RENAE WIMER-GONZALES,

COMPLAINANT,

v.

J. C. PENNEY CORP., INC.,

RESPONDENT.

ARB CASE NO. 10-148

ALJ CASE NO. 2010-SOX-045

DATE: February 7, 2012

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Renae Wimer-Gonzales, *pro se*, Lake Forest, California

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge* and Lisa Wilson Edwards, *Administrative Appeals Judge*

ORDER GRANTING RECONSIDERATION AND RE-INSTATING CASE ON DOCKET

On or about August 6, 2009, the Complainant, Renae Wimer-Gonzales, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration alleging that the Respondent, J.C. Penney Corp., had retaliated against her in violation of the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX).[1] On September 16, 2010, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order Granting Summary Judgment in this case, finding that Wimer-Gonzales had settled her SOX complaint and had failed to show that J. C. Penney had engaged in any of the conduct that under California law gives rise to a right to rescind.[2]

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[1] 18 U.S.C.A. § 1514A (Thomson/West Supp. 2011).

[2] Slip op. at 12.

Wimer-Gonzales filed a petition for review with the Administrative Review Board. The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX.[3]

On September 13, 2011, the Board received a Notice of Intent to File Complaint from the Complainant. If the Board has not issued a final decision within 180 days of the date on which a complainant filed a complaint, and there is no showing that the complainant has acted in bad faith to delay the proceedings, the complainant may bring an action at law or equity for de novo review in the appropriate United States district court, which will have jurisdiction over the action without regard to the amount in controversy.[4]

On October 13, 2011, the Administrative Review Board issued an Order to Show Cause in response to the filing of the Complainant's intent to file a de novo complaint in district court. Because the regulation provides that a complainant may file the de novo complaint only if there is no showing that the complainant has acted in bad faith to delay the proceedings, we issued an order to show cause permitting the parties to demonstrate why the Board should not dismiss the complaint as requested.

The Respondent did not respond to the Order to Show Cause. Wimer-Gonzales requested an extension of time to respond to the Order to Show Cause. The Board interpreted her motion as a desire to provide clarification to the Board on the basis of the ALJ's Decision and Order. Since it was the Complainant who had filed the Intent to File in District Court and the basis for the ALJ's Decision and Order was not relevant to whether we dismissed her case so that she could pursue her case de novo in district court, we denied her request for an extension of time to respond to the Order to Show Cause and dismissed her complaint in accordance with 18 U.S.C.A. § 1514A(b)(1)(B).[5]

On November 23, 2011, the Complainant filed a Motion for Reconsideration with the Board. The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the Board issued the

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[3] Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1980.110(a)(2009).

[4] 18 U.S.C.A. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114 (2011).

[5] *Wimer-Gonzales v. J. C. Penney Corp, Inc.*, ARB No. 10-148, ALJ No. 2010-SOX-045 (Nov. 17, 2011)(F. D. & O.).

decision.[6] In considering whether to reconsider a decision, the Board has applied a four-part test to determine whether the movant has demonstrated:

> (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision; (iii) a change in the law after the court's decision, and (iv) failure to consider a material fact presented to court before its decision.[7]

Once a complainant files a Notice of Intent to File in District Court, the ARB's routine practice is to issue an Order to Show Cause, so that any objections can be heard, and then if no valid objection is raised, to dismiss the complaint so that the complainant may proceed de novo in federal district court.[8] Although the Complainant filed a "Notice of Intent to File Complaint in the United States District Court," in her motion for reconsideration, she averred that she had not intended the Board to dismiss her complaint so she could proceed in district court but instead had simply "communicated to the Board that my appeal had gone well beyond the 180 days . . . without a decision made and provided the Board with my knowledge to my right to take the case to District Court."[9] The Complainant then expressed surprise that after filing a "Notice of Intent to File Complaint in the United States District Court," that the Board took her filing at face value and dismissed her case so that she could proceed de novo in district court in accordance with the filed Notice of Intent.

Nevertheless, the Complainant is not represented by legal counsel before the Board and while remaining impartial and refraining from becoming an advocate for a pro

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6 *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007).

7 *Abdur-Rahman v. DeKalb County*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003; slip op. at 4 (ARB Feb. 16, 2011).

8 *See, e.g., Vroom v. General Electric Co.*, ARB No. 10-121, ALJ No. 2010-SOX-019 (ARB Nov. 8, 2010); *Hillenbrand v. Coldwater Creek, Inc.*, ARB No. 10-101, ALJ No. 2008-SOX-010 (ARB Sept. 24, 2010); *Zang v. Fidelity Mgmt. & Research Co.*, ARB No. 08-078, ALJ No. 2007-SOX-027 (ARB Aug. 26, 2008); *Rzepiennik v. Archstone Smith, Inc.*, ARB No. 07-059, ALJ No. 2004-SOX-026 (ARB Apr. 30, 2007); *Mozingo v. The South Fin. Group, Inc.*, ARB No. 07-040, ALJ No. 2007-SOX-002 (ARB Feb. 8, 2007); *Bulls v. Chevron Texaco, Inc.*, ARB Nos. 07-014, 07-016; ALJ No. 2006-SOX-017 (ARB Jan. 17, 2004).

9 Motion for Reconsideration at 2.

se litigant, we are equally mindful of our obligation to "construe complaints and papers filed by pro se litigants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude.'"[10] The fact that the Complainant did not intend to inform the Board that she intended to file in district court, but only intended to inform the Board that she could file in district court was material to our decision to dismiss her complaint. Therefore, we **GRANT** the Complainant's Motion for Reconsideration and reinstate her appeal on the Board's docket.[11]

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

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[10] *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 4 (ARB Jan. 31, 2011) (quoting *Cummings v. USA Truck, Inc*., ARB No. 04-043, ALJ No. 2003-STA-047, slip op. at 2 (ARB Apr. 26, 2005) (citations omitted)). Such latitude is also afforded to pro se respondents. *See Dale v. Step 1 Stairworks, Inc*., ARB No. 04-003, ALJ No. 2002-STA-030 (ARB Mar. 31, 2005).

[11] In her Motion for Reconsideration, the Complainant states, "In June of 2011, the Plaintiff requested the Board consolidate the two complaints ARB 10-148 and ALJ 2011-SOX-0021 due to the cases having the same issues . . . ." Motion for Reconsideration at 2. The Board has no record of receiving a Motion for Consolidation in June 2011. The Board did receive a document on June 6, 2011, entitled "Update and or Determination if One Was Made on Administrative Review Board; Case No: 10-148 and Plaintiff Purposes [sic] an Agreement Be Made" (Update). In this document the Complainant stated, "On December 16, 2010 Ms. Gonzales forwarded the information to the Administrative Review Board with a Motion requesting that the material be admissible to her appeal ARB case # 10-148. The Plaintiff also requested that the cases be treated as one . . . ." Update at 2. The Board reviews final orders (and at its discretion interlocutory orders) issued by the Department of Labor's Administrative Law Judges. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The ALJ did not issue his final decision in ALJ No. 2011-SOX-021 until December 15, 2011. So even if the Board had recognized the Complainant's filing as a Motion to Consolidate, at that time the Board could not have consolidated the two cases because there was no ALJ Decision and Order on review before the Board. As stated in the ALJ's December 15th Decision and Order, the Complainant had ten business days to file a petition for review of that Decision and Order. The Board has no record that the Complainant filed an appeal of this decision. Pursuant to 29 C.F.R. § 1980.110(a), (b), an ALJ's Decision and Order becomes the final order of the Secretary unless a timely appeal is filed and accepted by the Board.