



**In the Matter of:**

**THOMAS SAPORITO,**

**ARB CASE NO. 12-109**

**COMPLAINANT,**

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

**v.**

**DATE: April 30, 2013**

**PUBLIX SUPER MARKETS, INC., et al.,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Thomas Saporito, *pro se*, Jupiter, Florida**

***For the Respondents:***

**Mary E. Pivec, Esq.; *Williams Mullen*, Washington, District of Columbia, and Igor M. Babichenko, Esq.; *Williams Mullen*, Norfolk, Virginia**

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and 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 (2012). 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. This case is before the Administrative Review Board for the second time following our reversal and remand of the Administrative Law Judge's (ALJ) first dismissal of this matter.<sup>1</sup>

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<sup>1</sup> The Board held that the ALJ erred by too narrowly construing the reach of the CPSIA and the meaning of "reasonable belief" in the statute, as well as ruling upon an issue that was not included in

On remand, Publix filed a Motion for Summary Decision, which the ALJ granted on August 31, 2012.<sup>2</sup> We again reverse the ALJ's Order for the reasons that follow, and remand the case for the ALJ to consider the merits of Saporito's complaint.

### BACKGROUND

Shortly after requesting a hearing but before any discovery occurred, the ALJ acted on his own initiative and issued an order to show cause which led to the ALJ's dismissal of Saporito's whistleblower claims. We reversed. Upon receiving the case again on remand, the ALJ issued an "Order Setting Scheduling Dates On Remand" on June 14, 2012. In relevant part, the ALJ ordered that any response to a dispositive motion filed by the parties, such as a Motion for Summary Decision, must be filed within 10 calendar days of receipt of the motion, otherwise the motion may be granted and the case terminated, and that the deadline for discovery was September 7, 2012.<sup>3</sup> On June 20, 2012, six days after the ALJ entered a scheduling order, Publix filed a 25-page "Respondents' Motion for Summary Decision," along with eleven statements from five of its employees and supporting documents (well over 100 pages), as well the December 10, 2009 four-page Occupational Safety and Health Administration determination dismissing Saporito's CPSIA complaint. Along with its Motion for Summary Decision, Publix filed "Respondents' Motion To Suspend Or, In The Alternative, Limit Discovery." On June 26, 2012, Saporito's counsel at the time filed a "Motion To Withdraw As Counsel," noting that Saporito was aware of his intention to withdraw.

On July 3, 2012, ten days after the Respondents' motions, the ALJ suspended all discovery.<sup>4</sup> In his order, the ALJ noted that Saporito failed to file a response to the Motion for Summary Decision within the time allotted and failed to file a response to the Motion to Suspend

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the ALJ's Order to Show Cause. *Saporito v. Publix Super Mkts., Inc.*, ARB No. 10-073, ALJ No. 2010-CPS-001 (ARB Mar. 28, 2012).

<sup>2</sup> Specifically, the ALJ ruled that certain complaints of adverse action were time-barred and further determined that the evidence of record, when considered in the best light for Saporito, failed to demonstrate a question of a material fact as to the existence of any other adverse employment actions under the Act. Moreover, the ALJ held that Publix demonstrated by clear and convincing evidence that Saporito's termination was unrelated to his alleged protected activity.

<sup>3</sup> June 14, 2012 Order Setting Scheduling Dates On Remand at 7-8.

<sup>4</sup> See Order Granting Respondent's Motion To Suspend Discovery And Order Granting Complainant's Counsel's Motion To Withdraw As Counsel. We note that, pursuant to the Office of Administrative Law Judges' rules, the ALJ entered his order *before* the deadline passed for Saporito to respond to the Respondents' motion to suspend discovery. Pursuant to 29 C.F.R. § 18.4(c)(3) (2012), five days must be added to the "prescribed time period" for a response. 29 C.F.R. § 18.6(b) required a response "within ten (10) days" of service of the Respondent's motions to suspend discovery. Therefore, Saporito's response was due by July 5, 2012.

Discovery. After business hours on July 3, 2012, Saporito's counsel filed a Motion For Extension Of Time To Respond To Respondents's [sic] Motion For Summary Decision,<sup>5</sup> to allow for Saporito's response in 60 days on September 3, 2012, and to extend the deadline for discovery to September 11, 2012. The next business day, the ALJ denied the motion on the same day it was deemed filed and granted no extension.<sup>6</sup>

On July 9, 2012, Saporito, now representing himself, filed Complainant's Notice Of Address Change And Complainant's Motion To File Response Out-of-Time, noting that he was "attempting to retain alternate legal representation" and was seeking an extension so he could "engage in discovery (prior) to having to respond" to "Respondents' hefty and voluminous Motion for Summary Decision." Later the same day, the ALJ issued an Order Denying Claimant's Request For Extension In Time To File Response, but again noted that he would consider a response from Saporito if it were filed prior to his issuing a Decision and Order on the Motion for Summary Decision. Saporito did not file a response. On August 31, 2012, the ALJ issued his Summary Decision and Order – Denying Complaints (D. & O.). As Saporito points out in his brief, the ALJ repeatedly stated that his rulings on summary decision were made "after deliberation on the record" and that "evidence of record" and "documents submitted" fail to raise an issue of fact.<sup>7</sup> Saporito filed a timely petition for review with the Board.

#### 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).<sup>8</sup> Pursuant to the CPSIA and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard.<sup>9</sup> The ARB reviews an ALJ's determinations on procedural issues

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<sup>5</sup> Again, pursuant to 29 C.F.R. § 18.4(c)(3), five days should have been added to the ten-day deadline "prescribed" by the ALJ and 29 C.F.R. § 18.40(a) for a response to a motion for summary decision, making the deadline July 5, 2012. The motion was initially date-stamped July 3, 2012, but that date was crossed out and it was deemed filed July 5, 2012.

<sup>6</sup> See Order Denying Extension Of Time To File Response. In denying the extension, the ALJ stated that "[a]ll matters received prior to a decision on a Motion for Summary Decision being issued are considered during deliberation on the Motion." While this provided Saporito some unknown time period to file something, it is not the same as granting a definite extension of time. Without a definite extension of time, we find that even an experienced attorney would have struggled to "properly and sufficiently respond to the Respondent's" 25-page motion for summary decision and dozen attachments. See Complainant's Brief at 6.

<sup>7</sup> Complainant's Brief at 2-4.

<sup>8</sup> See Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012). See also 29 C.F.R. § 1983.110.

<sup>9</sup> See 29 C.F.R. § 1983.110(b).

under an abuse of discretion standard<sup>10</sup> and the ALJ's conclusions of law de novo.<sup>11</sup> The Board also reviews de novo an ALJ's grant of summary decision pursuant to 29 C.F.R. § 18.40 (2012).<sup>12</sup>

## DISCUSSION

The totality of circumstances in this case leads us to find that the ALJ abused his discretion in preventing any discovery and denying Saporito's motion for additional time to respond to the motion for summary decision. Properly acting within their rights, on June 20, 2012, Publix filed a "voluminous" and complex Motion for Summary Decision, as well as a Motion to Suspend Discovery, which were both served on Saporito and his counsel at that time "via U.S. mail."<sup>13</sup> Filed only six days after the ALJ's scheduling order, the Respondents' motion for summary decision included almost a dozen statements with numerous attachments. The Respondents' motion also included a statement of 41 "undisputed facts supported by the record." Many of these "undisputed facts" are based on information that a complainant typically does not have. For example, a complainant typically would not have information to refute that "no associate has ever been disciplined for bringing a safety-related concern to" Publix's attention.<sup>14</sup> The Respondents repeatedly reference a video or "security camera footage" in support of its motion and stated reason for terminating Saporito's employment; yet, it is unclear from the record whether Saporito was given a copy of this critical video. Before the allotted deadline for a response to the motions, the ALJ suspended discovery, erroneously noting that Saporito failed to file responses to the motions "within the time allotted."<sup>15</sup> Similarly, on the day of the actual deadline, the ALJ denied Saporito, now representing himself, a request for an extension of time to respond to a complex and, as Saporito accurately describes, "voluminous" Motion For Summary Decision. This was also an abuse of discretion.

Turning to the issue of the statute of limitations, we note that the ALJ properly found as time-barred certain unfavorable employment actions and appreciate that discovery would not

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<sup>10</sup> *Butler v. Anadarko Petroleum Corp.*, ARB No. 12-041, ALJ No. 2009-SOX-001, slip op. at 2 (ARB June 15, 2012).

<sup>11</sup> *See Getman v. Sw. Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

<sup>12</sup> *Hasan v. Enercon Servs., Inc.*, ARB No. 10-061, ALJ Nos. 2004-ERA-022, -027; slip op. at 4 (ARB July 28, 2011).

<sup>13</sup> *See* Complainant's Brief at 6.

<sup>14</sup> Statement of Undisputed Facts 3 and 4.

<sup>15</sup> *See supra* text accompanying notes 4 and 5.

revive such claims.<sup>16</sup> On September 14, 2009, Saporito filed a CPSIA whistleblower complaint, alleging that Publix subjected him to a hostile working environment due to his CPSIA-related protected activity.<sup>17</sup> On November 3, 2009, Publix ended Saporito's employment.<sup>18</sup> That same day, Saporito filed a supplemental CPSIA whistleblower complaint, alleging that Publix subjected him to a hostile working environment and discharged him due to his CPSIA-related protected activity.<sup>19</sup>

Under the CPSIA, “[w]ithin 180 days after an alleged violation of CPSIA occurs, any employee who believes that he or she has been retaliated against in violation of the Act may file, or have filed by any person on the employee’s behalf, a complaint alleging such retaliation.”<sup>20</sup> Thus, the ALJ found that, based on the filing of Saporito’s original complaint on September 14, 2009, any discrete adverse actions Saporito alleged that occurred on or before March 28, 2009, were time barred from action under the CPSIA.<sup>21</sup> Consequently, the ALJ found that seven unfavorable employment actions Saporito alleged, occurring between December 20, 2007, and August 2008 were time barred.<sup>22</sup> Saporito has not denied the accuracy of these rulings and, therefore, we affirm these findings of the ALJ as supported by substantial evidence.<sup>23</sup> In

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<sup>16</sup> D. & O. at 22-24.

<sup>17</sup> See Complainant’s Response to Order to Show Cause Why Complaint Should Not Be Dismissed (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.

<sup>18</sup> Feb. 23, 2010 Affidavit of Thomas Saporito (Affidavit) at 1.

<sup>19</sup> 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.

<sup>20</sup> 29 C.F.R. § 1983.103(d); see also 15 U.S.C.A. § 2087(b)(1).

<sup>21</sup> D. & O. at 23.

<sup>22</sup> *Id.* at 23-24. The first three alleged adverse actions from Saporito that the ALJ listed (dated December 20, 2007; January 17, 2008; and May 1, 2008) are contained in Saporito’s November 30, 2009 Fifth Supplemental Complaint. Response, Attachment 7; D. & O. at 19-20. The final four alleged adverse actions from Saporito that the ALJ listed (dated May 1, 2008; May 19, 2008; May 18, 2008; and in August 2008) are contained in Saporito’s original September 14, 2009 Complaint. Response, Attachment 1; D. & O. at 17-18.

<sup>23</sup> *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 113-115 (2002). The *Morgan* holding applies to whistleblower complaints. *Erickson v. U.S. Env’tl. Prot. Agency*, ARB Nos. 03-002 – 004, 03-064; ALJ Nos. 1999-CAA-002; 2001-CAA-008, -013; 2002-CAA-003, -018; slip op. at 21 n.60 (ARB May 31, 2006). Nevertheless, we again note that Saporito has alleged that Publix subjected him to a hostile working environment due to CPSIA-related protected activity. A hostile

summary, we find the record substantiates Saporito's claim in his petition and appellate brief that he has been denied discovery and a meaningful opportunity to prosecute his whistleblower claim.<sup>24</sup> Given the substantial motion for summary decision the Respondents filed, we find that the ALJ abused his discretion in cutting off all discovery and refusing to grant Saporito any additional time to respond to the motion for summary decision. We agree with the ALJ that no additional discovery would have changed the untimeliness of many of his claims and affirm those findings. But it is not clear what Saporito would have argued if given some limited discovery and additional time to file a response to the motion for summary decision. Consequently, we vacate the ALJ's D. & O. and remand the case for the ALJ to (1) permit Saporito to engage in limited discovery within the ALJ's discretion and (2) allow for a reasonable opportunity to file a timely response to both motions. Other than our narrow rulings in this opinion, we make no findings pertaining to any elements of Saporito's complaint. The ALJ may consider on remand that a party opposing summary decision "is required to state with some precision the materials he hopes to obtain with further discovery, and exactly how he expects those materials would help him in opposing summary judgment."<sup>25</sup>

### CONCLUSION

The ALJ's final order suspending discovery is **REVERSED** and **REMANDED**. On **REMAND**, the ALJ shall (1) permit limited discovery relevant to the motion for summary decision and, if a motion for summary decision is re-filed, (2) permit a reasonable amount of time to respond to a motion for summary decision.

**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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work environment claim involves repeated conduct or conditions that occur "over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Morgan*, 536 U.S. at 114-115.

<sup>24</sup> See Complainant's Brief at 4-7.

<sup>25</sup> *Bucalo v. United Parcel Serv.*, ARB No. 08-087, ALJ No. 2006-TSC-002, slip op. at 4 (ARB July 30, 2010)(citing *Moore v. U.S. Dep't of Energy*, ARB No. 99-047, ALJ No. 1998-CAA-016, slip op. at 4 (ARB June 25, 2001)); see also *Lewandowski v. Viacom Inc.*, ARB No. 08-026, ALJ No. 2007-SOX-088, slip op. at 10-11 (ARB Oct. 30, 2009).