U.S. Department of Labor

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

In the Matter of:

JOHN F. WILLIAMS, JR.,

COMPLAINANT,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,

RESPONDENT.

ARB CASE NO. 08-103

ALJ CASE NO. 2008-TSC-001

DATE: September 30, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Kirk D. Willis, Esq., *Guida, Slavich & Flores, P.C.*, Dallas, Texas

For the Respondent:
Dianna D. Bowen, Esq., *Bracewell & Giuliani LLP*, Dallas, Texas

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge;* and Luis A. Corchado, *Administrative Appeals Judge*.

DECISION AND ORDER OF REMAND

The Complainant, John F. Williams, Jr., filed a retaliation complaint under the employee protection provisions of the Toxic Substances Control Act of 1986, 15 U.S.C.A. § 2622 (Thomson Reuters 2009) (TSCA); the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.A. § 9610 (Thomson/West 2005) (CERCLA); and their implementing regulations, 29 C.F.R. Part 24 (Westlaw 2010).

Williams alleged that his former employer, the Dallas Independent School District (DISD), violated the TSCA and CERCLA whistleblower protection provisions when it terminated his employment and did not select him for a position to which he applied because he filed a complaint with the Occupational Safety and Health Administration (OSHA) and requested health and safety information regarding his place of employment. Complainant's Amended Complaint at 7 (Oct. 30, 2007). A Department of Labor (DOL) Administrative Law Judge (ALJ) recommended that Williams' complaint be dismissed on summary decision because Williams failed to show a causal connection between his not being re-hired and any alleged prior protected activity on his part. The ALJ's decision was based in large part on requests for admission that he believed that Williams had failed to answer, and in part, on DISD's affidavits that he did not credit. For the following reasons, we remand the case to the ALJ.

BACKGROUND

On September 14, 2007, Williams filed a complaint with the DOL, alleging that DISD violated the TSCA and CERCLA when it terminated him for requesting information relating to an unsafe workplace. Complaint at 1 (Sept. 14, 2007). He thereafter amended his complaint to include the allegation that he was terminated for filing a complaint with OSHA in October 2002 and requesting environmental and safety-related information from his employer. Amended Complaint at 2 (Oct. 30, 2007).

After investigation, OSHA found that the preponderance of the evidence showed that Williams' alleged protected activity was not a contributing factor in DISD's rationale for not selecting him for the position for which he applied. OSHA Findings at 2 (Jan. 8, 2008). Therefore, OSHA dismissed Williams' complaint. Williams filed his objections to OSHA's ruling and requested a hearing before an ALJ.

Williams' complaint was assigned to an ALJ for a hearing. DISD served a request for admissions on Williams. On April 30, 2008, DISD filed a motion for summary decision with the ALJ arguing that: 1) because Williams did not answer its requests for admissions, it should be deemed admitted that DISD did not retaliate against him for engaging in protected activity under the TSCA or CERCLA; 2) Williams could not establish a prima facie case of retaliation because he did not engage in protected activity; DISD took no adverse action against him; DISD was not aware of any alleged protected activity; and there was no causal connection between any alleged

activity and adverse employment action; and 3) DISD had legitimate, non-discriminatory reasons for not renewing Williams' employment contract. Resp. Motion for Summary Decision.

On May 1, 2008, the ALJ issued an order to show cause in light of DISD's motion for summary decision. The ALJ gave Williams ten days to respond to the order, and required that Williams provide justification for why DISD's motion for summary decision should not be granted and his complaint dismissed.

In response to the ALJ's order, on May 10, 2008, Williams filed a motion to continue the hearing and requested additional time to answer DISD's requests for admission. Williams also stated that DISD had not responded to either of his requests for production of evidence. Also on May 10, 2008, Williams served his responses to DISD's requests for admission upon DISD. However, he did not file them with the ALJ.

On May 12, 2008, Williams filed with the ALJ his personal affidavit in response to DISD's motion for summary decision, attaching eleven documents. Williams also requested a continuance of the hearing, at the time scheduled for May 20, 2008, to afford him the opportunity to respond to DISD's motion and complete discovery, both as to the mutual exchange of requested documents and with respect to answering the discovery previously propounded.[1]

On May 13, 2008, the ALJ issued an order giving the parties until June 3, 2008, "to complete discovery and file all responses deemed necessary in support of or defense of the pending Motion for Summary Decision." The ALJ rescheduled the hearing for July 8, 2008.

On June 10, 2008, having not received copies of Williams' answers to DISD's request for admissions, and having not otherwise been informed that Williams had responded to the request for admissions, and without further notice to the parties, the ALJ issued a Recommended Decision and Order (R. D. & O.) granting DISD's motion for summary decision and dismissing Williams' claim. The ALJ deemed all of DISD's requested admissions admitted in light of Williams' perceived failure to respond to the discovery request. The admissions deemed admitted by Williams included admissions that his employment contract expired by its own terms, that he did not make any protected complaints, that DISD's failure to rehire him was not based on any protected complaints, and that DISD did not retaliate against him for making any protected complaints. Accordingly, the ALJ held that Williams failed to show a causal connection between DISD's failure to re-hire him and any alleged prior protected activity on his part.

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[1] DISD joined in the request for a continuance of the formal hearing pending a decision on its motion for summary decision.

Williams timely appealed the ALJ's R. D. & O. to the Administrative Review Board (Board). On appeal, Williams argues that he effectively complied with the ALJ's order requiring him to respond to DISD's request for admissions by providing them to DISD as ordered, and thus that the ALJ should not have dismissed his complaint on the grounds that the requests for admission were deemed admitted.

The issue before us is whether relevant and material evidence that was not before the ALJ at the time he ruled, namely Williams' answers to DISD's request for admissions, which Williams had provided to DISD but not filed with the ALJ, that have now been presented on appeal, should be submitted to the ALJ for consideration pursuant to remand by the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to issue final agency decisions in cases arising under the employee protection provisions of the TSCA and CERCLA. 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).

Under the TSCA and CERCLA, we review the ALJ's conclusions of law de novo, and the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 24.110(b).

LEGAL STANDARDS

In light of the posture of this appeal before the Board, by which the claimant essentially premises his entire basis for reversal upon material evidence that is submitted to our attention that was not before the ALJ when he ruled, we treat Williams' request on appeal as, in effect, a motion to reopen the evidentiary record pursuant to 29 C.F.R. § 18.54(c). Under 29 C.F.R. § 18.54(c), once the ALJ closes the record, "no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." We "ordinarily rel[y] upon this standard in determining whether to consider new evidence, i.e., any evidence that is submitted after the ALJ has closed the record." *Nixon v. Stewart & Stevenson Servs., Inc.*, ARB No. 05-066, ALJ No. 2005-SOX-001, slip op. at 12 (ARB Sept. 28, 2007). Absent a showing that the proffered evidence is "new and material evidence [that] has become available which was not readily available prior to the close of the record," the Board will not remand to the ALJ to consider the new evidence. *Id.*

DISCUSSION

The rules governing responses to requests for admissions are found at 29 C.F.R. § 18.20(g), and state:

> A copy of each request for admission and each written response shall be served on all parties, but shall not be filed with the Office of Administrative Law Judges unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission.

Preliminarily, we note that Williams was a pro se litigant before the ALJ. As we have stated previously, "[w]e construe complaints and papers filed by pro se complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude." *Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-003, slip op. at 6 (ARB Apr. 25, 2003).

The ALJ's order of May 13, 2008, directed the parties "to complete discovery and file all responses deemed necessary in support of or defense of the pending Motion for Summary Decision." It did not expressly require that Williams file his responses with the ALJ.

Williams served DISD's counsel with his response to DISD's requests for admissions on May 10, 2008. Therefore, Williams completed discovery as required by the ALJ's order. It is unclear whether DISD's counsel knew that Williams failed to file the responses to the requests for admission with the ALJ.[2]

Williams' responses to DISD's requests for admissions have now been presented to the Board on appeal. Because Williams' responses to the requests for admission are "new and material evidence" that the ALJ did not and, in fact, could not consider, we remand the case.

As the text of 29 C.F.R. § 18.20(g) provides, parties are not generally required to file

[2] We are of the opinion that counsel for DISD underestimated and, therefore, understated the ALJ's reliance on the mistaken belief that Williams had not answered the requests for admission. Regrettably, and hopefully through innocent misconceptions by the parties, it appears that no one alerted the ALJ through a motion or otherwise before this appeal was filed, either by way of notice to the ALJ upon DISD counsel's receipt of Williams' answers or, at least, upon issuance of the ALJ's decision. Had this occurred, the instant appeal may not have proven necessary.

their responses to admissions requests with the ALJ, unless expressly ordered to do so. Thus, in light of the directive contained in the ALJ's order, Williams acted in compliance with both the ALJ's order and Section 18.20(g) by providing DISD with his answers to the outstanding requests for admissions. Therefore, Williams denied the requests that formed the basis for the ALJ'S order dismissing the complaint.

The ALJ's decision to grant the motion for summary decision was based entirely on the fact that he deemed that Williams admitted what the ALJ believed to be the unanswered requests for admissions. In fact, the admissions appear to form the essence of the ALJ's order granting DISD's motion for summary decision.

The ALJ made his determination to dismiss the case according to the documents he had before him, and through no fault of the ALJ, he ruled upon DISD's motion for summary decision without having all of the evidence before him necessary to make a full and informed determination.

But to dismiss Williams' complaint because of admissions that he had, in fact, denied, resulted in an unfair ruling. We eschew this result, particularly because Williams is a pro se litigant. Due process concerns require that we remand this matter to the ALJ to reopen the evidentiary record and to assess the new evidence consisting of Williams' responses to DISD's requests for admission.

While we do not decide whether Williams' claims survive on summary decision, because of our insistence upon fairness, we are returning this matter to the ALJ to reassess the employer's motion for summary decision having taken into consideration Williams' responses.[3] On remand, the ALJ must determine the existence of any genuine issues of material fact, viewing the evidence in the light most favorable to, and drawing all inferences in favor of Williams, as the nonmoving party. *Ciofani v. Roadway Express, Inc.*, ARB No. 05-020, ALJ No. 2004-STA-046, slip op. at 3-4 (ARB Sept. 29, 2006).

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[2] We note that the ALJ comments in his R. D. & O., "Despite having failed to answer Respondent's requests for admissions, on May 12, 2008, Complainant did file an affidavit in response to Respondent's motion for summary decision. The affidavit consists of allegations, speculations and denial, which I find insufficient in face of Respondent's affidavits and Complainant's conclusive admissions." R. D. & O. at 6 n.1. While the Board does not play the role of fact finder in this case, Williams' affidavit and submissions appear to contain specific facts supporting his case and thus would seem to constitute more than merely allegation, speculation, and denial.

CONCLUSION

The ALJ deemed that Williams admitted, among other things, that DISD's refusal to rehire Williams was not an act of retaliation. This admission, along with the thirty-one other admissions, formed the basis for the ALJ's decision to grant DISD's motion for summary decision. Because the ALJ believed that Williams did not respond to the requests for admissions, when in fact he did, DISD is no longer entitled to a judgment as a matter of law.

The ALJ made his decision to dismiss this complaint without the knowledge that Williams had actually responded to DISD's requests for admission. Because the ALJ's ruling was based on less than the pleadings actually before the court, his ruling cannot stand.

Therefore, we **VACATE** the ALJ's decision and **REMAND** this case for further proceedings consistent with this Order.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge