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,[1]

RESPONDENT.

ARB CASE NO. 2022-0024

ALJ CASE NO. 2019-FDA-00015

DATE: July 26, 2022

Appearances:

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

For the Respondent:
J. Casey Leech, Esq. and Julia Pearce Argentieri, Esq.; *Jackson Lewis P.C.*; Chicago, Illinois

Before HARTHILL, Chief Administrative Appeals Judge, and BURRELL and PUST, Administrative Appeals Judges

DECISION AND ORDER

PUST, Administrative Appeals Judge:

Edith McCurry (Complainant) filed a complaint with the Department of Labor, Occupational Safety and Health Administration (OSHA), under the Food

[1] A review of the record, specifically Respondent's initial filings, indicates that Respondent identifies itself as Kenco Logistic Services, LLC, not Kenco Logistics Services, LLC.

Safety Modernization Act[2] (FSMA), and its implementing regulations at 29 C.F.R. § 1987. In her OSHA complaint, Respondent alleged that her former employer, Kenco Logistic Services, LLC (Respondent), violated the FSMA's employee protection provisions by terminating her long-term disability benefits. On November 2, 2020, an Administrative Law Judge (ALJ) issued a Decision and Order Granting Summary Decision in favor of Respondent. On appeal, the Administrative Review Board (ARB or Board) vacated and remanded the decision for further proceedings to provide the parties with an opportunity to respond to the ALJ's grounds for granting summary decision. On remand, the parties submitted supplemental briefing, and the ALJ again ordered summary decision in favor of Respondent. Complainant again appealed the ALJ's order. We affirm.

BACKGROUND

Complainant worked for Respondent as a human resources administrator at a plant in Manteno, Illinois.[3] Complainant began receiving short-term disability benefits on January 23, 2015, and was approved for a medical leave of absence on January 25.[4] On January 29, 2015, Respondent notified all of its employees at the Manteno plant that they would be laid off in March.[5] After her termination, Complainant elected to continue various health care benefits under Respondent's health care plans as allowed by the Consolidated Omnibus Budget Reconciliation Act of 1985.[6] Hartford Life and Accident Insurance Company (Hartford), a third party, administered Respondent's disability benefits plans.[7] Respondent had no involvement in decisions to grant, deny or alter employees' benefits under the disability benefit plans; those decisions were made by Hartford adjusters and analysts with no input from Respondent.[8]

After exhausting her short-term disability benefits, Complainant transitioned to long-term disability benefits.[9] More than two years after Complainant's employment with Respondent ended, Hartford terminated her disability benefits in July 2017 based on an erroneous determination that she was capable of part-time

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2 21 U.S.C. § 399d.

3 Decision and Order Granting Respondent's Motion for Summary Decision (D. & O.) at 4.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

work.[10] Hartford reversed that decision in February 2019 and thereafter paid Complainant at an adjusted rate to compensate her for the earlier underpayments.[11]

Complainant filed several unsuccessful legal actions against Respondent and related parties, alleging that Respondent discriminated against her during her employment in various instances, including by temporarily terminating her disability benefits. On August 29, 2016, Complainant filed an action[12] in the United States District Court for the Central District of Illinois against Respondent, her individual supervisors, and others, claiming discrimination based on race, sex, age, and disability in violation of several federal statutes, to which the court granted summary judgment against Complainant.[13] On March 23, 2018, Complainant brought another federal action against Respondent and others alleging that Respondent repeatedly changed her benefit plan premiums and medical coverage in retaliation for protected activity while she was employed, which the federal court dismissed as malicious.[14] On June 19, 2019, Complainant filed an action against Respondent and others in the United States District Court for the Northern District of Illinois alleging, *inter alia*, that the irregularities in her disability benefits were discriminatory and retaliatory in violation of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Ch. 18 § 1001 et seq., Title VII[15] and 42 U.S.C. § 1981.[16] On January 21, 2022, the district court granted summary judgment in favor of Respondent because Hartford was the sole decisionmaker for the disability benefits plan.[17]

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10 *Id*.

11 *Id*.

12 Complainant initially filed two near-identical actions: (1) Case No. 16-CV-2273 which originated as a charge filed with the Illinois Department of Human Rights (IDHR) and cross-filed with the Equal Employment Opportunity Commission (EEOC); and (2) Case No. 16-CV-2277, also filed with the IDHR and cross-filed with the EEOC. The two were consolidated under the first file number in *McCurry v. Kenco Logistic Services LLC,* No. 16-CV-2273, 16-CV-2277, 2017 WL 11489793 (C.D. Ill. Feb. 7, 2017).

13 *McCurry v. Kenco Logistics Servs.*, No. 16-CV-2273, 2018 WL 10321877 (C.D. Ill. Aug. 14, 2018). The court granted summary decision on an Americans with Disabilities Act claim against Respondent because a third-party administrator, not Respondent, handled the benefits plan and thus Respondent was not a proper defendant. *Id.* at *6.

14 *McCurry v. Kenco Logistics Servs.*, No. 2:18-cv-02093-CSB-EIL (C.D. Ill. May 22, 2018).

15 Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.

16 *McCurry v. Mars, Inc.*, No. 19-cv-04067, 2020 WL 6075872 (N.D. Ill. Oct. 15, 2020).

17 *McCurry v. Kenco Logistics Servs., LLC*, No. 19-cv-04067, 2022 WL 198889 (N.D. Ill. Jan. 21, 2022).

On April 20, 2018, Complainant filed a complaint with OSHA, alleging that Respondent unlawfully retaliated against her for engaging in activity protected under the FSMA by temporarily denying her disability benefits.[18] Complainant claimed that she had engaged in a protected activity by testifying in another FSMA case in favor of a former co-worker and against Respondent. [19] On May 3, 2019, OSHA issued a final determination letter dismissing the complaint because Hartford, not Respondent, made decisions concerning administration of the disability benefits plan.[20] On June 7, 2019, Complainant objected to the dismissal and requested a hearing before an ALJ.[21]

On September 4, 2019, Respondent filed a Motion for Summary Decision of the FSMA retaliation claim.[22] Respondent presented two reasons for dismissal of the claim: (1) Collateral estoppel bars the re-litigation of factual issues previously decided by the federal court in granting summary judgment; and (2) The Department of Labor lacks jurisdiction over the claim because it is an ERISA dispute.[23] On October 23, 2019, Complainant requested the ALJ to hold the case in abeyance while her federal district court case against Respondent was on appeal,[24] which the ALJ granted.[25]

On April 17, 2020, the ALJ lifted the stay and ordered Complainant to respond to the motion for summary decision by June 15, 2020, and show why she is

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[18] D. & O. at 5.

[19] Complainant claimed in her filings that she had testified in a separate FSMA whistleblower retaliation case against Respondent brought by another former employee of Respondent. *Id.* The ALJ noted that Complainant was seemingly referring to an FSMA case brought by a former coworker, in which the coworker had submitted a declaration from Complainant as part of an opposition to a motion for summary decision. *Id.* at 5 n.9.

[20] *Id.* at 2.

[21] *Id.*

[22] *Id.*

[23] Motion for Summary Decision at 1.

[24] On November 7, 2019, the Seventh Circuit Court of Appeals affirmed the earlier decision of the United States District Court for the Central District of Illinois by upholding the dismissal of all claims against Respondent and all other defendants, finding Complainant's appeal to be "patently frivolous" and ordering Complainant's attorney to show cause as to why he should not be sanctioned for failing to follow the Federal Rules of Appellate Procedure. *McCurry v. Kenco Logistics Servs., LLC*, 942 F.3d 783, 791-92 (7th Cir. 2019).

[25] D. & O. at 3.

not collaterally estopped from pursuing her claim against Respondent.[26] On August 6, 2020, the ALJ extended Complainant's time to respond and again ordered her to show why she is not collaterally estopped from pursuing her claim.[27] On September 30, 2020, Complainant, acting pro se, submitted a response to the motion.[28]

On November 2, 2020, the ALJ issued summary decision. The ALJ held that the record presented genuine issues of material facts regarding whether Complainant had engaged in an activity protected under the FSMA and subsequently suffered an adverse action.[29] However, the ALJ determined that Complainant failed to present any evidence establishing that the protected activity could have been a contributing factor in the alleged adverse action, stating that only "the employees of Hartford, not [Respondent], have taken all actions related to [Complainant]'s disability benefits."[30] The ALJ noted there was no evidence in the record that Respondent had "instructed, suggested, requested, directed, colluded, or conspired with Hartford to deprive [Complainant] of such benefits."[31] The ALJ further concluded that no one at Hartford had any knowledge of Complainant's alleged protected activity.[32] Because Complainant had failed to present any controverting evidence and therefore no material issue of fact remained for resolution at hearing with regard to the essential element of whether Complainant's protected conduct was a contributing factor in the alleged adverse action, the ALJ granted summary decision in favor of Respondent. Complainant timely appealed the decision to the Board.

On April 30, 2021, the Board issued an Order Vacating and Remanding, concluding that it was a procedural error for the ALJ to grant summary decision without first apprising the parties of the potential grounds for the decision.[33] The Board remanded the case and ordered the ALJ to provide the parties with an opportunity to respond to the grounds for granting summary decision.[34] On remand,

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26 Order to Show Cause at 4-5.

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

28 D. & O. at 4.

29 *Id.* at 8.

30 *Id.*

31 *Id.*

32 *Id.* at 9.

33 *McCurry v. Kenco Logistic Servs., LLC*, ARB No. 2021-0009, ALJ No. 2019-FDA-00015, slip op. at 6 (ARB Apr. 30, 2021).

34 *Id.* at 7.

the ALJ ordered the parties to submit supplemental briefings on the issue of whether Complainant's alleged protected activity had been a contributing factor to the alleged adverse action.[35]

On February 3, 2022, the ALJ issued a Decision and Order Denying Complaint on Remand. The ALJ determined that Complainant had failed to present any evidence establishing that her alleged protected activity had been a contributing factor in the disruption of her disability benefits.[36] Complainant had argued to the ALJ that Respondent had waived the lack of genuine issue of material fact argument because it failed to make that argument in its initial motion for summary decision.[37] The ALJ denied this contention, stating that he had ordered the parties to address the issue in accordance with the Board's order.[38]

The ALJ determined that it was clear that Hartford, not Respondent, took all actions related to Complainant's disability benefits, noting that no evidence showed Respondent took any action toward depriving Complainant of disability benefits or that Hartford was aware of Complainant's previous alleged protected activity.[39] The ALJ concluded that "as three federal courts have previously found" only Hartford managed Respondent's disability plan; Respondent had no role in any of the actions that affected Complainant's benefits and Hartford had no knowledge of any protected conduct.[40] Because there existed no genuine issue of material fact with regard to whether Complainant's protected conduct could have been a contributing factor in the alleged adverse action, the ALJ granted summary decision.[41]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to issue final agency decisions in FSMA cases.[42] The Board reviews an ALJ's factual

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35 Decision and Order Denying Complaint on Remand at 3.

36 *Id.* at 7.

37 *Id.* at 7-8.

38 *Id.* at 7.

39 *Id.* at 8-9.

40 *Id*. at 9.

41 *Id.*

42 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. 13,186 (Mar. 6, 2020).

determinations under the substantial evidence standard and an ALJ's legal conclusions de novo.[43]

DISCUSSION

Under the FSMA's employee protection provision, an entity engaged in the "manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food" may not discharge or otherwise discriminate against an employee for engaging in a protected activity, including providing information relating to a violation of the FSMA or objecting to an activity that the employee reasonably believes violates the FSMA.[44] To successfully prove a FSMA discrimination claim, a complainant must demonstrate by a preponderance of the evidence that (1) she engaged in protected activity, (2) she suffered an adverse employment action, and (3) her protected activity was a contributing factor in the adverse action.[45]

Complainant contests the ALJ's decision to grant summary decision on her claim. Summary decision is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law."[46] A genuine dispute of material fact means that a reasonable factfinder could decide in the favor of the nonmoving party.[47] When reviewing an ALJ's order granting summary decision, we view the allegations and evidence in the light most favorable to the nonmoving party.[48]

The FSMA regulations specifically require that "a preponderance of the evidence [demonstrates] that protected activity was a contributing factor in the

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43 *Watts v. Perdue Farms, Inc.*, ARB No. 2017-0017, ALJ No. 2016-FDA-00003, slip op. at 3 (ARB Mar. 5, 2019).

44 21 U.S.C. § 399d(a).

45 *Ellis v. Goodheart Specialty Meats*, ARB No. 2021-0005, ALJ No. 2019-FDA-00006, slip op. at 3 (ARB July 19, 2021). *See also Brown v. Choice Prod., LLC*, No. 20-CV-046-WMC, 2021 WL 5038759, at *8 (W.D. Wis. Oct. 27, 2021) (noting that "the Seventh Circuit has yet to consider the elements of a retaliation claim under the FSMA; indeed, very few courts have considered such a claim to date," the court applied standards of similar federal statutes' employee protection provisions and held that "[t]o survive summary judgment, therefore, [a complainant] 'must present direct evidence that: (1) [ ]he engaged in statutorily protected activity; (2) [ ]he suffered an adverse employment action; and (3) there is a causal connection between the two.'").

46 *Id.*

47 *Booker v. Exelon Generation Co., LLC*, ARB No. 2017-0038, ALJ No. 2016-ERA-00012, slip op. at 6 n.20 (ARB July 31, 2019).

48 *Ellis*, ARB No. 2021-0005, slip op. at 4.

adverse action alleged in the complaint."[49] The Board agrees with the ALJ that the Complainant failed to raise a genuine issue of material fact that her alleged protected activity was a contributing factor in the termination of her long-term disability benefits. To the contrary, the record demonstrates that Hartford was the sole administrator of the benefits plan and that Respondent had no role in approving or denying benefits, as previously determined by the federal court in Complainant's other actions.[50] Complainant's continued citation to her W-2 form as evidence that Respondent paid for and, therefore, administered the plan fails to establish a genuine issue of material fact requiring resolution at a hearing. Further, Complainant presents no evidence that Respondent informed Hartford of her alleged protected activity before the temporary denial of her benefits. Because Complainant failed to present any material evidence that Respondent had any role in the administration of her disability benefits plan, the Board concludes that her alleged protected activity was not a contributing factor in the decision to terminate her benefits.

On appeal, Complainant presents several arguments in support of her claim that the ALJ was estopped from determining whether a genuine issue of material fact exists on the issue of a contributory factor link between the alleged protected activity and the adverse action, including that the issue was barred by the doctrines of res judicata and judicial estoppel. None of these arguments have legal merit. Complainant also argues that Respondent waived the absence of a genuine issue of material fact argument by failing to assert it in the initial motion for summary decision. An ALJ is permitted to grant summary decision on grounds not argued by the moving party if the parties are provided with notice and a reasonable time to respond to those grounds.[51] Consistent with the Board's order on remand, the ALJ provided the parties an opportunity to respond to the grounds for granting summary decision in the first decision. As such, there is no legal support for

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[49] 29 C.F.R. § 1987.109(a).

[50] As noted by the Northern District: "The Plan has designated and named [Hartford] as the claims fiduciary for benefits provided under the Policy. The Plan has granted [Hartford] *full discretion and authority to determine eligibility for benefits* and to construe and interpret all terms and provisions of the Policy." *McCurry v. Kenco Logistics Servs., LLC*, No. 19-cv-04067, 2022 WL 198889, at *1 (N.D. Ill. Jan. 21, 2022) (emphasis added). Respondent argued in its initial motion for summary decision that collateral estoppel barred the action because a district court had already determined that Respondent had no role in the administration of the benefits plan. The doctrine of collateral estoppel, or issue preclusion, bars the relitigation of issues adjudicated in previous litigation between the same parties. *Chao v. A-One Med. Servs., Inc.*, ARB No. 2002-0067, ALJ No. 2001-FLS-00027, slip op. at 6 (ARB Sept. 23, 2004). Because the ALJ granted summary decision on other grounds, we do not address this argument.

[51] 29 C.F.R. § 18.72(f).

Complainant's waiver argument. Accordingly, we **AFFIRM** the ALJ's Decision and Order Denying Complaint on Remand.

SO ORDERED.[52]

TAMMY L. PUST
Administrative Appeals Judge

SUSAN HARTHILL
Chief Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge

[52] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, and not the Administrative Review Board.