

U.S. Department of Labor

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



IN THE MATTER OF:

CRYSTAL PFEIFER,

ARB CASE NO. 2023-0009

COMPLAINANT,

ALJ CASE NO. 2021-SOX-00030

v.

DATE: March 22, 2023

AM RETAIL GROUP, INC.,

RESPONDENT.

Appearances:

For the Complainant:

Allen A. Shoikhetbrod, Esq.; *Tully Rinckey, PLLC*; Albany, New York

For the Respondent:

John E. Kiley, Esq., Ryan Duffy, Esq.; *Sheppard, Mullin, Richter & Hampton LLP*; New York, New York

Before BURRELL, WARREN, and MILTENBERG, Administrative Appeals Judges

ORDER OF REMAND

PER CURIAM:

This case arises under the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX or Section 806), as amended, and its implementing regulations.¹ On September 17, 2021, Crystal P. Pfeifer (Complainant) filed a complaint against AM Retail Group, Inc. (Respondent). On November 8, 2022, the Administrative Law Judge (ALJ) assigned to this matter issued an Order

¹ 18 U.S.C. § 1514A; 29 C.F.R. Part 1980 (2022).

Dismissing Proceeding (Order). The ALJ dismissed the case after finding that Complainant's counsel was non-compliant with the Court's written and verbal orders and thus committed multiple nonsubstantive procedural errors requiring dismissal of Complainant's case. Complainant timely appealed and argues that the ALJ abused his discretion in dismissing the claim. We agree with Complainant that dismissal was too severe a sanction. Therefore, we vacate the ALJ's decision to dismiss the complaint and remand this case to the Office of Administrative Law Judges (OALJ) with a recommendation that it be assigned to a different ALJ.

BACKGROUND

In September 2021, Complainant filed an objection to the Occupational Safety and Health Administration's (OSHA) dismissal of her complaint and requested a hearing before an ALJ with the OALJ.² The ALJ held a Status Conference on the matter on October 25, 2021, after which he ordered Complainant to submit an amended complaint according to certain specifications.³ Pursuant to that Order, on January 24, 2022, Complainant filed an "Amended Objection" and a "Notice Withdrawing Hearing Request and Concurrent Request for Written Submissions in Lieu of Hearing."⁴ The ALJ held a second Status Conference on March 2, 2022, advising Complainant he would disregard the January 24 filing because it did not conform to his specifications and denying Complainant's motion for a decision on the papers.⁵ The ALJ simultaneously ordered Complainant to file another amended complaint.⁶ Complainant attempted to comply with the ALJ's Order by filing a second amended complaint (stylized as "Complainant's Amended Complaint") on March 11, 2022, along with a "Notice Withdrawing Hearing Request and Concurrent Request for Summary Decision."⁷

On March 30, 2022, the ALJ issued an Order to Show Cause to Complainant after receiving Complainant's March 11 filings of her second amended complaint and her "Notice Withdrawing Hearing Request and Concurrent Request for Summary Decision."⁸ On April 7, 2022, Complainant again apparently attempted to

² Order at 1-2.

³ *Id.* at 2.

⁴ *Id.* at 3.

⁵ *Id.* at 4. During the status conference, the ALJ also set deadlines for discovery and for filings for motions for summary decision. The ALJ advised the parties they were given until July 5, 2022, to complete discovery, and the deadline for filing a motion for summary decision was set 45 days after the completion of discovery. *Id.*

⁶ *Id.*

⁷ *Id.* at 5.

⁸ *Id.* at 6.

comply by filing three papers: a response to the Order to Show Cause; “Complainant’s Third Amended Complaint”; and a “Motion Withdrawing Hearing Request and Concurrent Request for Summary Decision.”⁹ On April 25, 2022, the ALJ held a hearing on the Order to Show Cause and advised the parties he was going to think about how to proceed in this case. He also warned Complainant that he would dismiss the complaint if the Complainant filed another motion for summary decision.¹⁰ Nevertheless, on August 15, 2022, Complainant filed a Motion for Summary Decision.¹¹ On November 8, 2022, the ALJ issued an Order Dismissing Proceeding. Complainant timely appealed that Order of Dismissal to the Administrative Review Board (ARB or the Board).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to review ALJ orders and decisions in SOX cases and to issue final agency decisions in such cases.¹² The Board reviews an ALJ’s determination on procedural issues under an abuse of discretion standard.¹³ The Board takes a particularly close look at the sanction of dismissal of the entire claim.¹⁴

DISCUSSION

We consider whether the ALJ abused his discretion when he dismissed the Complainant’s complaint on the grounds that Complainant’s counsel made multiple nonsubstantive procedural errors in attempts to comply with the ALJ’s orders. ALJs have an inherent authority to “manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”¹⁵ ALJs must exercise this power cautiously,

⁹ *Id.* at 7-9.

¹⁰ *Id.* at 9-10.

¹¹ *Id.* at 11.

¹² Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary’s discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

¹³ *Butler v. Anadarko Petroleum Corp.*, ARB No. 2012-0041, ALJ No. 2009-SOX-00001, slip op. at 2 (ARB June 15, 2012) (citations omitted).

¹⁴ *See Howick v. Campbell-Ewald Co.*, ARB Nos. 2003-0156, 2004-0065, ALJ Nos. 2003-STA-00006, 2004-STA-00007, slip op. at 7-8 (ARB Nov. 30, 2004) (citations omitted) (“[D]ismissal of a complaint for failure to comply with the ALJ’s orders is a very severe penalty to be assessed in only the most extreme cases.”).

¹⁵ *Newport v. Fla. Power & Light, Co.*, ARB No. 2006-0110, ALJ No. 2005-ERA-00024, slip op. at 4 (ARB Feb. 29, 2008).

however, and should take care in fashioning sanctions for conduct that abuses the judicial process.¹⁶

Complainant's counsel argues that the multiple alleged errors the ALJ cited in his Order were "actions that do not warrant a sanction or are truly violations of any order or rule of practice."¹⁷ Counsel argues that the ALJ failed to conduct a proper balancing of the *Howick* factors and that even if sanctions were warranted, the ALJ failed to properly consider lesser sanctions.¹⁸ Respondent's counsel argues that the ALJ correctly found that Complainant's repeated violations warranted dismissal and that the *Howick* factors also supported dismissal.¹⁹

Upon review of the ALJ's Order and the entire procedural history in this matter, the Board recognizes that Complainant's counsel failed to comply with the ALJ's orders and verbal directives and should have requested leave to file many of the filings. Nevertheless, the Board finds that the nonsubstantive procedural errors by Complainant's counsel do not rise to the level of egregious misconduct that requires dismissal of a claim.

Although the ALJ's timeline suggests that Complainant's counsel repeatedly ignored the Court's orders and, indeed, did so despite multiple warnings and allowances for counsel, a close look at the ALJ's Order shows that the ALJ relied in part on unclear email directions from his office, as well as on mistakes the ALJ had previously advised counsel he would disregard and strike from the record.²⁰ The procedural history demonstrates that Complainant's counsel made several attempts to cure the deficiencies the ALJ had found with his filings, all in apparent good-faith efforts to comply with the ALJ's orders and directives. Because Complainant's counsel was able to fix the record, it was error for the ALJ to conclude that sanctions less than dismissal would be ineffective.

¹⁶ *Id.*

¹⁷ Complainant's (Comp.) Opening Brief (Br.) 10.

¹⁸ *Id.* at 12. ALJs may consider several factors to determine whether a dismissal is warranted, including: (1) prejudice to the other party; (2) the amount of interference with the judicial process; (3) the culpability, willfulness, bad faith, or fault of the litigant; (4) whether the party was warned in advance that dismissal could be ordered for failure to cooperate or noncompliance; and (5) whether the efficacy of lesser sanctions were considered. *Howick*, ARB Nos. 2003-0156, 2004-0065, slip op. at 8.

¹⁹ Respondent's (Resp.) Response Br. 28.

²⁰ At the March 2, 2022 Status Conference, the ALJ indicated he would disregard the January 24, 2022 filing of the Complainant's second amended complaint, but noted this was "Violation 2" in the Order. The ALJ also failed to refer in the Order to the following emails between his attorney advisor and the parties: a May 2022 email; several August 2022 emails; and an August 31, 2022 Order Staying Proceeding.

For these reasons, the Board is convinced that counsel's errors and lack of proper courtesy to the Court do not merit the extreme sanction of dismissal of Complainant's claim in its entirety. The procedural errors and disputes outlined in the ALJ's order understandably have been vexing to the Court and undoubtedly have been costly to the parties; they do not reflect well on our system of adjudication. However, the Board finds that the ALJ abused his discretion in dismissing the entire claim and therefore remands it to the OALJ. Furthermore, in light of the above, and to promote comity as this case goes forward, the Board recommends that the OALJ exercise its discretion and reassign this case to a different ALJ.

CONCLUSION

For the above reasons, we **VACATE** the ALJ's Order Dismissing Proceeding and **REMAND** this matter for further proceedings consistent with this Order.

SO ORDERED.



THOMAS H. BURRELL
Administrative Appeals Judge



IVEY S. WARREN
Administrative Appeals Judge



NED I. MILTENBERG
Administrative Appeals Judge