U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

THOMAS SAPORITO, **ARB CASE NO. 10-073**

COMPLAINANT, **ALJ CASE NO. 2010-CPS-001**

v. **DATE: March 28, 2012**

PUBLIX SUPER MARKETS, INC., et al.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Jonathan Cantú, Esq., ***Government Accountability Project*****, Washington, District of Columbia**

For the Respondents:
Mary E. Pivec, Esq., ***Keller and Heckman LLP*****, Washington, District of Columbia**

BEFORE: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; Luis A. Corchado,** ***Administrative Appeals Judge*****; Lisa Wilson Edwards,** ***Administrative Appeals Judge*****.**

DECISION AND ORDER OF REMAND

This case arises under Section 219, the whistleblower protection provision, of the Consumer Product Safety Improvement Act of 2008 (CPSIA or Act), 15 U.S.C.A. § 2087 (Thomson Reuters/West 2009), and its implementing regulations at 29 C.F.R. Part 1983 (2011). Thomas Saporito filed a complaint alleging that Publix Super Markets, Inc., violated the CPSIA when it subjected him to a hostile work environment and discharged him from employment. A Department of Labor Administrative Law Judge (ALJ) determined that Saporito's complaint failed to state a claim upon which relief may be granted under the CPSIA and dismissed Saporito's complaint. The ALJ further determined that Saporito's pursuit of this complaint was

made in "bad faith" and, therefore, held that Publix is entitled to attorney's fees, not exceeding $1000, to be paid by Saporito as provided under 15 U.S.C.A. § 2087(b)(3)(C) of the Act. We reverse the ALJ's determinations, for the reasons that follow, and remand the case for the ALJ to consider the merits of Saporito's complaint.

BACKGROUND[1]

Publix is a supermarket chain that operates a dairy plant located in Deerfield Beach, Florida.[2] Saporito was employed as a maintenance technician at the plant beginning on July 24, 2007, until he was discharged on November 3, 2009.[3] Beginning in December 2007, Saporito began complaining in e-mails to his supervisors that the outside contact surfaces of plastic milk bottles, in which milk was being packaged at the plant and ultimately sold to consumers at Publix retail stores, allegedly were being contaminated with harmful chemicals and waste from the conveyor system at the plant.[4] He allegedly identified the chemical Sani-Glade as extremely "corrosive" and "toxic."[5] Similarly, he alleged that containers used to carry the plastic milk bottles were also being contaminated.[6]

Moreover, in a September 29, 2008, e-mail to his supervisors, Saporito complained about the pressurization of the milk filling room because failure to maintain a positive air pressure volume could contaminate both food products as well as the outside contact surface of plastic bottles.[7]

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1 We rely on Saporito's allegations for the factual background, along with reasonable inferences granted in his favor. We do not suggest that any of these facts have been decided on the merits.

2 *See* Complainant's Response to Order to Show Cause Why Complaint Should Not Be Dismissed (Response), Attachment 8.

3 Feb. 23, 2010 Affidavit of Thomas Saporito (Affidavit) at 1.

4 Response, Attachments 10-12, 16, 18.

5 See Response, Attachment 12 (E-mail dated 12/20/07).

6 Response, Attachments 10-12, 16, 18. Saporito also allegedly raised concerns about the drainage system for the conveyor system, use of wood pallets contaminated with animal waste, improper use of wiping tools, lack of running hot-water to wash hands, failure to properly maintain footbaths, absence of hand sanitation agents, failure to wear hairnets, lack of training, and lack of proper documentation, which all "could" result in contamination of the outside contact surface of plastic milk bottles. *Id.*

7 Response, Attachment 18.

On September 14, 2009, Saporito filed a CPSIA whistleblower complaint, alleging that the Respondents subjected him to a hostile working environment due to his CPSIA-related protected activity.[8] On November 3, 2009, Publix ended Saporito's employment.[9] That same day, Saporito filed a supplemental CPSIA whistleblower complaint, alleging that Publix subjected him to a hostile working environment and discharged due to his CPSIA-related protected activity.[10]

The Occupational Safety and Health Administration (OSHA) investigated Saporito's CPSIA complaint and dismissed it on December 10, 2009. In its determination, OSHA noted that it informed Saporito when he filed his complaint that food safety complaints were not covered under the CPSIA, but Saporito declined to withdraw his complaint.[11] OSHA dismissed Saporito's complaint because his "food safety complaints are not covered by the CPSIA and cannot be pursued by OSHA."[12] Saporito then requested a hearing before an ALJ.

On January 14, 2010, shortly after Saporito's request for hearing, the ALJ issued an Order to Show Cause Why Complaint Should Not Be Dismissed, which required Saporito "to establish"[13] that (1) his complaints related to "covered consumer products" and (2) each of the named Respondents is a "manufacturer, distributer, retailer, or labeler of consumer products." (Internal citations omitted.) Nothing further was required in the Order to Show Cause. After receiving responses to the Order to Show Cause, the ALJ issued his Recommended Determination and Order Retaining Jurisdiction For Action Under 15 U.S.C. § 2087(b)(3)(C) And Dismissing Complaint (D. & O.) on March 5, 2010. The ALJ determined that Saporito's complaint failed to state a claim upon which relief may be granted under the CPSIA, specifically focusing only on Saporito's failure to allege that he engaged in any protected activity under the Act. Thus, the ALJ dismissed Saporito's complaint. In addition, the ALJ determined that Saporito's pursuit of this complaint was made in "bad faith" and, therefore, held that Publix is entitled to attorney's fees, not exceeding $1000, to be paid by Saporito as provided under the Act. Saporito filed a timely petition for review with the Board.

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[8] Response, Attachment 1. Subsequently, Saporito filed supplemental complaints on September 30, 2009, October 8, 2009, October 14, 2009, and October 30, 2009, again alleging that the Respondents subjected him to a hostile working environment due to his CPSIA-related protected activity. Response, Attachments 2-5.

[9] Affidavit at 1.

[10] Response, Attachment 6. Subsequently, Saporito filed another supplemental complaint on November 30, 2009, again alleging that Publix subjected him to a hostile working environment and discharged him due to his CPSIA-related protected activity. Response, Attachment 7.

[11] *See* Dec. 10, 2009 OSHA Determination at 1.

[12] *See* Dec. 10, 2009 OSHA Determination at 3.

[13] The ALJ did not explain what he meant by "establish;" whether Saporito was required simply to provide more specific allegations or provide evidence or both.

Jurisdiction and Standard of Review

The Secretary of Labor has delegated her authority to issue final agency decisions under the CPSIA to the Administrative Review Board (ARB or Board).[14] Pursuant to the CPSIA and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard.[15]

The ARB reviews an ALJ's determinations on procedural issues under an abuse of discretion standard.[16] The Board reviews an ALJ's conclusions of law de novo.[17] In this case, the ALJ issued an Order to Show Cause, sua sponte, and then dismissed Saporito's complaint, as a matter of law. Therefore, we review the ALJ's conclusions de novo and limit our review to the legal grounds raised by the ALJ.

Discussion

For proper context, it is important to recognize the expressed purposes of the Consumer Product Safety Improvement Act, which contains the whistleblower provision relevant to this case. Pursuant to the Consumer Product Safety Act (CPSA), 15 U.S.C.A. § 2051 (Thomson Reuters/West 2009), as amended by the CPSIA, Congress found that "an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce" and that "the public should be protected from theses unreasonable risks." 15 U.S.C.A. § 2051(a)(1), (2). Logically, then, one of the CPSA's expressed "purposes" is to "protect the public against unreasonable risks of injury associated with consumer products." 15 U.S.C.A. § 2051(b). The statute and regulations generally define the term "consumer product" to include any article or portion of an article sold to consumers for the use or personal use, consumption, or enjoyment in a household, residence, or school. 15 U.S.C.A. § 2052(a)(5). The CPSIA expressly excludes "food" from the definition of "consumer product," as "food" is defined under the Federal Food, Drug, and Cosmetics Act (FFDCA) at 21 U.S.C.A. § 321(f) (Thomson Reuters/West 2009).

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[14] *See* Secretary's Order 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). *See also* 29 C.F.R. § 1983.110.

[15] *See* 29 C.F.R. § 1983.110(b).

[16] *Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, -115; ALJ Nos. 2004-SOX-020, -036; slip op. at 8 (ARB June 2, 2006) (citations omitted).

[17] *See Getman v. Sw. Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

The CPSA established a Consumer Product Safety Commission (the Commission) in furtherance of these goals. The CPSA, as amended by the CPSIA, empowers the Commission to enforce the CPSA and the CPSIA, along with any other federal act Congress has added to the Commission's oversight authority, resulting in a labyrinth of enforcement power. For instance, the Commission also enforces the Federal Hazardous Substances Act (FHSA), 15 U.S.C.A. § 1261 *et seq*. (Thomson Reuters/West 2009), and the Poison Prevention Packaging Act (PPPA), 15 U.S.C.A. § 1471 *et seq*. (Thomson Reuters/West 2009).[18] Under the PPPA, the Commission regulates packaging of "household substance[s]" which can include "food" as defined under the FFDCA at 21 U.S.C.A. § 321(f).[19] Under the FHSA, the Commission regulates "hazardous substances," a term not restricted to "consumer products" and which includes household substances that expose children to a hazardous quantity of lead (e.g., candy wrappers).[20] Clearly, the Commission's power extends beyond the regulation of "consumer products." Therefore, the ALJ erred in stating that he would dismiss Saporito's case if he failed to show that his complaints were related to "consumer products" as defined by the Act. This factor alone is a sufficient basis to reverse and remand this matter to the ALJ, given that he did not dismiss Saporito's claim on the only other concern identified in his Order to Show Cause (coverage of the Respondents). Nevertheless, we will address other errors the ALJ committed.

CPSIA Section 219 amended the CPSA to provide for whistleblower protection (the CPSIA whistleblower provision). That section provides in relevant part:

> (a) No manufacturer, private labeler, distributor, or retailer, may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee's initiative or in the ordinary course of employee's duties (or any person acting pursuant to a request of the employee) –
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> (1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any *violation* of, *or* any act or omission the *employee reasonably believes to be a*

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[18] *See* 15 U.S.C.A. § 2079(a) (transferring power to the Commission, including some powers under the Food, Drug and Cosmetic Act related to the Poison Prevention Packaging Act of 1970).

[19] A "package" under the PPPA "means the immediate container or wrapping in which any household substance is contained for consumption, use, or storage by individuals in or about the household." 15 U.S.C.A. § 1471(3).

[20] 15 U.S.C.A. § 1261(f)(1), (q)(1)(B); *see* Consumer Product Safety Commission Letter to candy producers in Mexico (English version) – July 12, 2004, Re: Candy wrappers containing lead or bearing lead-containing ink.

> *violation* of any provision of this chapter *or any other Act enforced by the Commission*, or any order, rule, regulation, standard, or ban under any such Acts;
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> (4) objected to, or refused to, participate in *any activity, policy, practice, or assigned task* that the *employee* (or other such person) *reasonably believed to be in violation* of any provision of this chapter or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under such Acts.[21]

Generally, the CPSIA whistleblower statute sets forth the same elements of a claim as other whistleblower statutes: (1) protected activity; (2) unlawful discrimination; and (3) a causal link between the protected activity and the unlawful discrimination. 15 U.S.C.A. § 2087(b)(2)(B)(i)-(iv); 29 C.F.R. § 1983.109(a). The ALJ's dismissal focused exclusively on the first element, protected activity, and so will we. More specifically, the ALJ based his dismissal on his findings that (1) none of Saporito's complaints fell within the Commission's jurisdiction, and (2) none of his complaints were reporting an "actual" violation. We address each in the same order.

Reasonable Belief Is Sufficient

The ALJ erred in focusing *strictly* on the limit of the Commission's jurisdiction. The ALJ plausibly reasoned that if the Commission did not have jurisdiction at the time of Saporito's disclosure, then Saporito's disclosure or complaint was not protected activity under the CPSIA whistleblower provision. But limiting CPSIA-protected activity coverage *entirely* to the CPSC's jurisdiction leaves out a critical part of the CPSIA definition of protected activity: reasonable belief.

The CPSIA broadly defines protected disclosures to include disclosures "relating" to employer conduct that the employee "*reasonably believes* to be a violation of any provision of [the CPSIA] or any Act enforced by the Commission . . . ." 15 U.S.C.A. § 2087(a)(1) (emphasis added). The CPSIA's plain language allows the complainant to be wrong as long as he held a reasonable belief of a violation of the Act or other act enforced by the Commission.[22] The Act

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[21] 15 U.S.C.A. § 2087 (emphasis added); 29 C.F.R. § 1983.102(a), (b)(1), (4). The term "Commission" means the Consumer Product Safety Commission. *See* 15 U.S.C.A. § 2053; 29 C.F.R. § 1983.101(c).

[22] This allowance for reasonable mistakes makes sense given the complexity of the enforcement powers of the Food and Drug Administration (FDA) and the Commission under multiple acts and where jurisdiction may even overlap, as indicated by the Memorandum of Understanding (MOU) reached between the Commission and the Food and Drug Administration (FDA) delineating the areas of jurisdiction between the two agencies for administration of the CPSA and the FFDCA with respect to "food, food containers, and food-related articles and equipment." *See* Response, Attachment 19, U.S. Food and Drug Administration MOU 225-76-2003 (July 26, 1976).

does not define "reasonable belief." Historically, the ARB has interpreted the concept of "reasonable belief" to require both a subjectively and objectively reasonable belief. A subjectively reasonable belief means that the employee actually believed that the conduct he complained of constituted a violation of relevant law. *See, e.g., Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009) (not a CPSIA case). An objectively reasonable belief means that a reasonable person would have held the same belief having the same information, knowledge, training, and experience as the complainant. *Harp,* 558 F.3d at 723. Often the issue of "objective reasonableness" involves factual issues and cannot be decided in the absence of an adjudicatory hearing. *See, e.g., Allen v. Admin. Review Bd.,* 514 F.3d 468, 477-478 (5th Cir. 2008) ("the objective reasonableness of an employee's belief cannot be decided as a matter of law if there is a genuine issue of material fact").[23] Nowhere did the ALJ address the issue of reasonable belief in resolving his Order to Show Cause.[24]

Actual Violation is Not Required

Alternatively, the ALJ further determined that protected activity under the CPSIA's whistleblower protection provision only relates to an "actual violation" of the Act or any other Act enforced by the Commission which has "occurred" or is "occurring."[25] The ALJ held that Saporito's complaints were speculative when he alleged that milk containers "could" be contaminated and "could" reach and "possibly" or "would" injure consumers.[26] Consequently, the ALJ held that Saporito has failed to allege any protected activity under the CPSIA and, therefore, his complaint must be dismissed.[27] We find that dismissal on this basis was error.

The problem with the ALJ's dismissal based on Saporito's allegedly speculative complaints is that the ALJ's Order to Show Cause gave no indication that this was an issue.[28] As

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[23] *See also Sylvester v. Parexel Int'l, LLC,* ARB No. 07-123, ALJ Nos. 2007-SOX-039, -42,; slip op. at 14 (ARB May 25, 2011).

[24] We also see difficulties with the legal conclusions about the Commission's jurisdiction based on the MOU, the FDA's "Grade 'A' Pasteurized Milk Ordinance" (PMO) (a "model milk regulation" that is "recommended" to states, counties, and municipalities), and other laws the ALJ cited. It was not entirely clear that these documents rendered the Commission powerless to address all of Saporito's complaints, such as his complaint about the toxicity and corrosiveness of the Sani-Glide chemical cleaning product Publix used, regardless of any migration of the chemical substance to food. For example, the ALJ pointed to no provision of the PMO indicating that the FDA had authority over Saporito's complaints to the exclusion of the Commission.

[25] D. & O. at 8-9.

[26] *Id.* at 9-10.

[27] *Id.* at 10.

[28] We recognize that the ALJ was most likely acting cautiously in issuing an Order to Show Cause to avoid being an advocate for the Respondent, making it difficult to elaborate too much in an

we indicated earlier in our opinion, the Order to Show Cause asked Saporito to establish that he complained about a "consumer product" and that each of the named Respondents was a "manufacturer, distributor, retailer, or labeler of 'consumer products' as defined by the Act."[29] This lack of notice raises due process concerns. The fundamental elements of procedural due process are notice and an opportunity to be heard. *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). In this case, it appears that Saporito did not suspect that the ALJ would address the issue of "speculation" because he did not address it in his response to the Order to Show Cause. He only addressed what the ALJ asked him to address. The ALJ's lack of notice to Saporito is sufficient grounds to reverse the ALJ's conclusion of law that Saporito's complaints were speculative.

In sum, our ruling is narrow. We reverse the ALJ's conclusions of law related to protected activity, limiting ourselves to the two distinct bases cited in the ALJ's decision following his Order to Show Cause: lack of Commission jurisdiction and speculative complaints.[30] The overarching error is that the ALJ's Order to Show Cause erroneously suggested that the CPSIA whistleblower statute was limited to concerns about consumer product safety. Next, the ALJ failed to consider the issue of reasonable belief, which requires a rejection of the ALJ's first basis for dismissal. As for the issue of speculation, the ALJ failed to provide sufficient notice to Saporito that this issue was pending, requiring a rejection of that basis. Consequently, we must reverse and remand this matter to the ALJ for further proceedings consistent with this order. Other than our narrow rulings in this opinion, we make no findings pertaining to Saporito's alleged protected activity or any other element of his claim, including whether he reasonably believed that his disclosures related to a violation of an Act enforced by the Commission.[31]

Order to Show Cause. Of course, need for caution makes orders to show cause less effective than a party's motion for summary decision, where the party can fully and fiercely advocate and flesh out the grounds for dismissal. But where the Order to Show Cause gave no indication for a particular issue, due process concerns arise.

[29] The ALJ did not address this issue in his decision; therefore, we will not address it.

[30] We also note that this appeal arose from the ALJ's self-initiated Order to Show Cause and not a motion challenging the sufficiency of Saporito's claim. Therefore, we do not address whether our rulings in *Sylvester,* ARB No. 07-123, should also apply in CPSIA claims. In *Sylvester*, we expressly limited our decision to cases arising under the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (Thomson/West Supp. 2011). *Sylvester*, at 13, n.10. Nevertheless, this question is now pending in other whistleblower appeals.

[31] We further note that the ALJ conflated Saporito's speculation as to potential harm with speculation as to a violation. *See* D. & O. at 10. The CPSIA requires reasonable belief of a violation and does not expressly require reasonable belief of harm.

The ALJ erred in Finding "Bad Faith."

Finally, we must address the ALJ's attorney's fees award, not exceeding $1,000, based on a finding of "bad faith."[32] The ALJ based his decision on finding no protective activity and that OSHA had allegedly warned Saporito that the Commission did not have jurisdiction over his alleged disclosures of law violations. Because we reverse the ALJ's determination that Saporito's complaint must be dismissed and remand this matter for further proceedings, we must reverse the ALJ's award of attorneys' fees.

CONCLUSION

The ALJ erred in determining that Saporito failed to allege a violation of the CPSIA or any other statute or regulation within the jurisdiction of the Commission and failed to allege any protected activity under the CPSIA. Accordingly, we **REVERSE** the ALJ's Decision and Order and **REMAND** the case for further proceedings consistent with this opinion.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

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[32] If the Secretary finds that a complaint . . . is frivolous or has been brought in bad faith, the Secretary may award to the prevailing employer a reasonable attorney's fee, not exceeding $1,000, to be paid by the complainant. 15 U.S.C.A. § 2087(b)(3)(C); *see also* 29 C.F.R. § 1983.105(b); 29 C.F.R. § 1983.109(d)(2).