

**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
COVINGTON DISTRICT OFFICE**

Issue Date: 08 February 2024

In the Matter of:

WILLIAM KICKHAM,
Complainant,

v.

**BRAZOS VALLEY AFFORDABLE
HOUSING CORPORATION,**
Respondent.

OALJ CASE NO.: 2024-CAR-00001

OSHA CASE NO.: 301023928

CHRISTINE HILLEREN-WILKINS
Administrative Law Judge

ORDER OF REMAND

This matter arises under the employee protection provisions of the Criminal Antitrust Anti-Retaliation Act.¹ Pursuant to 29 C.F.R. §18.12(b)(7), the Court issues this Order remanding the case to the Occupational Safety and Health Administration due to the lack of proper jurisdiction.

Procedural History and Facts

On September 25, 2023, Complainant filed two Complaints (“Complaints”) with the Occupational Safety and Health Administration (“OSHA”), therein alleging that his three Employers had taken adverse action against him because of Complainant’s reports of fraud to the Departments of Justice and Treasury.² On October 23, 2023, OSHA’s Assistant Regional Administrator issued Findings on behalf of the Secretary of Labor stating that after investigation, there was no reasonable cause to believe that Respondent Brazos Valley Affordable Housing Corporation violated the Criminal Antitrust Anti-Retaliation Act (“CAARA”).

On November 22, 2023, Complainant timely objected to OSHA’s Findings and requested a hearing before the Office of Administrative Law Judges (“OALJ”). Complainant’s objections noted that OSHA’s Findings referenced only Brazos Valley Affordable Housing Corporation as the sole Respondent and did not acknowledge that the Complaints included allegations of retaliatory conduct by all three of his Employers. Complainant’s objections further stated that his

¹ 15 U.S.C. § 7a-3.

² Complaint #100944 listed the Employers as Brazos Valley Council of Governments, BVAHC, and BVCDC, while Complaint #100945 listed the Employers as Brazos Valley Affordable Housing Corporation/BVCDC.

Complaints were not based on his Employers' violations of CAARA, but rather were filed due to violations of the Taxpayer First Act and Sarbanes-Oxley Act.

This matter was docketed with OALJ as an appeal arising under CAARA, and a *Notice of Docketing* was issued on December 4, 2023.³ The following day, OSHA filed a letter entitled "Correction to Secretary's Findings, dated October 23, 2023." In that letter, the OSHA Assistant Regional Administrator stated that the Secretary's October 23, 2023 Findings should have included the following named Respondents: 1) Brazos Valley Affordable Housing Corporation; 2) Brazos Valley Community Development Corporation; and 3) Brazos Valley Council of Governments. Additionally, the letter stated that the Secretary's October 23, 2023 Findings should have reflected that the Complaints arose under the following whistleblower statutes: 1) Consumer Financial Protection Act of 2010;⁴ and 2) Taxpayers First Act.⁵ A footnote in that letter stated that "OSHA would have determined that Respondents were not covered under SOX."

This matter was reassigned to the undersigned Administrative Law Judge on January 8, 2024. Following review, on January 25, 2024 the Court issued an *Order to Show Cause Why Complaints Should Not Be Remanded*, therein directing the Parties to show good cause in writing within ten days why this matter should not be remanded to OSHA for lack of jurisdiction over the Complaints under CAARA and the failure to properly serve all alleged Respondents named in the Complaints. The Court cautioned that the failure to timely comply with that Order would result in the issuance of an Order of Remand to OSHA without further notice.⁶

On February 5, 2024, Complainant and Respondent filed responses indicating they had no objection to remand of this matter, considering the foregoing jurisdictional issues. No response to the Court's Order has been received from OSHA.⁷

Discussion

A judge has all powers necessary to conduct fair and impartial proceedings, including those described in the Administrative Procedure Act.⁸ The undersigned is granted the authority to terminate the proceedings through dismissal or remand when doing so is not inconsistent with any statute, regulation, or executive order.⁹

³ The only Respondent named in and served with the *Notice of Docketing* is Brazos Valley Affordable Housing Corporation.

⁴ 12 U.S.C. § 5567.

⁵ 26 U.S.C. § 7623(d).

⁶ *Order to Show Cause Why Complaints Should Not Be Remanded* (issued January 25, 2024).

⁷ Any response to the Court's *Order to Show Cause Why Complaints Should Not Be Remanded* was due on February 5, 2024.

⁸ 5 U.S.C. § 556; 29 C.F.R. § 18.12(b).

⁹ 29 C.F.R. § 18.12(b)(7).

OSHA's October 23, 2023 Findings determined there was no reasonable cause to believe that one of Complainant's three identified Employers violated CAARA, such that the sole statute to be adjudicated on appeal of those Findings is CAARA. CAARA's implementing Regulations provide in part the following procedural parameters for processing a complaint:

(a) OSHA will notify the respondent(s) and the complainant's employer (if different) of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint. Such materials will be redacted, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also notify the respondent of its rights under paragraphs (b) and (f) of this section and § 1991.110(e). OSHA will provide an unredacted copy of these same materials to the complainant (or the complainant's legal counsel if complainant is represented by counsel) and to the DOJ.

(b) Within 20 days of receipt of the notice of the filing of the complaint provided under paragraph (a) of this section, the respondent may submit to OSHA a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the respondent may request a meeting with OSHA to present its position.

(c) During the investigation, OSHA will request that each party provide the other parties to the whistleblower complaint with a copy of submissions to OSHA that are pertinent to the whistleblower complaint. Alternatively, if a party does not provide its submissions to OSHA to the other party, OSHA generally will provide them to the other party (or the party's legal counsel if the party is represented by counsel) at a time permitting the other party an opportunity to respond. Before providing such materials to the other party, OSHA will redact them, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also provide each party with an opportunity to respond to the other party's submissions.¹⁰

Consistent therewith, the applicable Regulations further provide that OSHA's Findings and a notification of appeal rights will be sent by physical or electronic means that allow OSHA to confirm delivery to all parties of record (or each party's legal counsel if the party is represented by counsel).¹¹

CAARA's implementing Regulations do not appear to preclude remand in matters of improper jurisdiction, and arguably require that jurisdiction be properly established before the ALJ may

¹⁰ 29 C.F.R. § 1991.104(a), (b), (c).

¹¹ 29 C.F.R. § 1991.105(b).

proceed with adjudication.¹² Moreover, the same Regulations provide that, “[i]n special circumstances not contemplated by the provisions of these rules, or for good cause shown, the ALJ...on review may, upon application, and after three days’ notice to all parties, waive any rule or issue such orders that justice or the administration of CAARA requires.”¹³

Pursuant to the foregoing authority, the Court finds that remand of this matter is necessary to remedy the jurisdictional issues concerning the properly applicable statute(s) in this proceeding and the barred participation of certain parties named in the Complaints. As referenced above, OSHA’s October 23, 2023 Findings determined only that there was no reasonable cause to believe one of Complainant’s three identified Employers violated CAARA, such that the sole statute before the Court for adjudication on appeal of those Findings is CAARA. However, Complainant and OSHA have subsequently confirmed that CAARA is not the correct statute to be adjudicated in this matter. Additionally, two of the three Employers named in the Complaints do not appear to have received service of the Complaints, OSHA’s Findings, or any case filings until after the matter was already docketed with OALJ, if at all.¹⁴ OSHA’s failure to give proper notice of the Complaints and evidence to these Employers at the investigative stage has deprived them of an opportunity to provide their evidence and input into the proceeding, such that they have not been afforded the due process contemplated by applicable law.¹⁵

Furthermore, the Parties have not presented good cause for why this matter should remain before the Court at this juncture. When provided with an opportunity to show why this matter should not be remanded,¹⁶ neither Complainant nor Respondent objected to remand and OSHA did not file a response. Thus, given that the only statute before the undersigned (CAARA) is not the proper statute to be adjudicated, and in light of the procedural due process concerns surrounding the failure to serve two of three Respondents originally named in the Complaints, the Court remands this matter to OSHA to render Findings concerning the properly applicable statute(s) and to facilitate the provision of proper notice to all Respondents named in the Complaints.

¹² 29 C.F.R. § 1991.109(c) provides that “[n]either OSHA’s determination to dismiss a complaint without completing an investigation pursuant to § 1991.104(e) nor OSHA’s determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, *if there otherwise is jurisdiction*, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.” 29 C.F.R. § 1991.109(c) (emphasis added).

¹³ 29 C.F.R. § 1991.115.

¹⁴ As OSHA’s Findings were limited to Respondent Brazos Valley Affordable Housing Corporation and do not appear to have been served on either of the other two Employers identified in the Complaints, OALJ’s *Notice of Docketing* was also only served on Brazos Valley Housing Corporation. Consistent therewith, this Order will only be served on the Parties to the Complaints named in OSHA’s Findings and OALJ’s *Notice of Docketing*.

¹⁵ See 29 C.F.R. § 1991.104(a),(b),(c); 29 C.F.R. § 1991.105(b); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 107 S. Ct. 1740 (1986).

¹⁶ *Order to Show Cause Why Complaints Should Not Be Remanded* (issued January 25, 2024).

ORDER

For the foregoing reasons, this matter is **REMANDED** to the Occupational Safety and Health Administration to render Findings concerning the properly applicable statute(s) in this proceeding and to facilitate the provision of proper notice to all Respondents named in the Complaints.

So ORDERED in Covington, Louisiana, on February 8, 2024.

CHRISTINE HILLEREN-WILKINS
Administrative Law Judge