



In the Matter of:

THERON T. MATTHEWS,

ARB CASE NO. 11-036

COMPLAINANT,

ALJ CASE NO. 2009-SOX-026

v.

DATE: May 31, 2012

AMETEK, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

William D. Thomas, Esq.; James C. Thomas, Esq.; *Thomas Law Firm*, Tulsa, Oklahoma

For the Respondent:

George B. Randolph, Esq.; Jack D. Wuerstle, Esq.; *Riley, Riper, Hollin & Colagreco*; Exton, Pennsylvania

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

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A § 1514A (Thomson/West Supp. 2011) (the “Act” or “SOX”),¹ and its implementing regulations found at 29 C.F.R. Part 1980 (2011). Complainant Theron Matthews (Matthews) filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that he was terminated for reporting accounting irregularities to his employer, Ametek, Inc. (Ametek), in violation of SOX. OSHA dismissed the complaint, and Matthews requested a hearing before an Administrative Law Judge (ALJ). On February 15, 2011, prior to a hearing on the merits, the ALJ issued an order to show cause why Matthews’ failure to comply with discovery orders should not result in, inter alia, “dismissal of his claim in its entirety.” On February 25, 2011, Matthews moved to disqualify the ALJ. Ametek opposed the motion to disqualify the ALJ and, in response to the order to show cause, moved for dismissal of Matthews’ complaint on March 2, 2011. On May 3, 2011, the ALJ entered an order denying the motion to disqualify and dismissing the complaint. Matthews petitions for review. We affirm.

BACKGROUND

A. *Facts*

The following facts are alleged in Matthews’ complaints:

Ametek is a global manufacturer of electronic instruments and electromechanical devices. Matthews was hired in 2007 as Director of Operations for Chandler Engineering, one of Ametek’s subsidiary companies. That year, Matthews began observing what he believed to be serious accounting irregularities, including recognition and recording of revenue that he believed was contrary to generally accepted accounting principles and violated SEC rules. Third Amended Complaint at 3-5. Matthews reported these discrepancies in an e-mail to Ametek’s CEO. *Id.* at 5. Matthews contends that as a result of the reporting Ametek harassed, demoted, and eventually terminated his employment. *Id.* at 5-6.

B. *Proceedings Below*

The lengthy and contentious pre-trial and discovery proceedings in this case spanned two years. The issue presented, however, centers on discovery. In May 2009, Ametek moved to compel Matthews to respond to 23 interrogatories and 34 requests to

¹ On July 21, 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. 111-203, 124 Stat 1376 (2010). Sections 922(b) and (c), and 929A of the Dodd-Frank Act amended Section 806 of the SOX, but those amendments are not relevant to this case.

produce documents, including administrative subpoenas to serve on Matthews' prior employer (based on prior whistleblower litigation between Matthews and his prior employer).² In October 2009, Ametek moved to compel Matthews to provide answers to the numerous interrogatories and respond to document requests, and sought information as to Matthews' communications from 2007 to 2009 with "headhunters" or regarding prospective employers to whom complainant had submitted applications or sought employment. ALJ Bench Memo on Discovery and Pre-Hearing Motions and Rescheduling Hearing at 5, 8-9. The ALJ ordered the parties to resume exchange of discovery. *Id.* at 12. In April 2009, Ametek sought to compel a continuation of Matthews' deposition beyond the three days that had already been completed. Matthews opposed the request. On March 29, 2010, the ALJ entered a Bench Memorandum on discovery and, among other things, granted Ametek's motion to compel Matthews to be deposed for one additional day, and granting a request for production of documents that Matthews had in his possession associated with his prior whistleblower litigation; various credit information (which the complainant apparently did not oppose); Matthews' federal income tax returns from 2004 and 2005; and Matthews' and his wife's savings or checking account information from September 8, 2008, to the present (for which Matthews requested a protective order, but which the ALJ denied). ALJ Bench Memo on Discovery, Prehearing Motions and Notice and Cancelling Hearing (Mar. 29, 2010).

Following the fourth (and last) day of Matthews' deposition that the ALJ had ordered, Ametek moved to compel Matthews to disclose the name, location, address, and position or duties of his new employment or employer. Ametek's Letter Serving as a Motion for Sanctions and to Compel Plaintiff's Supplemental Answers (dated Nov. 5, 2010). Ametek sought copies of all documentation, offers, paychecks, written communications, resumes, and applications to/from/concerning/pertaining to the new employment and any pay or benefits. *Id.* Matthews opposed the motion, arguing that the information was not relevant to the claim since the Complainant had agreed to limit his claim for damages after the date of his new employment; Matthews also contended that the request was intended to "harass" him and "sabotage his current employment." Complainant's Response (filed Nov. 23, 2010). After a conference call with the parties, the ALJ entered an order granting the motion to compel information on Matthews' current employment, and on his 2009 state and federal tax return. ALJ Bench Memo on Discovery and Pre-hearing Motions (Dec. 9, 2010); see also ALJ Bench Memo on Discovery and Pre-hearing Motions (Jan. 6, 2011) (ordering Matthews' compliance with Ametek's discovery requests by January 19, 2011).

² This is Matthews' second whistleblower complaint before the ARB. In 2007, he filed a SOX complaint against his prior employer, LaBarge, Inc., alleging that he was terminated because he informed his supervisors and other staff that the company was engaged in fraudulent activity. An ALJ dismissed Matthews' complaint for failure to comply with discovery orders. In 2008, the ARB affirmed the ALJ's order and dismissed the complaint. *Matthews v. LaBarge, Inc.*, ARB No. 08-038, ALJ No. 2007-SOX-056 (ARB Nov. 26, 2008).

C. *ALJ's Show Cause Order*

By January 2011, Matthews had not complied with the discovery request for records associated with his current employer. On February 15, 2011, the ALJ issued an order to show cause why Matthews' failure to comply with the discovery order and provide documents related to his current employment should not result in sanctions, including "dismissal of his claim in its entirety." Rather than respond directly to the show cause order, Matthews, on February 25, 2011, moved to disqualify the ALJ pursuant to 29 C.F.R. § 22.16(b) (2011), alleging personal bias.

On March 2, 2011, Ametek opposed the motion for disqualification, and moved for dismissal of Matthews' complaint for failure to comply with discovery orders.

D. *ALJ's Order Dismissing Complaint*

On March 11, 2011, the ALJ entered an order denying Matthews' motion to disqualify, and dismissing his SOX complaint. The ALJ determined that the motion did not proffer or allege "any extrajudicial source of bias," and the ALJ stated that he has had "no relationship, interactions, or contacts with either party or counsel beyond those related to this case and documented in the administrative file." ALJ Order of Dismissal at 3-4 (Mar. 11, 2011). The ALJ observed that the case began two years ago, and that during that time Ametek's counsel "appeared to fully exhaust his client's entitlement to affirmative discovery and similarly raise[d] all available protective motions in an attempt to foreclose some of Complainant's discovery requests." *Id.* at 4-5. The ALJ observed that while Ametek "may have been more proactive and even aggressive than Complainant in the exercise of its rights to discovery" that the ALJ ruled against Ametek on a number of issues, and that Ametek has been "compliant even with adverse orders." *Id.* at 5. The ALJ stated that Matthews has been "repeatedly noncompliant, requiring multiple orders, providing late and incomplete responses, and [was] non-communicative." *Id.* The ALJ stated that Matthews has "delayed the process, forced [Ametek] to incur additional and needless litigation costs and interfered with" the ALJ's ability to resolve the case in a timely manner. *Id.* The ALJ concluded that based on the case history and Matthews' prior experience with discovery, there was "no reason to believe that any lesser sanction would significantly increase the probability of ever being able to decide the case on the merits . . . without much more wasted time and expense." *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX. 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 Board reviews an ALJ's procedural rulings for abuse of discretion, i.e., whether, in ruling as he did, the ALJ abused the discretion vested in him

to preside over the proceedings. *Stalworth v. Justin Davis Enter., Inc.*, ARB No. 09-038, ALJ No. 2009-STA-001, slip op. at 3 (ARB June 16, 2010); *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); *Waechter v. J.W. Roach & Sons Logging & Hauling*, ARB No. 04-183, ALJ No. 2004-STA-043, slip op. at 2 (ARB Dec. 29, 2005).

DISCUSSION

Matthews contends (Brief at 15) that the ALJ's disqualification is warranted because he lost control of the discovery in the case, permitted Ametek to take discovery of irrelevant documents and information, and that the discovery processed created an appearance of "personal bias against complainant." We disagree.

A motion to disqualify (or recuse) an ALJ from proceedings can be filed pursuant to 29 C.F.R. § 18.31.³ ("Whenever any party shall deem the administrative law judge *for any reason* to be disqualified to preside . . . that party shall file with the [ALJ] a motion to recuse.") (emphasis added). Matthews alleged that the ALJ had a personal bias against him based on the ALJ's discovery rulings. Beyond disputing those rulings, Matthews has not asserted that the ALJ engaged in any non-judicial conduct that would question his impartiality. The ARB generally "presume[s] that an ALJ is unbiased unless a party alleging bias can support that allegation; and bias generally cannot be shown without proof of an extra-judicial source of bias." See, e.g., *Matter of Slavin*, ARB No. 04-088, ALJ No. 2004-MIS-002, slip op. at 15-18 (ARB Apr. 29, 2005); *Eash v. Roadway Express, Inc.*, ARB No. 00-061, ALJ No. 1998-STA-028, slip op. at 8 (ARB Dec. 31, 2002). "Unfavorable rulings and possible legal errors in an ALJ's orders generally are insufficient to prove bias." *Powers v. Paper, Allied-Indust., Chem. & Energy Workers Int'l Union*, ARB No. 04-111, ALJ No. 2004-AIR-019 (ARB Aug. 31, 2007). Here, Matthews has not shown that the ALJ had any personal bias against him based on any extra-judicial source.

The ALJs have authority to dismiss a case on their own initiative for lack of prosecution. 29 C.F.R. § 18.6(d)(2)(v) (permitting an ALJ to dismiss cases when a party fails to comply with ALJ's orders). This control is vested in the ALJs' interests in "manag[ing] their dockets in an effort to 'achieve the orderly and expeditious disposition of cases.'" *Lewman v. Ken Brick Masonry Supply*, ARB No. 07-01, ALJ No. 2006-STA-016, slip op. at 3 (ARB Oct. 31, 2007) (citation omitted). The ALJ dismissed Matthews' complaint due to his failure to respond to the Show Cause Order. The Show Cause Order

³ Matthews erred in filing his motion to disqualify the ALJ pursuant to 29 C.F.R. § 22.16(b), which are regulations implementing the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801-3812; see 29 C.F.R. 22.1. The ALJ ruled correctly on Matthews' motion to disqualify under 29 C.F.R. § 18.31, which pertains to the rules of practice and procedure for ALJs in SOX complaints.

requested the parties to show cause why, inter alia, the complaint should not be dismissed due to Matthews' failure to comply with discovery orders requiring the disclosure of information relating to his current employment. The Order informed the parties that failure to respond could result in dismissal of the complaint. Show Cause Order at 3. Matthews, who was represented by counsel, did not respond to the order – he gave no reasons for wanting to avoid disclosing the employment information (other than alleging harassment) and provided no alternative method for providing the salary information.⁴ Instead, Matthews moved to disqualify the ALJ. The ALJ was thus within his discretion to dismiss the complaint. *Lewman*, ARB No. 07-01, slip op. at 4 (“Dismissal as a sanction for failure to prosecute is a matter within the ALJ’s sound discretion.”); *see also Blodgett v. Tennessee Dep’t of Env’t & Conservation*, ARB No. 03-043, ALJ No 2003-CAA-007, slip op. at 2-3 (ARB Mar. 19, 2004); *Eklund v. NIH*, No. 1995-ERA-003 (Sec’y Aug. 17, 1995) (same).

CONCLUSION

For the foregoing reasons, the ALJ’s order dismissing the complaint is **AFFIRMED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

Luis A. Corchado, Administrative Appeals Judge, concurring:

The two central issues on appeal are (1) whether the Administrative Law Judge (ALJ) should have disqualified himself and (2) whether the ALJ abused his discretion in ordering the ultimate sanction of dismissal of Theron Matthews’ case against Ametek,

⁴ Any backpay awarded to Matthews would require current salary information. In calculating backpay, any award is “offset by any earnings” that a complainant receives from the time of termination until reinstatement. *Roberts v. Marshall Durbin, Co.*, ARB Nos. 03-071, -095; ALJ No. 2002-STA-035, slip op. at 18, n.12 (ARB Aug. 6, 2004). If Matthews was successful on the merits, Ametek’s “liability for backpay [would be] reduced by sums [Matthews] earned . . . in other employment.” *Hobby v. Georgia Power*, ARB Nos. 98-166, -169; ALJ No. 1990-ERA-030, slip op. at 28, n.19 (ARB Feb. 9, 2001)(citation omitted).

Inc. (Ametek). There is no question that the ALJ exhibited highly commendable patience⁵ in dealing with the litigious activity of the parties and properly denied Matthews' February 25, 2011 motion to disqualify him.⁶ I agree that Matthews engaged in misconduct that warranted a severe sanction. I agree with the ultimate decision but the grounds stated in the majority do not persuade me to affirm the dismissal of the entire case.

I respectfully disagree with the majority's rationale on various points. First, I do not see that the "failure to prosecute" is a relevant issue in this case.⁷ In fact, as previously mentioned and noted by the ALJ, the parties heavily litigated this case. Second, I cannot agree that Matthews failed to respond to the ALJ's February 15, 2011 show cause order. While not titled a "Response" to the show cause order, on the day a response was due, Matthews' attorney did file a motion to disqualify the ALJ. The motion to disqualify directly referenced the show cause order and essentially argued that snow storms interfered with Matthews' ability to timely respond, Ametek's discovery tactics were abusive, and that the ALJ's alleged bias allowed Ametek to seek allegedly irrelevant and abusive discovery. Nevertheless, even if considered a response to the ALJ's February 15, 2011 show cause order, I agree that the motion to disqualify stated insufficient grounds to ward off sanctions.

One final concern I have with the majority's opinion is its silence on a thorny and critical issue in this case: the extent of actual prejudice to the opposing party.⁸ Pursuant to the ALJ's dismissal order, the discovery at issue centered on "current employment documents" and 2009 tax returns and related documents. ALJ Order of Dismissal at 2, 3 (Mar. 11, 2011) (Dismissal Order). Considering that Matthews was fired on September 4, 2008, these documents related solely to the issue of damages and not to the alleged SOX violations or entitlement to reinstatement. There was little indication that Ametek was prevented from defending against the alleged SOX violation, especially considering

⁵ The number of pretrial orders and dozen or so teleconferences demonstrate the ALJ's patience.

⁶ Less than three weeks after this matter was assigned to an ALJ, the Respondent filed a motion for sanctions.

⁷ The majority opinion's "Discussion" of the sanction begins and ends with the issue of "failure to prosecute." See *infra*, p. 5.

⁸ The issue of prejudice was the first of five factors listed by the ALJ as he contemplated the appropriate sanction. Dismissal Order at 4, citing *Conkle v. Potter*, 352 F.3d 1333, 1337 (10th Cir. 2003).

that it deposed Matthews for four days.⁹ There is some indication that Matthews agreed to waive any claim for back pay after his “new employment,” but there is no indication that he waived all of his claims for back pay and post-termination damages.¹⁰ Consequently, barring Matthews from seeking post-termination damages would have easily resolved the prejudice caused by lacking the post-termination information. But the ALJ may impose a more severe sanction so long as the decision is not an abuse of discretion.

Ultimately, I concur that a dismissal sanction became a viable option after Matthews’ counsel engaged in more contumacious conduct in December 2010, January and February 2011 after being ordered to produce additional post-termination employment records, coupled with the continuing defiance of the ALJ’s orders. Dismissal Order at 2, 3. Regardless of Matthews’ belief of judicial bias, his counsel cannot simply fail to appear for pretrial conferences, fail to return the ALJ’s phone calls and e-mails, and continue to refuse to comply with repeated orders to produce documents. Consequently, even if a lesser sanction could have cured the actual prejudice to Ametek, I cannot say that the ALJ abused his discretion in selecting the ultimate sanction of dismissal.

LUIS A. CORCHADO
Administrative Appeals Judge

⁹ Ametek asserts that Matthews engaged in evasive and dilatory tactics during his deposition, but Ametek does not assert that it cannot defend against the alleged SOX violation.

¹⁰ See “Bench Memorandum on Discovery and Pre-Hearing Motions,” at 1-2 (Dec. 9, 2010) (“Claimant asserted that he agreed to limit any claim for damages after the date of his new employment . . .”).