



In the Matter of:

MICHAEL J. MADRY,

COMPLAINANT,

ARB CASE NO. 13-049

**ALJ CASE NOS. 2013-TSC-001
2013-CAA-003**

v.

DATE: June 6, 2014

EMLAB P&K, LLC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

James J. Syme, Jr., Esq.; *Law Offices of James J. Syme, Goodyear, Arizona*

For the Respondent:

Deanne R. Rader, Esq. and Monica M. Ryden, Esq.; *Gordon & Rees, Phoenix, Arizona*

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*.

DECISION AND ORDER OF REMAND

This case arises under the whistleblower provisions of the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (Thomson Reuters 2009), and the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (Thomson/West 2003). Complainant Michael Madry filed complaints with the Occupational Safety and Health Administration (OSHA) alleging that his employer, EMLab P&K, LLC (EmLab or Company) took actions against him that violated the TSCA and CAA whistleblower provisions. On March 25, 2013, an Administrative Law Judge (ALJ) dismissed Madry's complaints for failure to respond to a motion to dismiss filed by EMLab. Madry petitions the Administrative Review Board (ARB) for review. For the following reasons, we affirm the ALJ's decision in part, reverse in part, and remand for further proceedings.

BACKGROUND

A. *Madry's First OSHA Complaint*

In 2007, Madry began working as a Quality Assurance Manager and Health and Safety Coordinator for EMLab, a company that provides analytical microscopy and indoor air quality testing. The Company is a wholly owned subsidiary of TestAmerica, for which Madry had worked since 2000. Between 2008 and 2010, Madry allegedly engaged in several actions reporting safety concerns to supervisors. The Company terminated Madry's employment on June 30, 2011. Madry OSHA Complaint (dated Sept. 30, 2010); OSHA's Findings Letter (dated Nov. 1, 2012).

Madry filed a complaint with OSHA on October 2, 2010, alleging violations of the TSCA and CAA whistleblower provisions. On November 1, 2012, following an investigation, OSHA found reasonable cause to believe that the Company violated TSCA and CAA by giving Madry a negative performance appraisal, placing him on a performance improvement plan, and requiring a psychological assessment. OSHA Findings Letter (dated Nov. 1, 2012). OSHA did not find reasonable cause to believe that Madry's termination violated TSCA or CAA. *Id.* at 8. OSHA ordered the Company to pay Madry backpay (at the rate of \$28.78 per hour for a 40-hour work week from September 22, 2010, through June 30, 2011), lost vacation and sick time (at the rate of \$95.40 per week from September 22, 2010, through June 30, 2011), and compensatory damages in the amount of \$62,723.90 (which includes relief for emotional distress in the amount of \$50,000). *Id.* at 9.

B. *EMLab proposed settlement agreement and Madry's second OSHA Complaint*

On November 13, 2012, the Company sent Madry a letter proposing a settlement that included payment of the relief set out in the OSHA letter. Proposed Waiver, Settlement and Release Agreement (Release Agreement). The Release Agreement included a Waiver of Reinstatement provision requiring Madry to:

waive[] any right or claim he might have to recall, reinstatement or reemployment, agrees not to apply for or otherwise seek or accept employment by the Company or with any of its parents, subsidiaries or affiliated corporations, divisions or partnerships, or with any successor or assign

Release Agreement at ¶ 4.b.¹ Madry did not sign the Release Agreement.

By letter dated December 14, 2012, Madry filed with the OSHA Region IV Investigator an "Affidavit of Complaint of Retaliation" alleging that the Waiver of Reinstatement provision

¹ The Release Agreement also required Madry to withdraw his complaint with OSHA and EEOC. Release Agreement at 7 and 8.

set out in the Release Agreement was an act of discrimination that violated TSCA, CAA, and other environmental employee protection provisions.² On December 20, 2012, OSHA determined that there was no reasonable cause to find that the Waiver of Reinstatement provision set out in the Release Agreement violated TSCA or CAA. Secretary Findings dated Dec. 18, and 20, 2012; and Jan. 29, 2013. The OSHA's Findings pertaining to Madry's second complaint regarding the Release Agreement stated:

Complainant failed to establish a cognizable adverse action for his complaint. Settlement offers containing future employment waivers are not *per se* retaliatory, nor do they normally constitute an 'adverse action' absent other showings of wrongdoing by the employer seeking to negotiate a settlement with the employee or ex-employee.

OSHA's Findings (dated Dec. 18, 2012).

C. Proceedings before the ALJ

On November 27, 2012, Madry requested a hearing by a Department of Labor OALJ on his first complaint (filed on October 2, 2010). The Company requested an ALJ hearing on this complaint on November 29, 2012. On December 12, 2012, the ALJ issued a Notice of Hearing and Pre-Trial Order and docketed the case as ALJ Case No. 2013-TSC-00001.

On January 17, 2013, Madry filed objections to OSHA's December 20, 2012 findings relating to the Release Agreement, and requested a hearing with the OALJ. Madry Letter to OALJ (dated Jan. 17, 2013) (second complaint). Madry stated that the second complaint is "directly connected to a previous complaint filed on October 1, 2010, EMLab P&K LLC/9-0370-11-001, which has already been scheduled for a hearing before Administrative Law Judge Steven B. Berlin on April 8, 2013, Case No. 2013-TSC-00001." *Id.* at 1. Madry stated that "[i]f the Respondents have no objections and if it is more convenient, the Complaining Party would like to request that both complaints be consolidated and heard at that juncture." *Id.* The OALJ docketed Madry's second complaint as ALJ Case No. 2013-CAA-00003. The ALJ held a telephone conference with the parties on January 24, 2013. Madry represented himself pro se in the phone conference. On January 30, 2013, the ALJ issued an order consolidating the two cases (ALJ Case No. 2013-TSC-00001 and ALJ Case No. 2013-CAA-00003).

² See Madry Letter to OSHA Region IV Investigator Whitman (dated Dec. 14, 2012) ("The Complaining Party reasonably believes that his former employer engaged in adverse employment action via the inexplicable inclusion of significantly restrictive language in the proffered 'Settlement Agreement."); see also Madry Letter to OSHA Acting Regional Supervisory Investigator Wu (dated Dec. 17, 2012) ("The inclusion of that language, in itself, can be interpreted as an act of discrimination that violates the applicable employee protection (or whistleblower) sections of [the environmental] statutes . . .").

On February 19, 2012, the Company moved to dismiss Madry's second complaint (Case No. 2013-CAA-00003) "for lack of adverse action." EmLab P&K, LLC's Motion to Dismiss at 1 (dated Feb. 15, 2012). The Company argued that the "provision in the settlement agreement waiving any right or claim [Madry] might have to future employment with EmLab" does not constitute an adverse action under TSCA or CAA. *Id.*

Madry did not file a response to the motion to dismiss by the due date, March 4, 2013. On March 7, 2013, the ALJ issued an Order to Show Cause directing Madry to file an opposition to the Company's motion to dismiss and show "why he should be allowed to file it late." ALJ Order to Show Cause (dated Mar. 7, 2013). The Order stated: "Any failure to comply timely with this Order might result in the motion being granted and the case being dismissed." *Id.* at 2.

Madry, by this time represented by counsel, responded on March 22, 2013, stating "no objection to the dismissal of Case No. 2013-CAA-0003." Madry Response To Motion To Dismiss (dated Mar. 22, 2013). On March 25, 2013, the ALJ entered an order dismissing the entire case. Decision and Order of Dismissal on Summary Decision (D. & O.) (Mar. 25, 2013). The ALJ stated:

Complainant is represented by counsel. His response to the Order to Show Cause was due filed in this Office no later than March 22, 2013. He timely responded with a filing whose caption showed both of the above case numbers. Yet it expressly addressed only one of them: Case No. 2013-CAA-00003. As to that case, Complainant stated that he did not object to the dismissal. As to the other case number, Complainant was silent. He defaulted and failed to respond to the Order to Show Cause.

D. & O. at 1. The ALJ dismissed the case "in its entirety . . . as to all claims and parties." *Id.* at 2.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to ARB the authority to issue final agency decisions under the TSCA and CAA. Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 24.110 (2013). We review an ALJ's procedural rulings, including a default ruling, for abuse of discretion. *Matthews v. Ametek, Inc.*, ARB No. 11-036, ALJ No. 2009-SOX-026, slip op. at 4-5 (ARB May 31, 2012); see also *Estrada v. Speno & Cohen*, 244 F.3d 1050, 1056 (9th Cir. 2001) ("the judge's decision to order default judgment is reviewed for an abuse of discretion."). An ALJ necessarily abuses discretion when committing legal error. *United States v. Hinkson*, 585 F.3d 1247, 1261-1262 (9th Cir. 2009) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . .").

DISCUSSION

Madry filed objections to both OSHA's Findings dated November 1, 2012 (first complaint, Case No. 2013-TSC-00001), and OSHA's Findings dated December 20, 2012 (second complaint, Case No. 2013-CAA-00003). The Company moved the ALJ to dismiss Madry's second complaint (Case No. 2013-CAA-00003), that pertained to the employment waiver terms set out in the Release Agreement. Following an Order to Show Cause directing Madry to respond to EmLab's motion, the ALJ, however, sua sponte dismissed Madry's case "in its entirety," including Madry's first *and* second complaints. An ALJ may not dismiss a complaint sua sponte unless the parties are given "notice . . . and an opportunity to respond." *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006); see also *Garayalde-Rijos v. Mun. of Carolina*, 747 F.3d 15, 22-23 (1st Cir. 2014); *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998) (citing 5A WRIGHT & MILLER, FED. PRACTICE AND PROCEDURE § 1357, at 301 (2d ed.1990)); *Fredyma v. AT&T Network Sys. Inc.*, 935 F.2d 368, 369 (1st Cir. 1991). In this case, the ALJ erred in dismissing sua sponte Madry's first complaint (Case No. 2013-TSC-00001) because he failed to give Madry notice and an opportunity to respond.

First, there was no motion pending for dismissal of Madry's first complaint (Case No. 2013-TSC-00001). The Company moved the ALJ to dismiss only Madry's second complaint (Case No. 2013-CAA-00003) that involved OSHA's Findings dated December 20, 2012, and pertained to the employment waiver terms set out in the Release Agreement. Madry's response to the Order to Show Cause was directed solely to the motion to dismiss Case No. 2013-CAA-00003, and clearly stated that Madry did not oppose dismissal of that second complaint. See Madry Response (dated Mar. 22, 2013).

Second, the ALJ's Order to Show Cause failed to give Madry notice that the ALJ would dismiss Madry's first complaint. The Order to Show Cause stated that "Respondent filed a motion to dismiss this whistleblower action" and that the "motion is case dispositive." Order to Show Cause at 1. But, again, the motion to dismiss that the Company filed was limited to dismissal of Madry's second complaint (Case No. 2013-CAA-00003) pertaining to OSHA's findings (dated Dec. 20, 2012) as to the employment waiver terms of the Release Agreement. Even though the Order was "case dispositive," it was dispositive of only Madry's second complaint. While the ALJ was within his discretion to dismiss Madry's second complaint to OSHA's Findings (dated Dec. 20, 2012) pertaining to the Release Agreement, which Madry did not oppose, there was no motion pending for dismissal of Madry's first complaint. The ALJ's sua sponte dismissal of Madry's first complaint (Case No. 2013-TSC-00001) – when the Company sought *and* Madry agreed to dismissal of only the second complaint (Case No. 2013-CAA-00003) – was error as Madry had no notice or opportunity to respond.³

³ See *Garayalde-Rijos*, 747 F.3d at 22 (court of appeals holds that district court improperly dismissed, sua sponte, employee's entire complaint against city and its mayor, alleging sex discrimination and retaliation under Title VII and Puerto Rico law, in one sentence, without explanation or notice, where city did not seek that relief and had moved to dismiss only a subset of

Accordingly, the ALJ was within his discretion in dismissing Madry's second complaint (Case No. 2013-CAA-00003).⁴ However, the ALJ's sua sponte dismissal of Madry's first complaint (Case No. 2013-TSC-00001) was error. The ALJ's Order dismissing the case in its entirety was thus an abuse of discretion.

CONCLUSION

For these reasons, the ALJ's Decision and Order of Summary Dismissal (dated Mar. 25, 2013) dismissing ALJ Case No. 2013-CAA-00003 is **AFFIRMED**. The ALJ's Decision dismissing ALJ Case No. 2013-TSC-00001 is **REVERSED**, and this case is remanded for further proceedings.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. Cooper Brown, Deputy Chief Administrative Appeals Judge, concurring:

I concur in the majority's decision reversing the ALJ's dismissal of Case No. 2013-TSC-00001. As the ARB has recognized, notice and an opportunity to respond are fundamental elements of procedural due process. *See, e.g., Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 5 (ARB Dec. 29, 2010); *Galinsky v. Bank of America*, ARB No. 08-014, ALJ No. 2007-SOX-076 (ARB Jan. 13, 2010); *Ass't Secretary & Helgren v. Minnesota Corn Processes*, ARB No. 01-042, ALJ No. 2000-STA-044, slip op. at 5 (ARB July 31, 2003). *Accord Yellow Freight Sys. v. Martin*, 954 F.2d 353, 357-358 (6th Cir. 1992).

I write separately because, even though I am in agreement with the majority's disposition of this matter, I profoundly disagree with the majority's invocation of the "abuse of discretion" standard in review of the ALJ's dismissal of Case No. 2012-TSC-00001. Compliance with the due process requirements of notice and an opportunity to respond is not a matter within the ALJ's discretion. Involved is strictly a question of law, which prior ARB decisions have addressed accordingly. *See Williams*, ARB No. 09-018; *Galinsky*, ARB No. 08-014; and

the claims asserted against it); *Carroll*, 470 F.3d at 1177 (court of appeals holds that district court erred when providing the parties "with no notice or opportunity to be heard as to the traditional tort claims before issuing its order of dismissal.").

⁴ The ALJ's dismissal of Case No. 2013-CAA-00003 is not challenged on appeal.

Helgren, ARB No. 01-042. Moreover, in the instant case we are called upon to review an ALJ's summary decision of dismissal. As the ARB has repeatedly stated, an ALJ's decision granting summary decision is reviewed de novo with the ultimate question being, after review of the evidence in the light most favorable to the non-moving party, whether the ALJ correctly applied the relevant law. See, e.g., *Woods v. Boeing South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-009, slip op. at 6 (ARB Dec. 10, 2012); *Peters v. American Eagle Airlines, Inc.*, ARB No. 08-126, ALJ No. 2007-AIR-014, slip op. at 3 (ARB Sept. 28, 2010). Accord *Carroll v. Ft. James Corp.*, 470 F.3d 1171, 1173 (5th Cir. 2006) (reviewing de novo for legal error lower court's sua sponte dismissal of plaintiff's claims without prior notice and opportunity to respond).

E. COOPER BROWN
Deputy Administrative Appeals Judge