



RENAE GONZALES,

ARB CASE NO. 10-148

COMPLAINANT,

ALJ CASE NO. 2010-SOX-045

v.

DATE: September 28, 2012

J. C. PENNEY CORP., INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Renae Gonzales, *pro se*, Lake Forest, California

For the Respondent:

Lisa Abram, Esq., *J.C. Penney Corporation, Inc.*, Plano, Texas

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

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (Thomson/West Supp. 2012). Renae Gonzales (Complainant) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on August 6, 2009, alleging that her employer, J.C. Penney Corporation (Respondent), retaliated against her during the course of her employment following complaints that she made about her supervisor.¹

¹ Congress has amended the Act (18 U.S.C.A § 1514A) since Gonzales filed her complaint. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010)(Dodd-Frank Act); 76 Fed. Reg. 68084-97 (Nov. 3, 2011). The Department of Labor amended the SOX's implementing regulations (29 C.F.R. Part

Gonzales and J.C. Penney later entered into a settlement agreement pursuant to 29 C.F.R. § 1980.111(d)(1), which OSHA approved. Gonzales sought to rescind the agreement, and requested a hearing before a Department of Labor Administrative Law Judge (ALJ). On September 16, 2010, an ALJ issued a Decision and Order Granting Summary Decision in favor of Respondent, and dismissed the complaint.²

Gonzales petitioned the Administrative Review Board (ARB) for review. We affirm the ALJ's decision and dismiss the complaint.

BACKGROUND

A. Facts

These facts, taken from the ALJ's decision, are undisputed and viewed in the light most favorable to Complainant.³

Gonzales was employed at J.C. Penney as a District Administrative Assistant in Lake Forest, California.⁴ In August, 2009, she filed a complaint with OSHA alleging that J.C. Penney forced her to resign from her position with the company after she questioned certain practices of her former District Manager.⁵

1. Parties enter into settlement agreement of SOX claims

Gonzales informed OSHA on September 15, 2009, that she had retained attorneys Heide Hutchinson and Desiree Nordstrom to represent her.⁶ Three months later, however, Gonzales informed OSHA that she had severed her relationship with her

1980) in response to the Dodd-Frank Act. See 76 Fed. Reg. 68084 (Nov. 3, 2011). These minor revisions to the settlement regulations “do not reflect substantive changes in the requirements for submission and Departmental approval of settlement agreements.” *Id.* at 68090.

² *Gonzales v. J.C. Penney Corp.*, Decision and Order Granting Summary Decision, No. 2010-SOX-00045 (ALJ Sept. 16, 2010) (D. & O.).

³ D. & O. at 3.

⁴ OSHA complaint from Renae Gonzales date-stamped Aug. 6, 2009.

⁵ *Id.*

⁶ D. & O. at 3; see also Declaration of Maral Boyadjian in Support of OSHA's Response to Defendant J.C. Penney Corporation, Inc.'s Motion to Dismiss (Boyadjian Dec.) at Exhibit (Ex.) 2 (E-mail from Gonzales to OSHA dated Sept. 15, 2009).

attorneys for purposes of her “OSHA Claim against J.C. Penney,” and requested that the agency “cease sending any material or communication to” these attorneys.⁷ On March 8, 2010, Gonzales informed OSHA that Attorney Hutchinson had represented her at a mediation on March 5, where the parties sought to settle Gonzales’s complaints.⁸ Gonzales signed a settlement agreement with J.C. Penney on March 5, 2010, resolving “all disputes that Gonzales may have with regard to her employment relationship with J.C. Penney or the termination of such employment relationship.”⁹ Two days later, on March 7, Gonzales revoked the agreement because of the “minimal amount offered” that would release the company from liability.¹⁰

Negotiations between Gonzales’s counsel and J.C. Penney resumed on March 9.¹¹ Despite these negotiations, Gonzales informed OSHA on March 10 that her attorney was not representing her in the SOX complaint.¹² After four weeks of further negotiations, Gonzales e-mailed OSHA on April 10, 2010, informing the agency that she had decided to settle her SOX whistleblower claim against J.C. Penney. She stated,

The revised release agreement is very similar to, if not exactly the same as the original agreement. In doing so I am obligated to agree to seek the dismissal of any claims filed. As soon as I receive the consideration from the company, I will send a certified letter to your office stating my request to withdraw my complaint.^[13]

⁷ D. & O. at 3; see also Boyadjian Dec. at Ex. 3 (E-mail from Gonzales, copying OSHA dated Dec. 30, 2009).

⁸ D. & O. at 3-4; see also Boyadjian Dec. at Ex. 4 (E-mail from Gonzales to Boyadjian dated Mar. 8, 2010).

⁹ D. & O. at 2 (ALJ states that “parties sign[ed] a settlement agreement”); see also Def. Reply, Ex. 2 at p. 1 (Confidential Release Agreement between Gonzales and J.C. Penney).

¹⁰ D. & O. at 3-4; see also Def. Reply Brief at Ex. 3 (Facsimile from Gonzales to Company Human Resources Director Nancie Rodems, dated Mar. 7, 2010).

¹¹ D. & O. at 4.

¹² See D. & O. at 4, n.8, citing Complainant Opp. at 1; see also D. & O. at 4 (Gonzales complained to OSHA that her attorneys were “not representing [her] in the [SOX] complaint,” and that at a March 8 meeting, her attorneys “threatened her house and her ‘family’s security’ and ‘created a level of fear and intimidation [when she] revoked the agreement on March 7, 2010.”); *id.* citing Boyadjian Dec. at Ex. 5 (E-mails from Gonzales to Boyadjian dated Mar. 10, 2010).

¹³ D. & O. at 5; see also Boyadjian Dec. at Ex. 6 (E-mail from Gonzales to Boyadjian dated Apr. 10, 2010).

Gonzales signed the most recent negotiated settlement agreement with J.C. Penney on April 19, 2010.¹⁴ A J.C. Penney representative signed the agreement on April 26, 2010.¹⁵ When the Agreement's revocation option expired after seven days (see Agreement at §5.5), J.C. Penney made the required payments to Gonzales and her attorneys as provided by the settlement agreement.¹⁶

2. OSHA approves settlement agreement

On May 13, 2010, Gonzales informed OSHA that she was "withdrawing [her] complaint."¹⁷ OSHA requested J.C. Penney's counsel to send a copy of the settlement agreement to the agency for review.¹⁸ J.C. Penney sent a copy to OSHA but redacted the settlement amount.¹⁹ On June 22, 2010, OSHA issued a letter approving the settlement agreement as "fair, adequate and reasonable."²⁰ The letter stated that OSHA's approval of the signed settlement "constitutes the final order of the Secretary and may be enforced in accordance with SOX and OSHA's regulations at 29 C.F.R. 1980.113." *Id.*

On July 1, 2010, OSHA notified Gonzales by e-mail that she had 30 days to file objections and request a hearing before an ALJ.²¹ The notice stated that if no objections were filed, any "findings would become final and not subject to court review." *Id.* On July 7, 2010, Gonzales notified the Office of Administrative Law Judges and OSHA that she objected to the case closure, and requested review by an ALJ.²² Gonzales complained that OSHA excluded her from its communications related to the April 2010

¹⁴ D. & O. at 5; see also Resp. Reply at Ex. 6 (Confidential Release Agreement).

¹⁵ *Id.*

¹⁶ D. & O. at 5; see also Respondent's Mot. Dismiss at Ex. 6.

¹⁷ D. & O. at 5; see also Respondent's Reply at Ex. 8 (Letter from Gonzales to Boyadjian dated May 13, 2010, requesting that "complaint # 9-3290-03-072 be dismissed immediately."); see also Boyadjian Dec. at Ex. 10.

¹⁸ D. & O. at 5-6; see also Boyadjian Dec. at Ex. 11.

¹⁹ D. & O. at 6, n.12; see also Respondent's Mot. Dismiss at Ex. 1.

²⁰ D. & O. at 6; see also Boyadjian Dec. at Ex. 9 (OSHA Letter dated June 22, 2010).

²¹ See Boyadjian Dec. at Ex. 10 (E-mail from Boyadjian to Gonzales dated July 2, 2010).

²² Boyadjian Dec. at Ex. 10 (Letter from Gonzales to OSHA dated July 7, 2010).

settlement agreement.²³ On August 6, 2010, OSHA notified Gonzales that it would not reopen the investigation because the agency found no evidence that she entered the settlement under “coercion, lack of consent, duress, fear, or undue influence.”²⁴ The agency stated that it reviews settlement agreements “to determine if a Complainant has waived future employment possibilities” and that Gonzales’s agreement “contained no such future waivers with J.C. Penney Company, [and thus there] was no reason to intervene in the agreement [Gonzales] entered into.”²⁵

3. *Proceedings before the Administrative Law Judge*

After Gonzales requested a hearing before the ALJ to object to her case being closed due to the settlement, J.C. Penney moved to dismiss the complaint.²⁶ The ALJ treated J.C. Penney’s motion to dismiss as a motion for summary decision under 29 C.F.R. § 18.40.²⁷ Gonzales opposed the Motion; OSHA filed a response in support of the motion.

The ALJ issued a decision and order on September 6, 2010, granting summary decision in favor of J.C. Penney. The ALJ determined that as the settlement agreement was a type of contract, Gonzales’s attempt to rescind was governed by contract law under the State of California, where the parties signed the agreement.²⁸ The ALJ determined that under California law, Gonzales must prove that she consented to the settlement by mistake or that Respondent obtained her consent by duress, menace, fraud, or undue influence.²⁹ Citing California law, the ALJ held that to effect the rescission, Gonzales must have given notice of her intent to rescind and must have restored to J.C. Penney the value she received under the terms of the settlement or offered to restore the value conditional upon J.C. Penney likewise restoring the value it received.³⁰

²³ Boyadjian Dec. at Ex. 10 (Letter from Gonzales to OSHA dated July 7, 2010, at p. 2).

²⁴ ALJ Record, Ex. 3 (Letter from OSHA Regional Administrator to Gonzales dated Aug. 6, 2010).

²⁵ *Id.*

²⁶ D. & O. at 2.

²⁷ *Id.* at 3, n.4.

²⁸ *Id.* at 7.

²⁹ *Id.*

³⁰ *Id.* at 7-9.

In reviewing J.C. Penney's motion, the ALJ considered the facts in the light most favorable to Gonzales.³¹ Gonzales argued that her attorneys had pressured her to enter into the settlement and had given her incorrect advice and that OSHA had not properly reviewed the settlement. The ALJ determined that under California law, pressure from a party's own counsel to enter into a contract does not constitute "undue influence" for purposes of rescinding the contract.³² The ALJ observed that state law provides other avenues of relief when a party's own counsel is alleged to have engaged in misconduct.³³ The ALJ further determined that when Gonzales signed the second settlement agreement in April 2010, she knew that she had the option to revoke it because it contained the same option as the prior agreement that she signed in March 2010.³⁴

The ALJ rejected Gonzales's argument that the settlement should not have been approved because it did not order J.C. Penney to reinstate her or to at least redact her no-hire status. The ALJ determined that since J.C. Penney had never admitted to or been found to have violated the SOX, Gonzales had not established that she was entitled to any remedy the SOX provides for whistleblowers who have established that they have been retaliated against.³⁵ The ALJ found that the settlement provided that J.C. Penney denied any wrongdoing and the purpose of the settlement was to voluntarily resolve Gonzales's employment complaints that had not yet resulted in a final decision. The ALJ thus concluded that J.C. Penney had no obligation to offer Gonzales reinstatement or adjust her personnel records.³⁶

The ALJ determined that there was nothing about the settlement agreement that would cause him to question OSHA's approval and that the agreement was "fair, adequate, and reasonable."³⁷

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision approving the settlement agreement. See Secretary's Order No. 1-2010, 75 Fed. Reg.

³¹ See 29 C.F.R. § 18.40 (2012).

³² D. & O. at 10.

³³ *Id.* at 10-11.

³⁴ *Id.* at 11.

³⁵ *Id.*

³⁶ *Id.* The ALJ noted that Gonzales had not returned the proceeds of the settlement to J.C. Penney, and stated that "Complainant cannot keep the benefit of the contract and at the same time avoid the consequences of the release." *Id.* at 10.

³⁷ *Id.* at 11, 12.

3924-25 (Jan. 15, 2010) (delegating to the ARB the Secretary’s authority to review cases arising under, *inter alia*, the SOX). The ALJ’s decision to approve the settlement agreement is subject to review for abuse of discretion. *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1158-1159 (5th Cir. 1991).

The ALJ’s order on review granting summary decision under 29 C.F.R. § 18.40, is reviewed under the same standard governing summary judgment under Federal Rule of Civil Procedure 56. We review an ALJ’s grant of summary decision *de novo*. *Poli v. Jacobs Engineering Group, Inc.*, ARB No. 11-051, ALJ No. 2011-SOX-027, slip op. at 4 (ARB Aug. 31, 2012); see also *Levi v. Anheuser Busch Cos., Inc.*, ARB Nos. 06-102, 07-020, 08-006; ALJ Nos. 2006-SOX-037, -108; 2007-SOX-055, slip op. at 6 (ARB Apr. 20, 2008). Under 29 C.F.R. § 18.40(d), the ALJ may issue summary decision if “there is no genuine issue as to any material fact and that a party is entitled to summary decision.” *Id.* We view the record on the whole in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the movant established that it was entitled to judgment as a matter of law. *Poli*, ARB No. 11-051, slip op. at 4; see also *Smale v. Torchmark Corp.*, ARB No. 09-012, ALJ No. 2008-SOX-057, slip op. at 5-6 (ARB Nov. 20, 2009).

DISCUSSION

A. Regulatory Framework

The regulations administering the SOX are set out at Title 29, Part 1980, and provide for parties to settle complaints pending with OSHA. The regulations state:

Investigative settlements. At any time after the filing of a complaint, and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant and respondent agree to a settlement. The Assistant Secretary’s approval of a settlement reached by the respondent and the complainant demonstrates his or her consent and achieves the consent of all three parties.^[38]

The same process applies to Adjudicatory Settlements in cases pending before an ALJ or the ARB.³⁹ Section 1980.111(e) of 29 C.F.R. states that “[a]ny settlement approved by the Assistant Secretary, the ALJ, or the ARB, will constitute the final order of the Secretary and may be enforced pursuant to § 1980.113.” Section 1980.113 provides as follows:

³⁸ 29 C.F.R. § 1980.111(d)(1)(2012).

³⁹ See 29 C.F.R. § 1980(d)(2).

Judicial enforcement. Whenever any person has failed to comply with a * * * final order, including one approving a settlement agreement, issued under the Act, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred. * * *^[40]

The ALJ and ARB are authorized under 29 C.F.R. § 1980.115 to waive these regulations for good cause. The regulations state:

Special Circumstances; waiver of rules. In special circumstances not contemplated by the provisions of this part, or for good cause shown, the ALJ or the ARB on review may, upon application, after three days notice to all parties, waive any rule or issue any orders that justice or the administration of the Act requires.^[41]

B. Special circumstances warranted the ALJ's review of OSHA's approval of the settlement agreement

Under the regulations, OSHA's June 22, 2010, notice approving the settlement agreement signed by Gonzales on April 19 and by J.C. Penney on April 26 (and not revoked by any party within seven days), constituted the "consent of all three parties" to the agreement.⁴² This settlement agreement approved by OSHA thus became the the Secretary's final order.⁴³ The ALJ observed (D. & O. at 6, n.12) that the copy of the agreement reviewed and approved by OSHA redacted the monetary amount that the parties agreed J.C. Penney would pay Gonzales. While Gonzales does not raise this issue on appeal in her brief, this issue, which was addressed by the ALJ in his decision below, raises legitimate concerns as to OSHA's approval process that could invalidate the finality of the Secretary's order.

Section 1980.111(e) of 29 C.F.R. states that any settlement approved by the Assistant Secretary, e.g., the OSHA Administrator or his/her delegate, "will constitute the final order of the Secretary." The regulations permit the ALJ and ARB to waive any rules where special circumstances warrant.⁴⁴ We find that special circumstances

⁴⁰ 29 C.F.R. § 1980.113.

⁴¹ See 29 C.F.R. § 1980.115.

⁴² 29 C.F.R. § 1980.111.

⁴³ See 29 C.F.R. § 1980.111(e).

⁴⁴ 29 C.F.R. § 1980.115.

warranted review by the ALJ in this case, and waiver of Section 1980.111(e), to permit the ALJ to review an otherwise final order approving a settlement agreement because of OSHA's purported errors in its approval process. While the ALJ found potential errors in OSHA's approval, the ALJ was nonetheless well within his discretion to find that any such procedural errors did not undermine OSHA's finding that the agreement was "fair, adequate and reasonable."

1. Any errors by OSHA do not warrant withdrawal of the agency's approval of the settlement agreement

It is undisputed that OSHA reviewed a redacted copy of the Gonzales/J.C. Penney settlement agreement that excluded the payout amount that Gonzales agreed to in exchange for releasing her SOX rights pertaining to her pending complaint.⁴⁵ OSHA erred in approving a settlement agreement that redacted the monetary settlement amount. See *Fuchko v. Georgia Power Co.*, Nos. 1989-ERA-009, 1989 ERA-010 (Sec'y June 13, 1994) (Secretary refuses to approve a redacted settlement agreement because exact amount of money paid is a "matter of public concern."). "The particular terms of the agreement, such as the amount of money to be received by the Complainant, affect not only the individual whistleblower but impact the public interest as well." *Id.* "Where such terms are not fair, adequate and reasonable, other employees may be discouraged from reporting safety violations." *Id.*, quoting *Plumlee v. Alyeska Pipeline Svc. Co.*, No. 1992-TSC-007, slip op. at 5 (Sec'y Aug. 6, 1993). The ALJ, however, reviewed the unredacted agreement and determined that the terms were fair, adequate, and reasonable. D. & O. at 12. See also *Fuchko*, Nos. 1989-ERA-009, 1989-ERA-010 (Sec'y Oct. 12, 1994) (Order Approving Settlement and Dismissing Case) (Secretary approved agreement and dismissed case after reviewing unredacted copy of the settlement agreement, which the Secretary found to be "fair, adequate and reasonable."). We see no basis for disturbing that determination.

Gonzales contends (Br. at 5) that the agency failed to contact her after she signed the agreement, and that OSHA erred by contacting her attorneys during the course of negotiations after she instructed OSHA not to do so. Given the facts in the record, this contention also does not warrant withdrawal of the agency's approval of the settlement agreement.

OSHA dismissed the complaint *after* Gonzales notified the agency that a settlement had been reached, and Gonzales moved to withdraw her complaint. See D. & O. at 5-6. OSHA's approval of the agreement followed Gonzales's request for dismissal of her complaint, which came in the form of an e-mail (see *supra* at p. 4, n.17) to the agency from Gonzales herself; Gonzales requested that OSHA dismiss her complaint after executing the settlement agreement between her and J.C. Penney. D. & O. at 5 (After the parties signed the agreement, "Complainant wrote to OSHA on May 13, 2010, requesting to withdraw her complaint and that the matter be 'dismissed immediately.'").

⁴⁵ See D. & O. at 6, n.12.

Gonzales also contends (Br. at 8), without the support of legal argument, that the Dodd-Frank Act, 124 Stat. 1376 (July 21, 2010), prohibits the settlement of whistleblower complaints on the basis that settlements constitute a waiver of rights under the Act. This contention, however, is belied by the regulations promulgated to enforce the Act. The Department of Labor amended the SOX regulations after passage of the Dodd-Frank Act, but the regulations continue to provide for the settlement of SOX whistleblower cases. 29 C.F.R. § 1980.111(a). The Secretary of Labor's Delegation of Authority to the ARB states: "The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions."⁴⁶ Thus the ARB is bound by its delegation of authority to apply 29 C.F.R. § 1980.111(d), which permits settlement of SOX whistleblower complaints.

Gonzales also argues that OSHA erred in approving the settlement agreement because the agreement precludes her from being rehired at the company. The ALJ determined that the SOX does not require that in settling her claims that J.C. Penney must reinstate her or alter her personnel record to make her eligible for rehire. D. & O. at 11 ("The settlement agreement represents the voluntary resolution of undecided, disputed claims, not more. J.C. Penney had no obligation to offer reinstatement or to adjust Complainant's personnel records as part of any settlement."). Gonzales presents no legal argument that refutes this conclusion.

2. *Gonzales fails to show that the settlement agreement should be rescinded*

Gonzales's arguments for rescinding the contract stem from a dispute between her and her attorneys.⁴⁷ This is not, however, a proper basis for rescinding, or voiding, the contract in this case.

Macktal v. Brown & Root, Inc., 923 F.2d 1150 (5th Cir. 1991) involved a complainant who filed a whistleblower complaint with the Secretary of Labor under section 201 of the Energy Reorganization Act (ERA), and later entered into a settlement agreement of his ERA claims. Complainant alleged, among other things, that "pressure exerted by his attorney to accept the settlement void[ed] his consent." *Id.* at 1157; see also *id.* at 1156 (complainant alleged that attorneys "threatened to withdraw from representation and to charge Macktal \$12,000 in fees if he did not consent to the * * * oral agreement," and then the attorneys "used the written settlement * * * to bludgeon him into signing two versions of the general release."). The court of appeals noted the

⁴⁶ Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), see Sec. (c)(48), 75 Fed. Reg. 3925 (Jan. 15, 2010).

⁴⁷ D. & O. at 11; see also Complainant's Br. at 2-4, 5-6.

serious allegations of misconduct, but observed the Secretary's reasoning that "the alleged coercion by Macktal's counsel did not affect the validity of his consent to the settlement." *Id.* at 1158. The court of appeals determined that the Secretary was within her discretion to "refuse[] to void the settlement based on Macktal's allegations," stating as follows:

Considering the ethical duties of an attorney to his client, the client's right to seek new counsel, and the availability of a direct action against the attorney, the Secretary concluded that Macktal, rather than Brown & Root, should bear the risk of his attorneys' alleged misconduct, and refused to void the settlement based on Macktal's allegations. We cannot say that this action constituted an abuse of discretion.

Id. at 1157-58.

Based on the reasoning in *Macktal*, the ALJ in this case was well within his discretion in refusing Gonzales's request to void the settlement agreement. While the ALJ accepted for purposes of J.C. Penney's Motion to Dismiss that Gonzales's attorneys had exerted some pressure on her to sign the settlement, the ALJ, like the court in *Macktal*, found that Gonzales could have obtained new counsel, and/or could have sought advice from the State Bar of California.⁴⁸ The ALJ also found that about six weeks elapsed between the date on which Gonzales alleged her attorneys pressured her and the date on which she signed; and an additional week passed afterwards when she could have exercised her right to revoke the agreement as she had done previously.⁴⁹ The ALJ observed that not only was this sufficient time to obtain legal advice, but at the very least it was sufficient time for the adverse effects of her attorneys' pressure tactics to have subsided and for her "to regain her mental capacity to the point that she wasn't susceptible to the undue influence of her attorneys." *Id.*⁵⁰

⁴⁸ D. & O. at 11.

⁴⁹ *Id.*

⁵⁰ The ALJ applied California state law standards in determining that Gonzales failed to prove that the April 2010 settlement agreement that she signed with J.C. Penney should be rescinded or voided, see D. & O. at 7-10, and neither party disputes the ALJ's application of state law to the settlement agreement approved by OSHA in this case. Nonetheless, this case is governed by the court of appeals' decision in *Macktal*, which holds that where, as here, a "settlement involves a right to sue derived from a federal statute[,] federal law * * * governs the validity of the settlement." *Id.*, 923 F.2d at 1157, n.32; see also *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (where "source of law that governs * * * case" is a "right to sue conferred by a federal statute[,] * * * traditional common-law principles" govern.); *Williams v. Metzler*, 132 F.3d 937, 946 (3d Cir. 1997) (involving settlement of Energy Reorganization Act complaint approved by Secretary of Labor where "federal common law

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's Decision and Order Granting Summary Decision in favor of Respondent, and **DISMISS** the complaint.⁵¹

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

Judge Corchado, concurring

I concur with the majority's decision to affirm the Administrative Law Judge's (ALJ) dismissal of Ms. Renae Gonzales's⁵² claim but on narrower grounds. Initially, it is

principles govern construction of the contract"); *New York State Electric & Gas Corp. v. F.E.R.C.*, 875 F.2d 43, 45 (3d Cir.1989) ("Basic contract principles apply to settlement agreements."). Despite this possible legal error by the ALJ, the error is indeed harmless since the facts and law fully support the ALJ's discretionary decision to refuse to void the April 2010 settlement agreement.

⁵¹ Gonzales filed an Appendage to Plaintiff's Reply to Defendant's Initial Response Received December 6, 2010. This document included exhibits that are not part of the administrative record compiled before the ALJ in this case. J.C. Penney objected to these documents on the ground that they were not part of the ALJ's record. The ARB's review is generally limited to the record before the ALJ. See, e.g., *Pollock v. Continental Express*, ARB Nos. 07-073, 08-051; ALJ No. 2006-STA-001, slip op. at 8, n.94 (ARB Apr. 7, 2010) ("The Board's review of a case must be based on the record before the ALJ."). Nevertheless, we did review the documents to determine whether they constituted new and material evidence that might require a remand to the ALJ for re-opening of the record and his consideration. 29 C.F.R. § 18.54(c) ("Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available * * *"). We found that the documents were not material as they are not relevant to Gonzales's argument that her settlement agreement should be rescinded, or voided, so they could not have affected the outcome of this case.

⁵² The Complainant, in her most recent filings with the Board, has referred to herself as Renae Wimer-Gonzales. We have continued to refer to the Complainant as Renae Gonzales, consistent with the ALJ's D. & O., to avoid any confusion.

important to appreciate that the Occupational Safety and Health Administration (OSHA) created a procedural quagmire in this case by first issuing a letter on June 22, 2010 indicating that the Complainant's claim was settled and closed without appeal rights and then sending an informal email on July 7, 2010, indicating that she had 30 days to file an objection and request a hearing. Even so, I do not believe that the Administrative Review Board (the ARB or Board) needed to ignore the regulation that declares approved settlements as final orders of the Secretary. In waiving the finality of settlement, the majority invoked a catch-all regulation arguably allowing for such a waiver but without following the requirements of that rule. Finally, the majority opinion cites no supporting statute or regulation that permits the OALJ or the ARB to act like a judicial court and analyze whether to rescind through an equitable remedy a fully executed and approved settlement contract.

Neither the ALJ nor Board have general jurisdiction but have only the authority expressly or implicitly provided by law, statute or regulation.⁵³ Obviously, the scope of authority over an appeal must be the first question decided and the Complainant has the burden of establishing jurisdiction exists.⁵⁴ Specifically, in this case, the ALJ first needed to determine what authority he had over the Complainant's appeal following the Complainant's approved settlement and withdrawal of her complaint because of the settlement. 29 C.F.R. § 1980.111(a)(2011).

As the majority opinion indicates, the regulations unequivocally provide that an approved settlement constitutes a "final order of the Secretary" enforceable pursuant to 1980.113. 29 C.F.R. § 1980.111(e). An approved settlement is a final order regardless of whether the settlement occurs with OSHA, the OALJ or the Board. *Id.* Therefore, as a matter of law, a party has no right to a hearing for any claims that were resolved by settlement and approved by OSHA.⁵⁵

In this case, it was not clear whether the ALJ treated the settlement as an approved settlement. If the ALJ determined OSHA approved the settlement, then the

⁵³ See, e.g., *Wonsock v. Merit Sys. Prot. Bd.*, 296 Fed. Appx. 48, 50 (Fed. Cir. 2008) (Federal Circuit Court agreed with the Merit Systems Protection Board that the administrative law judge had no jurisdiction to review the Office of Personnel Management's discretionary decision pertaining to benefit rules).

⁵⁴ *Id.* See also, *Culligan v. American Heavy Lifting Shipping, Co.*, ARB No. 03-046, ALJ Nos. 2000-CAA-20, 2001-CAA-09, -011; slip op. at 7 (ARB June 30, 2004)(in discussing "subject-matter jurisdiction, the Board stated that "[i]t is axiomatic that the party asserting jurisdiction has the burden of proving it.").

⁵⁵ See, e.g., *Carter v. Marten Transp. Ltd.*, ARB No. 09-117, ALJ No. 2009-STA-031, slip op. at 4 (ARB July 21, 2011)(similar ruling in a whistleblower case brought under the Surface Transportation Assistance Act).

ALJ had no authority to review OSHA's decision without clearly identifying the basis for further analysis.⁵⁶

Arguably, the ALJ had discretion to determine that OSHA did not actually approve the settlement because a material term was missing (the dollar amount). The ALJ noted that OSHA approved the settlement without knowing the amount of the settlement. D. & O. at 6, n.12. This was an undisputed fact, but not a concern raised by the Complainant. It was also undisputed that the Respondent was responsible for the redaction. If so, given the undisputed redaction of a material term of the settlement, the ALJ may have had enough authority to determine in this case that OSHA did not actually approve the settlement or validly approve withdrawal of the complaint. Under these peculiar facts, the ALJ could then step into the shoes of the Secretary and decide whether to approve the settlement. In deciding to approve the settlement as fair and reasonable, it seems proper to consider all the factors raised by the parties, e.g., duress.

Ultimately, the ALJ did examine the unredacted settlement agreement in this case and found it to be "fair, adequate, and reasonable." D. & O. at 12. Therefore, assuming the ALJ had the authority to approve the settlement, his order cured any deficiency in the approval process and his approval then became the final order of the Secretary and enforceable. 29 C.F.R. § 1980.111(e) (2011). In such a case, I believe that the Board's authority would be limited to reviewing the procedural decisions made by the ALJ but not substantively reviewing whether the settlement was fair. In my view, a settlement approved by OSHA or the ALJ becomes a fully enforceable contract⁵⁷ that can no longer be terminated unilaterally by DOL, the complainant or the respondent; only a court of law could unwind the settlement contract.

⁵⁶ Citing to *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1158-1159 (5th Cir. 1991), the majority opinion asserts that the Board reviews the ALJ's approval of settlement agreements under an abuse of discretion standard. However, the *Macktal* decision arose under a different regulatory scheme and obsolete regulations. The court in *Macktal* stated the following:

Under the relevant regulations, the ALJ had the authority only to make a recommendation to the Secretary concerning the final disposition of the case. The Secretary retained the authority to issue the final order.

Id. at 1153. In *Macktal*, the parties reached a settlement agreement while the case was pending before an ALJ, filed a motion to dismiss based on the settlement agreement, and the ALJ then issued a recommended decision, which recommended that the Secretary grant the motion to dismiss. *Id.* at 1152.

⁵⁷ *Trechak v. American Airlines, Inc.*, ARB No. 03-141, ALJ No. 2003-AIR-005, slip op. at 2 (ARB Mar. 19, 2004) ("A settlement agreement is a contract and once entered into is binding and conclusive.")

Yet, without citing to any enabling statute or regulation, the ALJ and the Board assume that they have the broad power to act like a judicial court and consider whether the settlement contract could be rescinded through equity. Logically, invoking such equity power would open the door for parties to allege fraud claims as a basis for requesting a hearing and then litigating such claims before the OALJ. Such a result exceeds the Secretary's statutory and regulatory authority over whistleblower claims. I do not suggest that the Secretary never has the power to withdraw her approval of a settlement in the right circumstances and while the claim is still pending before the Secretary. But I see no authority for allowing the OALJ or ARB to adjudicate fraud claims between the parties.

Lastly, relying on 29 C.F.R. § 1980.115, the majority claimed special circumstances existed to waive the rule of finality for approved settlement agreements. That regulation clearly limits its application to cases where there is no rule addressing the circumstances in question or where good cause has been shown. Furthermore, the regulation unambiguously provides that no rule may be waived or special order issued without first providing three days notice to the parties of the intent to invoke the special circumstances rule. In this case, there is a rule addressing the finality of settlements and, in my opinion, good cause has not been shown to waive the settlement regulations or issue a special order. I also do not understand how the Board can retroactively invoke this rule on the ALJ's behalf. More importantly, the Board has not given the parties the required three days notice. In the end, I agree that we should affirm the ALJ's decision but on the grounds that the parties have settled their claims, OSHA and/or the ALJ approved the settlement, and no special circumstances exist to disturb the finality of such settlement agreement.

LUIS A. CORCHADO
Administrative Appeals Judge