant could present evidence that her protected activity could have been a contributing factor in

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2018). On March 23, 2017, Complainant brought a second action against Respondent and others alleging that it repeatedly changed her benefits plan premiums and medical coverage in retaliation for protected activity while she was employed, which the court dismissed as malicious. *McCurry v. Kenco Logistics Servs.*, No. 18-cv-2093 (C.D. Ill. May 22, 2018). On July 19, 2019, Complainant filed an action in the United States District Court for the Northern District of Illinois against Respondent and others, alleging that the irregularities in her disability benefits were discriminatory and retaliatory in violation of Title VII and § 1981. *McCurry v. Mars, Inc.*, No. 19-cv-04067, 2020 WL 6075872 (N.D. Ill. Jun. 17, 2020). The court denied Respondent's motion to dismiss the discrimination claims because the facts alleged by Complainant differed from the facts alleged in the initial lawsuits enough to avoid claim preclusion. *Id.* at *6.

11 D. & O. at 5.

12 *Id.* at 2.

13 *Id.*

14 *Id.*

15 Motion for Summary Decision at 1.

the alleged adverse employment action.[16] On October 23, 2019, Complainant filed a response requesting the ALJ to hold the case in abeyance while the federal district court case was on appeal.[17] On October 24, 2019, the ALJ cancelled the November 13 hearing and ordered the case to be held in abeyance.[18]

On April 17, 2020, the ALJ lifted the stay and ordered the complainant "to respond to the Motion for Summary Decision and show cause, by June 15, 2020, why she is not collaterally estopped from pursuing her claim against Kenco in this forum and why her request for a hearing should not be dismissed."[19] Counsel for Complaint withdrew his representation on the same day.[20] On August 6, 2020, the ALJ extended Complainant's time to respond in an order and again ordered the complainant to "respond to the Motion for Summary Decision herself and show cause, by September 30, 2020, why she is not collaterally estopped from pursuing her claim against Kenco in this forum because a federal court had previously found that Kenco did not take adverse action against her related to her post-termination benefits and why her request for a hearing should not be dismissed."[21] Neither order requested Complainant to address whether there was evidence that her alleged protected activity contributed to the disruption of her long-term benefits. On September 30, 2020, Complainant, acting pro se, submitted a Response Opposing Respondent's Motion for Summary Decision.[22]

On November 2, 2020, the ALJ issued the D. & O. granting the motion. The ALJ held that the record presented a genuine issue of material facts regarding whether Complainant engaged in an activity protected under the FSMA[23] and subsequently suffered an adverse action.[24] However, the ALJ found that Complainant failed to present any evidence establishing that the protected activity could have been a contributing factor in the adverse action, stating that it "is

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16 D. & O. at 2.

17 *Id.* at 3.

18 *Id.*

19 Order to Show Cause at 4-5.

20 D. & O. at 3.

21 Order Extending Time to Respond to Motion for Summary Decision at 4-5.

22 D. & O. at 4.

23 Complainant claimed that she had testified in a separate FSMA whistleblower retaliation case made by another Respondent employee. *Id.* at 5.

24 *Id.* at 8.

beyond peradventure that employees of Hartford, not [Respondent], have taken all actions related to [Complainant]'s disability benefits."[25] The ALJ noted there was no evidence that Respondent had "instructed, suggested, requested, directed, colluded, or conspired with Hartford to deprive [Complainant] of such benefits."[26] The ALJ further concluded that there was no evidence that anyone at Hartford had any knowledge of Complainant's alleged protected activity.[27] Accordingly, the ALJ granted summary decision. However, the ALJ did not base the decision on the two reasons offered by Respondent in support of its motion. Complainant petitioned the Administrative Review Board (Board) to review the decision thereafter.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated his authority to the Administrative Review Board to issue final agency decisions in FSMA cases.[28] The Board reviews an ALJ's factual determinations under the substantial evidence standard.[29] The Board reviews the ALJ's legal conclusions de novo.[30]

DISCUSSION

On appeal, Complainant contests the ALJ's decision to grant summary decision on grounds not raised by Respondent.[31] In its motion for summary decision, Respondent argued that the complaint should be dismissed because of collateral estoppel and lack of jurisdiction. In his D. & O., the ALJ granted summary decision solely because he determined there was a lack of a genuine issue of fact regarding whether Complainant's alleged protected activity contributed to the temporary denial of her long-term disability benefits.

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25 *Id.*

26 *Id.*

27 *Id.* at 9.

28 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

29 29 C.F.R. § 1987.110(b).

30 *Watts v. Perdue Farms, Inc.*, ARB No. 2017-0017, ALJ No. 2016-FDA-00003, slip op. at 3 (ARB May 28, 2020).

31 Complainant raises other arguments in her appeal, including that there were genuine issues of material fact. However, for the reasons discussed herein, we need only discuss her procedural argument.

Under the Department of Labor's Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, an ALJ may grant summary decision "on grounds not raised by a party" only after providing the parties "notice and a reasonable time to respond."[32] Here, neither party was apprised that the ALJ was considering whether there was a genuine issue of material fact and given an opportunity to respond to the issue. In *Brucker v. BNSF Railway Co.*, the Board stated that an ALJ that "sua sponte, without notice to the parties, first raised and then decided [an] issue" to grant a motion for summary decision likely "prejudiced" the complainant by "fail[ing] to give him notice of his intention to consider the . . . issue."[33] Here, Complainant also was prejudiced because she was unable to respond to the ALJ's rationale for granting summary decision, depriving her of an opportunity to be heard.[34] The ALJ's actions, therefore, did not conform to the procedural requirements for summary decision and compels the Board to vacate and remand the decision.

Respondent in its brief contends that the Board should dismiss Complainant's appeal before reaching its merits because her initial brief fails to conform to the Federal Rules of Appellate Procedure.[35] Respondent cites Rule 28(a) which requires an appellant's brief to contain the "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies."[36] Respondent contends that Complainant's opening brief lacks arguments against the ALJ's conclusion that there was no genuine issue of material fact or citations to facts in the record in support of her appeal.

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[32] 29 C.F.R. § 18.72(f)(2).

[33] *Brucker v. BNSF Ry. Co.*, ARB No. 2014-0071, 2013-FRS-00070, slip op. at 13 (ARB July 29, 2016) (citing 29 C.F.R. § 18.72(f)(2)). However, the Board did not rule on the issue because the complainant failed to raise it in his brief. *Id.*

[34] In her response to Respondent's motion, Complainant did present an argument that there was a genuine issues of material fact for her retaliation claim. Response Opposing Respondent's Motion for Summary Decision at 13-18. However, though it is unclear as to why Complainant, acting pro se, included this argument in her response, it was not in response to the ALJ notifying the parties that it was considering the issue because the ALJ only ordered Complainant to address the arguments in Respondent's Motion for Summary Decision and why her claim was not barred by collateral estoppel in the two orders issued after the ALJ lifted the stay on the case.

[35] In the absence of its own procedural rule, the Board applies the principles employed by federal courts under the Federal Rules of Appellate Procedure. *Henin v. Soo Line R.R. Co.*, ARB No. 2019-0028, ALJ No. 2017-FRS-00011, slip op. at 2 (ARB Feb. 26, 2019).

[36] Fed. R. App. P. 28(a)(8).

While Complainant's initial brief perhaps fails to meet the procedural standards for submissions to the Board, we note that the Board holds pro se litigants "to lesser standards than legal counsel in procedural matters"[37] and gives them "a certain degree of adjudicative latitude."[38] Complainant identified the ALJ's procedural error in her initial brief and more thoroughly discussed the issue in her reply brief. Because of Complainant's pro se status and the procedural error made by the ALJ, we decline to dismiss Complainant's appeal.

Therefore, we **VACATE** the ALJ's D. & O. and **REMAND** the case to the OALJ for further proceedings to allow the parties an opportunity to respond to the ALJ's grounds for granting summary decision.

SO ORDERED.

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[37] *Zavaleta v. Alaska Airlines, Inc.*, ARB No. 2015-0080, ALJ No. 2015-AIR-00016, slip op. at 11 (ARB May 8, 2017).

[38] *Young v. Schlumberger Oil Field Servs.*, ARB No. 2000-0017, ALJ No. 2000-STA-00028, slip op. at 10 (ARB Feb. 28, 2003).